

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

CENTURA DEVELOPMENT CO., INC.,	: NO. 13 – 02,706
Appellant	:
	: CIVIL ACTION - LAW
vs.	:
	:
BOARD OF SUPERVISORS OF	:
OLD LYCOMING TOWNSHIP,	:
Appellee	:
	:
OROGRAIN BAKERIES MANUFACTURING, INC.,	:
Intervenor	: Land Use Appeal

**OPINION AND ORDER**

Before the court is Appellant’s appeal of the decision of the Board of Supervisors of Old Lycoming Township, which denied his conditional use application respecting a parcel of land in Old Lycoming Township. A certified record was filed December 20, 2013, briefs were filed February 27, March 17 and April 1, 2014, and argument was heard April 4, 2014.

On March 11, 2013, Centura filed an Application for Conditional Use Hearing with the Township, seeking to establish a water withdrawal and distribution facility on a parcel of real property at 3231 Lycoming Creek Road, Williamsport, Pennsylvania.<sup>1</sup> The property is located in a Commercial Zoning District and the proposed use is permitted as a conditional use by Section 27 – 1302 of the Old Lycoming Township Zoning Ordinance. Hearings on the application were held on April 30, May 8, May 22, May 30, July 17 and August 14, 2013. By written decision issued September 25, 2013, the Board denied the application. The instant appeal was filed October 24, 2013.

Initially, the court notes that the parties have spent considerable time and energy arguing over the proper standard of review to be applied by this court. By Order dated January 6, 2014, it was directed that the matter proceed *de novo*. The Township has nevertheless continued to argue that the matter should be reviewed for an abuse of discretion, prompting

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<sup>1</sup> The property is currently used as a Contractor’s Shop and Yard, pursuant to a conditional use approval dated July 26, 2011, and the proposed water withdrawal use would be carried out in conjunction with the current use.

Centura to continue to argue that a *de novo* standard should be applied. As will be noted *infra*, however, even if abiding by an abuse of discretion standard, the court would find that the Board committed an error of law, and thus under either standard, reach the same result.

An applicant for approval of a conditional use must establish that its proposal complies with all specific requirements of the ordinance. Sheetz v. Phoenixville Borough Council, 804 A.2d 113 (Pa. Commw. 2002). That is, the applicant has both the duty to present evidence and the burden of persuasion with respect to showing that the proposed use satisfies the objective requirements of the ordinance. *See* Greaton Properties, Inc. v. Lower Merion Township, 796 A.2d 1038 (Pa. Commw. 2002). By meeting this burden, an applicant is entitled to a presumption that the use is consistent with the health, safety and general welfare of the community, which presumption shifts the burden of production to the objectors to show that there is a high probability that the use will “generate adverse impacts not normally generated by this type of use and that these impacts will pose a substantial threat to the health and safety of the community.” Id. at 1046. Where, as here, the ordinance does not require the applicant to show that the use will *not* have such a detrimental effect, the burden of proof on that issue is also with the objectors. Id.

Therefore, any analysis of the evidence presented to the Board must necessarily begin with a determination of what are the specific requirements of the ordinance. In the instant case, Section 27 – 1002.E states that the “Township shall, in making decisions on each application of the conditional use, consider the following general criteria, in addition to the special criteria established elsewhere in this Chapter.:

- (1) The purposes of the zone in which the requested conditional use is to be located and the compatibility of the requested conditional use with existing and potential land uses on adjacent tracts of ground;
- (2) Whether the specific site is an appropriate location for the use, structure or condition;
- (3) Whether the use developed will adversely affect the neighborhood;
- (4) Whether the use will create undue nuisance or serious hazard to vehicles or pedestrians;
- (5) Whether adequate and appropriate facilities and services will be provided to ensure the proper operation of the proposed use;
- (6) The economic, noise, glare, or odor effect of the conditional use on adjoining properties generally in the district;

- (7) Whether satisfactory provision and arrangement has been made concerning the following:
- a) Ingress and egress to the property and structure thereon with particular reference to automotive and pedestrian safety and convenience, traffic flow, control and access in case of fire or other emergency.
  - b) Off-street parking and loading areas.
  - c) Waste collection, storage and disposal.
  - d) Utilities, with reference to location, availability and compatibility.
  - e) Screening and buffering with reference to type, dimensions and character.
  - f) Signs, if any, and proposed exterior lighting with reference to glare, traffic safety, economic effect and compatibility and harmony with properties in the district.
  - g) Required yards and open spaces.”

