

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

KRISTIE SMEDLEY &
WILLIAM SMEDLEY,

Plaintiffs/Appellants,
vs.

ZONING HEARING BOARD
OF LYCOMING COUNTY,

Defendant/Appellee.

: NO. 18 - 0996

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: CIVIL ACTION

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: *Administrative Appeal*

MEMORANDUM OPINION

Before the Court is an administrative appeal filed by Plaintiffs Kristie Smedley ("Ms. Smedley") and William Smedley ("Mr. Smedley") (collectively "Plaintiffs") from a decision rendered by Defendant, the Zoning Hearing Board of Lycoming County ("Defendant"), regarding a special exception proposal. Argument was heard before this Court on November 15, 2018 and the Court reserved decision. Defendant was permitted to file supplemental briefing addressing two cases Plaintiffs cited during argument, and Plaintiff was afforded opportunity to respond. On November 16, 2018, Defendant filed its *Post Argument Memorandum* and, on November 27, 2018, Plaintiffs filed their *Post-Argument Memorandum*.¹ As both parties have agreed that the record below is complete, the Court will be relying on the record below in this opinion.² This is the Court's Memorandum Opinion on Plaintiffs' Appeal.

¹ Plaintiffs cited *Ankiewicz v. Benton Township*, 2018 WL 5117988 (Pa. Commw. Ct. Oct. 22, 2018) and *Protect PT v. Penn Township Zoning Hearing Board*, 2018 WL 5831186 (Pa. Commw. Ct. Nov. 8, 2018); however, these unreported cases were not factually germane.

FACTS & PROCEDURE

Plaintiffs own 33.86 acres of private property in Gamble Township, Lycoming County, Pennsylvania.³ The property, 1148 Lake Road, Trout Run, Pennsylvania 17771 (the “Property”), is zoned as a Countryside Zoning District and is currently being used for agricultural and residential purposes.⁴ The Property contains a single-family dwelling, and eight agricultural buildings: a corn crib, storage shed, open shed, pole building, tool shed, shop, utility building, and farm utility shelter.⁵ Access to the Property is gained by a right-of-way easement across property owned by the Pennsylvania Fish & Boat Commission that abuts Lake Road.⁶

On March 26, 2018, Plaintiffs petitioned Defendant to grant a special exception for the operation of agricultural accessory businesses on the Property.⁷ Plaintiffs requested the right, “in stages,” to:

1. “Establish and grow varieties of grapes and hops”;
2. “Process grapes and hops into wine and [beer] to sell on and off site”;
3. “Sell grapes and hops as finished products to other businesses and the public”;
- and
4. “Hold special events on the property such as weddings, meetings, etc.”⁸

Plaintiffs proposed agricultural expansion, a tasting and sales room, a customer entrance, and parking to the East of Lake Road.⁹ Lake Road runs alongside Rose Valley Lake.¹⁰

² 2 Pa.C.S.A. § 754.

³ Plaintiffs’ Brief in Support of Appeal at 1 (October 12, 2018).

⁴ Certified Record on Appeal, ex. ZA-1, at 2 (Aug. 10, 2018) (hereinafter “Rec.”).

⁵ Rec., ex. ZA-1, at 2.

⁶ *Id.*

⁷ Rec., ex. ZA-1, attach. 2.

⁸ *Id.* at 1.

On April 10 and April 17, 2018, notice was published regarding an April 25th hearing for Plaintiffs' special exception proposal before Defendant.¹¹ Individual letters were sent to neighbors Mr. and Mrs. Hockman on March 27, 2018, as well as John Knopp ("Mr. Knopp") and Holly Knopp.¹² Legal notice was also posted.¹³ On March 29, 2018, after an initial review, the Lycoming County Planning Commission ("LCPC") recommended approval of Plaintiffs' proposal.¹⁴ On April 24, 2018, Mr. Frederick Hockman ("Mr. Hockman"), who resides on Lake Road, filed a written response in opposition to any modification to the Property.¹⁵ Likewise, on April 25, 2018, Cynthia Bower ("Ms. Bower"), also of Gamble Township, filed a written response in opposition.¹⁶

First Hearing

On April 25, 2018, the first special exception hearing was held before Defendant.¹⁷ Chairman Lloyd Forcery ("Mr. Forcery"), Chris Logue ("Mr. Logue"), Dan Clark ("Mr. Clark"), and Rom Andraka ("Mr. Andraka") were present and participated in the hearing.¹⁸ Mr. Keegan Klotz ("Mr. Klotz"), as spokesperson for Plaintiffs, was asked questions by Defendant and members of the public before those present were permitted to voice their concerns regarding Plaintiffs' proposal. While approximately a dozen individuals expressed their opinions regarding the proposal through questions or

⁹ *Id.* at 1-2.