Old Lycoming Township Zoning Ordinance of 1992, Section 27 – 1002.E. Counsel agree that these are the only criteria at issue, that there are no other “special criteria established elsewhere in this Chapter”. They do not agree that these are *general* criteria, however. Centura contends they are all *general* requirements, thus placing the burden of proof on the Township, but the Township posits that they are all *specific* requirements, and that Centura failed to carry its burden to show compliance with them.<sup>2</sup>

“Specific” means “reasonably definite” and does not include “general, non-specific or non-objective” requirements. Bray v. Zoning Board of Adjustment, 410 A.2d 909, 911 (Pa. Commw. 1980). A municipality may not require an applicant to prove compliance with “vague, nebulous guidelines which lend themselves to arbitrary application.” Appeal of Baker, 339 A.2d 131 (Pa. Commw. 1975). Upon consideration of the requirements of the ordinance in the instant case, the court believes only one is sufficiently “reasonably definite” to be classified as “specific”.

Consideration (1), “the purposes of the zone in which the requested conditional use is to be located and the compatibility of the requested conditional use with existing and potential land uses on adjacent tracts of ground”, is clearly general. See Yarnall v. Allen, 444 A.2d 1335

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<sup>2</sup> The court does not agree with Centura that the use of the word “general” to modify the word “criteria” in the ordinance is dispositive; the ordinance in Marquise Investment, Inc. v. City of Pittsburgh, 11 A.3d 607 (Pa. Commw. 2010), also referred to “general criteria”, but the Commonwealth Court did not hesitate to classify some of the requirements as specific nonetheless.

(Pa. Commw. 1982)(harmony with the purpose of the ordinance is a general policy concern). Indeed, the Township does not argue to the contrary.<sup>3</sup>

Consideration (2), “whether the specific site is an appropriate location for the use, structure or condition”, without more, is also a general consideration. In JoJo Oil Co. v. Dingman Township Zoning Hearing Board, 77 A.3d 679 (Pa. Commw. 2013), the Commonwealth Court found that a requirement to show that “the use is appropriate to the specific location for which it is proposed” was a specific requirement, but there the ordinance also indicated that such a determination was to consider the requirements of the Comprehensive Plan, and also provided a list of criteria “as a guide in evaluating a proposed use”, including :

- a. The presence of adjoining similar uses.
- b. The presence of an adjoining district in which the use is permitted.
- c. The need for the use in the area proposed, as established by the Comprehensive Plan.
- d. Sufficient area to effectively screen the use from nearby different uses.
- e. Conditions such that there were several potential sites for the use but not a sufficient need to establish a permitting zone district or to leave the District open to indiscriminate placement of such use.
- f. Sufficient safeguards such as parking, traffic control, screening and setbacks can be effectuated to remove any potential adverse influence the use may have on adjoining uses.

Id. at 683. Here, no reference to any particular considerations is made, nothing to define “appropriate” is provided. The consideration appears to be simply another way of inquiring whether the use will be compatible with the location, i.e. zone, in which it is being proposed. As noted above, that is a general consideration.

Consideration (3), “whether the use developed will adversely affect the neighborhood”, is also clearly general, *see Bray, supra*, at 911-12 (“the burden as to the requirement that the

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<sup>3</sup> Although the Township states on page 16 of its brief that “Centura failed to meet the requirements of the Ordinance”, in addressing “each deficiency ... in turn”, the Township begins with number 2. See Brief of Old

special exception be found to be ‘not more detrimental to the neighborhood’ was left upon the objectors”), and the Township does not seriously argue otherwise.<sup>4</sup> *See also, Spencer v. McKean Township Zoning Hearing Board*, 537 A.2d 943, 945 (Pa. Commw. 1988) (whether the intended use would be “in harmony with the character of the neighborhood” is a general criterion).