¹⁰ Rec., ex. ZA-1, attach. 2, at 1-2.

¹¹ Rec., exs. ZA-1, attach. 4; ZA-2.

¹² Rec., ex. ZA-1, attach. 4.

¹³ Rec., ex. ZA-3.

¹⁴ Rec., ex. ZA-4.

¹⁵ Rec., ex. ZA-5. Mr. Hockman later changed his mind after gaining more information about the proposal. Rec., ex. ZA-6, at 23.

¹⁶ Rec., ex. P-2.

¹⁷ Transcript at 2 (Apr. 25, 2018) (hereinafter "T1").

¹⁸ The seated members consisted of Mr. Forcery, Mr. Clark, and Mr. Logue. T1 at 2. Mr. Andraka stated "No, I won't be seated because I live right down the road and I don't want to give an appearance of a bias," however, Mr. Andraka asked quite a few probing questions of Plaintiffs' spokesperson, Mr. Klotz,

statements, Mr. Klotz did not possess sufficient information at this particular stage in the process to address most concerns. Mr. Klotz would often defer to the appropriate regulatory authority on the specifications required.¹⁹ Indeed, even his expectations surrounding the number of parking spaces needed for the event venue were speculative.²⁰ What Mr. Klotz did know at this time was: the name of the venue, "Rose Valley Vines & Wines,"²¹ that the interior capacity of the event venue would only hold two-hundred and fifty people,²² musical performances would be housed indoors,²³ and the tasting rooms would be closed to the public when the event venue hosted an event.²⁴ Likewise, Mr. Klotz assured those present that the venue would not allow cash bars, would prohibit the cooking or preparing of food, and any hosted events would end contractually at 10:00 p.m.²⁵

The objectors' concerns were similarly speculative and concerned secondary effects of the event venue, such as: noise levels,²⁶ vibration concerns,²⁷ waste management,²⁸ distributor management,²⁹ and disorderly conduct and enforcement of rules.³⁰ Ultimately, the Defendant found that more information was necessary in order for it to

throughout the hearing despite recusing himself. *Id.* It is unclear from the record which members deliberated.

¹⁹ See, e.g., T1 at 32.

²⁰ *Id.* at 29-32 (noting he believed the parking lot would have one-hundred spaces, but did not "expect" all spaces to be utilized). In fact, those present noted the speculative nature of Plaintiffs' proposal. See, e.g., *id.* at 50.

²¹ *Id.* at 60.

²² *Id.* at 40.

²³ *Id.* at 36.

²⁴ *Id.* at 15.

²⁵ *Id.* at 18, 20-21.

²⁶ See, e.g., *id.* at 36, 71 (concerned about the noise from air conditioners, compressor pumps, steam valves, delivery trucks, garbage trucks, lines of traffic, and tour busses), 74-76 (noise affecting the bird habitat surrounding Rose Valley Lake).

²⁷ See, e.g., *id.* at 66.

²⁸ See, e.g., *id.* at 54 (pesticides and herbicide run-off), 58 (general waste from venue), 66 (sewage's impact on surrounding wells).

²⁹ See, e.g., *id.* at 55.