Consideration (4), “whether the use will create undue nuisance or serious hazard to vehicles or pedestrians”, is a general consideration as it expresses safety concerns in only very general terms. *See Marquise Investment, Inc. v. City of Pittsburgh*, 11 A.3d 607 (Pa. Commw. 2010)(requirement that a conditional use not have a detrimental impact on the residents and local vehicular and pedestrian traffic in the area by its express terms involves health, safety and welfare concerns, and thus the burdens of proof and persuasion are on the City). *See also Yarnall, supra* at 1337 (requirement that the use is “suitable with respect to traffic and highways in the area and provides for adequate access and off-street parking arrangements in order to protect major streets and highways from undue congestion and hazard” relates to general policy concerns as to harmony with the purposes of the ordinance or to general detrimental effect upon the neighborhood).

Consideration (5), “whether adequate and appropriate facilities and services will be provided to ensure the proper operation of the proposed use”, is so vague, that apparently even the Township is unsure of its meaning. The Township has interpreted this requirement to require the provision of toilets, by inserting the word “comfort” or “rest” in front of the word “facilities”, but there is nothing to indicate such is a proper interpretation. Similar language in other ordinances has expressed (in clearer terms) that it must be determined that the municipality will be able to provide necessary services such as water, sewer, police and fire protection. For example, in *Yarnall, supra*, the ordinance there required that the proposed change be “reasonable in terms of the logical, efficient and economical extension of public services and facilities, such as public water, sewers, police, fire protection and public schools, and assure[] adequate arrangements for sanitation in specific instances.” *Id.* The

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Lycoming Township, p. 17.

<sup>4</sup> See page 14 of the Township’s Brief: “Clearly, based on *Bray*, the only criterion that could arguably be considered general is Section (3)”. (Emphasis in original.)

Commonwealth Court found this to be a general consideration. Thus, if the court is correct and the ordinance here is directing a consideration of the ability of the community's public facilities and services to absorb the demands of the proposed use, such speaks to the general welfare and safety of the community and is a general consideration. If the court is incorrect, it is because the ordinance does not clearly explain what it actually does mean to direct, and thus is not "reasonably definite" or "specific".

Consideration (6), "the economic, noise, glare, or odor effect of the conditional use on adjoining properties generally in the district" clearly speaks to consideration of whether the use will have any adverse impact on the neighborhood and, as such, is a general consideration. In Yarnall, *supra*, consideration "that the use of the property adjacent to the area included in the proposed change or modification is adequately safeguarded with respect to harmonious design of buildings, aesthetics, planting and its maintenance as a sight or sound screen, landscaping, hours of operation, lighting, numbers of persons involved, allied activities, ventilation, noise, sanitation, safety, smoke and fume control and the minimizing of noxious, offensive or hazardous elements" was found to address "general detrimental effect upon the neighborhood" and thus constitute a general requirement. *Id.* See also Marquise Investment, *supra* at 613 (the requirement to find that "the development will not create detrimental health and safety impacts, including but not limited to potential impacts of noise, emissions, or vibrations from the proposed development" found to be a general consideration based on court's opinion that the focus of the subsection was "the safety, health and convenience of residents in the area").

Consideration (7), which requires "satisfactory provision and arrangement" for "ingress and egress to the property and structure thereon with particular reference to automotive and pedestrian safety and convenience, traffic flow, control and access in case of fire or other emergency, off-street parking and loading areas, waste collection, storage and disposal, utilities, with reference to location, availability and compatibility, screening and buffering with reference to type, dimensions and character, signs, if any, and proposed exterior lighting with reference to glare, traffic safety, economic effect and compatibility and harmony with properties in the district, [and] required yards and open spaces", is, for the most part, a specific

requirement as it is reasonably definite in its terms.<sup>5</sup> The requirement to provide satisfactory “exterior lighting with reference to glare, traffic safety, economic effect and compatibility and harmony with properties in the district” speaks only to general safety impact or its potential detrimental effect on the neighborhood, however, and therefore cannot be classified as specific. See Yarnall, *supra*. The court need not address the issue of signs as Centura indicated it was not planning to install any signs as part of the proposed use. The remaining requirements will be considered seriatim, and the court will consider whether Centura met its burden of proof with respect to such.

As noted above, the proposed use as a water withdrawal and distribution facility will be conducted in conjunction with the current use of the property as a Contractor’s Shop and Yard.<sup>6</sup> The property comprises approximately 16 acres and was formerly a large retail store and there is a large building thereon. To the rear of that building there is currently a large water storage pond<sup>7</sup> and Centura plans to incorporate that pond into its proposed use. Specifically, Centura will install a pump trailer, electrical panels, and two water pumping stations (with a fill point on each side of each station) in close proximity to the water storage pond. The pump in the pump trailer will pump water from the pond through the fill stations and into water trucks. An electric, submersible pump will replenish the pond by withdrawing ground water through a well, subject to the limitations imposed by the Susquehanna River Basin Commission.<sup>8</sup> The water will be delivered to gas well sites via trucks, and their ingress and egress is proposed to occur via Lycoming Creek Road, a state highway; Centura estimates that 54 to 58 trucks would

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<sup>5</sup> In fact, many of the listed factors are also addressed by other ordinance provisions which identify specific conditions and thus “satisfactory provision and arrangement” is made by simply complying with those other provisions.

<sup>6</sup> Testimony established that several companies currently use the property and as part of that use, on the property is located various equipment; on May 8, 2013, there were “nine trucks, ... 43 frack tanks, four flat-bed trailers, two low boys, three tractors, two van trailers, nine roll-off boxes, approximately 12 personal vehicles, two smaller storage trailers, one low forklift, five unit body water trucks, one semi water truck, two work pick-ups, one small flat-bed, one aerial lift, one waste container, and one moving van”. N.T., May 30, 2013, at p. 95.

<sup>7</sup> The pond is a component of the fire suppression system associated with the warehouse on the property. N.T., April 30, 2013, at p. 36.

<sup>8</sup> Centura obtained ground water withdrawal approval from the Susquehanna River Basin Commission on December 14, 2012. Such approval allows for the withdrawal of a 30-day average of 250,000 gallons per day at a maximum withdrawal rate of 174 gallons per minute. The permit requires Centura to submit a metering plan, a ground water elevation monitoring plan, periodic certification of the accuracy of the monitoring equipment, digital photographic evidence that all required equipment has been installed, quarterly water withdrawal reports and quarterly ground water elevation monitoring reports. N.T., April 30, 2013, at p. 34-35

visit the facility per day.<sup>9</sup> Centura also plans to install water storage tanks, which are portable (designed to be hitched to a truck),<sup>10</sup> to store water in addition to that which is pumped into the pond.<sup>11</sup> Operation of the facility could occur for up to 24 hours per day.<sup>12</sup>

With respect to each of the specific criteria, the court finds as follows:

**a) Ingress and egress to the property and structure thereon with particular reference to automotive and pedestrian safety and convenience, traffic flow, control and access in case of fire or other emergency.**

Although the property is bordered on three sides by roads,<sup>13</sup> Centura will limit ingress and egress to Lycoming Creek Road and will prevent access by vehicles other than emergency vehicles to the other two roads (which are smaller roads) by means of barriers. N.T., August 14, 2013, at p. 60-61. Lycoming Creek Road is a four-lane state highway and the entrance to the property from Lycoming Creek Road is governed by a Highway Occupancy Permit issued by PennDOT in 1973. N.T., May 8, 2013, at p. 55-56. That permit allows 751 to 1500 trips per day. Id. Centura estimates that on average the use will produce 54 to 58 trips per day, Id. at p. 97, and calculated that at maximum pumping and filling rates, at the most 278 trips could be made in a day. Id. at p. 60. A PennDOT traffic count found the traffic count at that driveway to be 9300 vehicles per day and thus, the increase would be less than three per cent. Id. at p. 61. *See also* N.T., August 14, 2013, at p. 57.<sup>14</sup> Thus, Centura has made satisfactory provision for ingress and egress with particular reference to automotive safety.

The court finds that pedestrian safety is not an issue at this location; the project design engineer testified that he did not observe any pedestrians in the area during his site visits, N.T., May 8, 2013, at p. 51, and the Community Planning consultant testified that there are no sidewalks or crosswalks in the area and thus pedestrian traffic is not contemplated. N.T., August 14, 2013, at p. 61. The bike path will not be impacted by any traffic as it abuts the boundary of the property which is not bordered by a road.

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<sup>9</sup> N.T., April 30, 2013, at p. 36.

<sup>10</sup> N.T., May 8, 2013, at p. 34.

<sup>11</sup> N.T., July 17, 2013, at p. 42.

<sup>12</sup> N.T., May 8, 2013, at p. 36.

<sup>13</sup> The fourth boundary abuts a bike path.

<sup>14</sup> The current use of the property produces minimal traffic. Id. at p. 61.