³⁰ See, e.g., *id.* at 37 (noise level enforcement), 42-43 (alcohol consumption enforcement).

render a decision.³¹ Defendant requested written comment from Gamble Township and the Pennsylvania Fish & Boat Commission.³²

On May 10, 2018, the Gamble Township Board of Supervisors provided its requested position on Plaintiffs' proposal, noting that it was opposed to any modification based on feedback from the residents regarding concerns of increase in traffic, noise, litter, and danger to wildlife.³³ On May 15, 2018, after further documentation was provided, the LCPC confirmed its prior approval on March 29, 2018.³⁴ The LCPC also noted a 2013 Rose Valley Lake Area Traffic Report (the "Traffic Report") that was conducted from June 26 - 27, 2013.³⁵ The Traffic Report noted that "Average Daily Traffic" consisted of one-hundred and seventy-nine vehicles per day with "Peak Hour Volume" being fifteen vehicles in the morning and seventeen vehicles in the evening.³⁶ On May 17, 2018, the Pennsylvania Fish & Boat Commission provided its requested position stating that it was not concerned with Plaintiffs' proposed development, but attached a few conditions to the project.³⁷

On May 22, 2018, the Lycoming Audubon Society submitted its written opposition to the proposal discussing its fear that Plaintiffs' venue would disrupt the natural habitat of Rose Valley Lake.³⁸ And, on May 23, 2018, Ms. Kaitlin Eck ("Ms. Eck"), daughter of

³¹ T1 at 86.

³² *Id.* Joe Reighard, Chairman of the Gamble Township Board of Supervisors, expressed his view that the Board did not submit written comment because the concerns of those objecting to the project were "irrelevant" to the hearing. T1 at 82.

³³ Rec., ex. ZA-6, at 12-21.

³⁴ *Id.* at 4.

³⁵ *Id.* at 5-6.

³⁶ *Id.*

³⁷ *Id.* at 2-3. The Pennsylvania Fish & Boat Commission's conditions concerned: (1) Plaintiffs resubmitting their proposed improvements, (2) a driveway being built to Pennsylvania Department of Transportation standards, (3) reasonable buffer and set-backs from the property lines and plant screenings to minimize visual, sound and activity impacts, and (4) providing the Commission an opportunity to review and comment on the storm water control plan. *Id.* at 2.

³⁸ *Id.* at 22.

Mrs. Smedley, submitted a response in support of Plaintiffs' proposal.³⁹ Similar to comments expressed by Mr. Klotz at the first zoning board hearing, Ms. Eck noted that her family values the beauty and tranquility of the area and simply wishes to "share its beauty with others," allowing "them to create special memories in a remarkable setting."⁴⁰

Second Hearing

On May 23, 2018, the second special exception hearing was held before Defendant.⁴¹ Chairman Mr. Forcery, Mr. Kline, Leslie Whitehall, Mr. Logue, Mr. Clark, and Mr. Andraka were present and participated in the hearing.⁴² The requested correspondence was presented and testimony from those present related to the new information was allowed.⁴³ Richard Heimbach ("Mr Heimbach"), Lycoming County Zoning Officer, reviewed the responses he received from the Gamble Township Board of Supervisors and Pennsylvania Fish & Boat Commission, as noted above.⁴⁴ Mr. Fred Holland, Esq., as Solicitor for Defendant, provided an overview of written objections Mr. Klotz had submitted regarding the aforementioned responses.⁴⁵ Mr. Heimbach also addressed the supportive letter from the LCPC, including the attached Traffic Report, letter from the Lycoming Audubon Society, and letter from Ms. Eck.⁴⁶

³⁹ Rec., ex. ZA-6, at 24.

⁴⁰ *Id.*

⁴¹ Transcript at 1 (May 23, 2018) (hereinafter "T2").

⁴² *Id.* at 2. The seated members again consisted of Mr. Forcery, Mr. Clark, and Mr. Logue. *Id.*

⁴³ *Id.* at 3.

⁴⁴ *Id.* at 4-5.

⁴⁵ *Id.* at 5. Mr. Klotz's main objections concerned the Gamble Township Board of Supervisors' comments and supporting documentation, which was a petition signed by approximately forty objectors to Plaintiffs' proposal. *Id.* Mr. Klotz argued that such comments were pure speculation and the petition was prejudicially phrased. *Id.*

⁴⁶ *Id.* at 6-10.