With respect to traffic flow, it appears that the current entrance/exit is large enough to accommodate the largest trucks that would be visiting the property and that they will be able to turn into and out of the property from and onto Lycoming Creek Road without impeding traffic in the left lane of the two lanes which abut the property (the “passing” lane). N.T., May 8, 2013, at p. 62, 111. That fact, in conjunction with the less than three per cent increase in traffic expected, supports a finding that Centura has made satisfactory provision for ingress and egress with particular reference to traffic flow.

Finally, as noted above, Centura plans to install barriers along the two roads other than Lycoming Creek Road to prevent vehicles other than emergency vehicles from accessing the property from those two roads. Emergency vehicles will be able to access the property from all three roads, however, as those barriers will be flexible barricades. Id. at p. 63-64. It also appears that the design of the lot will provide emergency vehicles with 360 degree access to the structures thereon. Id. at p. 62. Therefore, Centura has made satisfactory provision for ingress and egress with particular reference to access in case of fire or other emergency.

**b) Off-street parking and loading areas.**

Parking is specifically addressed by Section 27-801 of the Ordinance and requires one parking space for each employee plus three visitor spaces for the current use; no specifications exist for the proposed use. The site has over 150 parking spaces, however, and that number well exceeds the number of employees that will be using the building. Id. at p. 66-67. Centura has therefore made satisfactory provision for off-street parking.

The requirements for loading areas are specifically addressed by Section 27-802 of the Ordinance: any loading area must be constructed at grade level or at no more than a 5% grade, with adequate protection against water impounding or drifting snow. The site plan indicates that the loading area will be constructed at grade level. *See* Certified Record of Proceedings, Exhibit 6. Satisfactory provision has thus been made for loading areas.

**c) Waste collection, storage and disposal.**

As waste and trash production will be limited to trash from the truck drivers, which is to be put into a trash can, and as the trash is to be picked up weekly by a licensed waste hauler

pursuant to the contract which currently serves the property, Id. at p. 67, satisfactory provision has been made for waste collection, storage and disposal.

**d) Utilities, with reference to location, availability and compatibility.**

Electricity to the property is provided by PP&L, and water is obtained through a private well. Public sewer is provided to the property. Id. at p. 52. Centura has made satisfactory provision for utilities.

**e) Screening and buffering with reference to type, dimensions and character.**

Screening is specifically addressed by Section 27-507 of the Ordinance and Centura's plan to install a row of evergreens along the boundary which abuts the bike path, as well as its willingness to install any screening deemed necessary by the Township in the land development phase, supports a finding that satisfactory arrangement has been made for screening. Id. at p. 68-69, 71. Further, the site plan indicates that the 25 foot buffering requirement has been met. Id. at p. 68. *See also*, N.T., August 14, 2013, at p. 62. Thus, satisfactory arrangement has also been made for buffering.

**g) Required yards and open spaces.**

Required yards is specifically addressed by Section 27-307 of the Ordinance, which specifies a ten foot setback for the front yard and five foot setbacks for the side and rear yards. The proposed site plan complies with these setback requirements. N.T., May 8, 2013, at p. 72.

Open spaces are specifically addressed by Section 27-506 of the Ordinance, which restricts lot coverage to a maximum of 65%; that the site complies with such is clear from Exhibit 6 to the Certified Record of Proceedings. Thus, Centura has made satisfactory provision for required yards and open spaces.

As Centura has demonstrated that the proposed use satisfies the objective requirements of the ordinance, it is entitled to a presumption that the use is consistent with the health, safety and general welfare of the community, and that presumption shifts the burden to the objectors to show that there is a high probability that the use will "generate adverse impacts not normally generated by this type of use and that these impacts will pose a substantial threat to the health

and safety of the community.” Greaton Properties, Inc, *supra*. No such showing was made in this case. The objectors presented no evidence, but merely voiced concerns by making comments at the hearing on April 30, 2014, submitting written statements throughout the proceedings and making statements during their cross-examination of Centura’s witnesses, none of which was subject to cross-examination by Centura’s counsel. The central focus of the concerns was the effect the proposed use will have on their well-water quantity and quality. As was made clear in the initial presentation of the Hearing Examiner, however, “the Susquehanna River Basin Commission has issued an approval relative to the quantity of the water withdrawal, and the law essentially preempts any local municipality from revisiting the idea of quantity.” N.T., April 30, 2013, at p. 5. Although warned that “[q]uantity is not an issue”, Id. at p. 13, the overwhelming majority of the comments and statements expressed concerns that wells would go dry if the conditional use was approved. As this issue was not before the Board, and is thus not before this court, it will not be addressed, except to note that the court is satisfied that the SRBC permit conditions have been designed to address the very concerns expressed by the objectors.