Following the introduction of the aforementioned exhibits, members of Defendant requested clarification from Mr. Heimbach regarding Plaintiffs' proposal. Mr. Andraka inquired as to how Plaintiffs' venue could meet the requirement of § 3210E(3)(b) of the Lycoming County Zoning Ordinance (the "Ordinance") that an accessory business not produce "objectionable conditions which are audible, visible, or otherwise detectable by human senses at the property line."⁴⁷ Mr. Heimbach responded that the Ordinance contains other provisions that describe the appropriate level of sound and noise that can be heard.⁴⁸ Mr. Andraka responded that, if that is correct, then § 3210E(3)(b) contains "poorly written criteria."⁴⁹ Mr. Kline asked whether the 2013 Traffic Study was the most recent iteration and whether the traffic volume had increased.⁵⁰ Mr. Heimbach responded that he had not performed an origin and destination study, but that the gas well development traffic and general increases in traffic numbers each year would likely result in an increase in traffic.⁵¹

Mr. Klotz was then provided an opportunity to expound on his written objections.⁵² During Mr. Klotz's presentation, Mr. Logue summarized Mr. Klotz's testimony at the prior meeting:

So you were very vague on the way your business [is] going to be operating and run. So we really don't have any concrete data, other than your saying—deferring to us and the County on how the business should be run. Do you have any more specific detail on how the business is going to be run?⁵³

⁴⁷ T2 at 11-12.

⁴⁸ *Id.* at 12.

⁴⁹ *Id.*

⁵⁰ *Id.* at 13.

⁵¹ *Id.*

⁵² *Id.* at 14.

⁵³ *Id.* at 19.

Mr. Klotz inquired as to what aspect of Plaintiffs' proposal Mr. Logue found vague.⁵⁴ Mr. Logue retorted, "Well about the volume of alcohol you're going to be serving and patrons can purchase at the event or at the special event, or at the tasting, any of those things."⁵⁵ Mr. Klotz responded:

With the licensing of course we have to apply for and hope to get it approved through the [Pennsylvania Liquor Control Board ("PLCB")]. And in those licenses are requirements themselves that I would propose we would follow their requirements. That information certainly is public information. I do not have copies of that, of what they permit a tasting room to serve. Again, it is public information. I do not have those facts, you know, with me myself, no. . . .⁵⁶

Upon further disagreement, Mr. Klotz stated that Plaintiffs would follow the training programs and guidelines promulgated by the PLCB.⁵⁷ Mrs. Smedley then provided supportive testimony of the proposed project.⁵⁸ Defendant did not have questions for Mrs. Smedley.⁵⁹

Members of the public were then permitted to voice their opinions on new issues raised by the letters and comments submitted.⁶⁰ Donna Jackson ("Ms. Jackson"), who also resides on Lake Road, expressed concern with the potential commercialization of Rose Valley Lake.⁶¹ Steven Brady ("Mr. Brady") raised concerns regarding potential noise and a traffic increase, noting that "the real problem is we can't get any clear sense

⁵⁴ T2 at 19.

⁵⁵ *Id.*

⁵⁶ *Id.* at 20.

⁵⁷ *Id.* at 21.

⁵⁸ *Id.* at 21-25.

⁵⁹ *Id.* at 25.

⁶⁰ *Id.* at 25-26.

⁶¹ *Id.* at 27-28. Ms. Jackson noted that she was the individual who collected signatures in the Trout Run area for the petition that was sent to Gamble Township Board of Supervisors. *Id.* at 26. Ms. Jackson also submitted additional signatures at the hearing. *Id.* at 30; Rec., ex. P-3.

of what is going to happen with the business.”⁶² Finally, Mr. Knopp again expressed a continuing concern of enforcement at the events.⁶³

The Decision

On June 18, 2018, Defendant issued its decision denying Plaintiffs’ request in part.⁶⁴ Defendant permitted Plaintiffs’ request only as to the operation of a winery and brewery on the Property as long as Plaintiffs complied with three conditions.⁶⁵ Of the conditions required, Plaintiffs were prevented from permitting outdoor music at the winery or brewery.⁶⁶ In their “Discussion” section, Defendant found that Plaintiffs had met their burden of presenting a special exception request that fell within the definition of Agricultural Accessory Businesses.⁶⁷ Accordingly, Defendants found that the objectors present at the board hearings had a “burden to show that the proposed use would have a detrimental effect on health, safety and welfare as governed by the provisions of the Lycoming County Zoning Ordinance.”⁶⁸ In its findings of fact, Defendant found that:

¶12. “The Event Venue is in the proximity of Lake Road”;

¶13. “The conducting of events which will attract 100 or more automobiles would significantly increase the traffic on Lake Road”;

¶14. “Current traffic counts on Lake Road indicate that, at least during week days, traffic is unlikely to exceed 25 vehicles per hour”;

¶15. “Testimony from the Applicant indicated that vehicle traffic around the beginning and end of events would be significantly higher [than] 25 vehicles per hour.”⁶⁹

⁶² T2 at 32-35.