With respect to the remaining concerns, which can be classified as traffic concerns, even were the court to consider the statements made as evidence, objectors “cannot meet their burden by merely speculating as to possible harm”. Marquise Investment, *supra*, at 615. The objectors must demonstrate to a high degree of probability that the water withdrawal and distribution facility will adversely affect the public welfare in a way not normally expected by a water withdrawal and distribution facility. Id. The comments made about traffic amounted to no more than speculation, however. For example:

Ryan Anderson:<sup>15</sup> “I also have a concern about the 21,000 additional trucks. Provided that they just left there and went immediately to the beltway or the overpass it wouldn’t be as bad, but I know they’re going to come up Log Run Road, up Lycoming Creek Road, some of the most heaviest trucks on the road. I mean, are we going to be responsible for the repair to the Log Run Road, or who’s going to take care of that potential damage? And as someone else stated, are they going to put additional traffic lights? Again, these are all questions. I know they don’t need to be answered now. There’s probably some can attest to exact numbers but there’s multiple accidents every week on Lycoming Creek

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<sup>15</sup> No relation to the undersigned.

Road. You add another 21,000 trucks that can't stop very fast, how many more people are going to be affected, some permanently?"

N.T., April 30, 2013, at p. 59-59. And, at p. 64, Mr. Butterfield commented that "I think it's self-evident that 54 large, noisy, dirty trucks going through residential areas in a course of a day is a detriment to the welfare of those citizens." At p. 66, Mr. Steele stated:

"And then the truck hazard. I forgot about that. I never realized there would be 54 to 58 trucks coming in and out of there. I live – I pull off of Hayes Avenue. We're the first house on Hayes Avenue. This past summer I pulled off and made a left. I almost got dinged. I had a gas truck – or a water truck coming out of the old river side. It shot me into the oncoming traffic lane to get around him. Now I may have 54 shots of that a day."

Nothing was presented to show that the proposed use will generate traffic not normally generated by a water withdrawal and distribution facility, let alone that such an abnormal amount of traffic threatens safety. See Marquise Investment, supra, at 617, quoting Accelerated Enterprises, Inc. v. The Hazel Township Zoning Hearing Board, 773 A.2d 824, 827 (Pa. Commw. 2001) ("an increase in traffic is generally not grounds for denial of a [conditional use] unless there is a high probability that the proposed use will generate traffic not normally generated by that type of use and that the abnormal traffic threatens safety."). As the Objectors did not carry their burden, the presumption that the proposed use is consistent with the health, safety and general welfare of the community has not been rebutted and thus Centura is entitled to a finding to that effect.

Understandably, the proposal to withdraw a quarter of a million gallons of water a day from the basin which provides water to their homes has produced fear, anger and frustration in the citizens of Old Lycoming Township. The Township has provided for the use in its ordinance, however, and once the objective criteria for that use are demonstrated to have been met, the use must be approved conditionally.

**ORDER**

AND NOW, this 17<sup>th</sup> day of April 2014, for the foregoing reasons, the September 25, 2013, decision of the Board of Supervisors of Old Lycoming Township in this matter is hereby REVERSED and the Application for Conditional Use submitted March 12, 2013, is hereby APPROVED. The matter is remanded to that body for the imposition of reasonable conditions.<sup>16</sup>

BY THE COURT,

Dudley N. Anderson, Judge

cc: Kurt E. Williams, Esq., Salzmann Hughes, P.C.  
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J. David Smith, Esq.  
Fred A. Holland, Esq.  
Gary Weber, Esq.  
Hon. Dudley Anderson

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<sup>16</sup> See Butler v. Derr Flooring Company, 285 A.2d 538, 543 (Pa. Commw. 1971)( “Inasmuch as the adjudication of the Board was a denial of a special exception, the court could reverse the action of the Board, but it then had nothing before it to modify.... [and could not] thereafter impose its own restrictions and conditions upon the special exception.”)