⁶³ *Id.* at 30-31.

⁶⁴ Decision of Zoning Hearing Board of Lycoming County, *In re: Kristie and William Smedley*, No. 2018-004 (June 18, 2018) (hereinafter “Decision”).

⁶⁵ *Id.* at 7-8.

⁶⁶ *Id.* at 7.

⁶⁷ *Id.* at 5.

⁶⁸ *Id.*

⁶⁹ *Id.* at 3.

Defendant subsequently found that the presence of Rose Valley Lake in the vicinity of the proposed venue would be prohibitive of the proposal since noise is an “unavoidable” consequence of events and it would disrupt the surrounding residents and wildlife near Rose Valley Lake.⁷⁰

Based on these findings of fact, Defendant held that the objectors had satisfied that burden.⁷¹ Defendant qualified its findings as follows:

Based upon the traffic information that was presented by the Zoning Administrator, and also based upon the Applicant's testimony regarding anticipated traffic for events, there will be a concentration of traffic, anytime there is an event. This increase in traffic will be substantial and adverse, especially on Lake Road. The entry of 100 or more vehicles for an event, all at approximately the same time, and the exit of those vehicles also at approximately the same time, will create an adverse effect on the traffic in the vicinity. Traffic for the brewery and winery, on the other hand, will be more sporadic and we do find it would not have the same detrimental effect.

More importantly, the character of the neighborhood will be adversely affected by the noise that is an inevitable result of events such as those that are planned. A wedding is a joyous occasion that involves music and conversation among large groups of people. While this may not adversely affect most areas in which agricultural accessory businesses locate, the Board must consider the character of this particular neighborhood adjoining Rose Valley Lake. We find that the noise associated with weddings and other events, joyous as it might be, will have an adverse effect on the character of the neighborhood of Rose Valley Lake. Part of that character is the presence of abundant wildlife.⁷²

PARTIES' CONTENTIONS

On July 11, 2018, Plaintiffs filed a *Notice of Appeal* in this Court.⁷³ Plaintiffs argue that they were denied due process in the hearings because Mr. Andraka participated in the hearings despite verbally recusing himself and Mr. Logue should have recused

⁷⁰ Decision at 4.

⁷¹ *Id.* at 5.

⁷² *Id.* at 5-6.

⁷³ Notice of Appeal (July 11, 2018) (hereinafter “Notice”).

himself because he is a relative of Herman Logue who owns and operates a similar wedding venue and would be a competitor of Plaintiffs.⁷⁴ Plaintiffs also argue that Defendant's findings regarding an increase in traffic and noise were not supported by substantial evidence or proven based on a high degree of probability.⁷⁵ Likewise, Plaintiffs assert that the objectors failed to demonstrate objective evidence that was inconsistent with the health, safety and welfare of the community, or that the proposal would "generate adverse effects greater than that normally expected from this type of use."⁷⁶ Additionally, Plaintiffs claim that Defendant's conditional approval of their winery and brewery is an abuse of discretion and not supported by substantial evidence.⁷⁷

On October 12, 2018, Plaintiffs filed their *Brief in Support* and Defendant filed its *Brief in Opposition* on October 29, 2018. Defendant argues that it did not err as it applied § 10310 as written and found that Plaintiffs' proposal would " 'result in a substantial or undue adverse effect.' "⁷⁸ Further, Defendant argues that § 3210E(3) is controlling regarding appropriate noise levels, not § 5130, and § 3210E(3) allows Defendant to place a condition when granting Plaintiffs' request.⁷⁹

⁷⁴ Notice at 2. While this Court's decision renders these issues moot, the Court will address Plaintiffs' due process arguments. Although board members will not be disqualified solely for expressing a prior opinion related to the issue before the board, see 53 P.S. § 65603, even the appearance of bias can be disqualifying. See *McVay v. Zoning Hearing Bd. of the New Bethlehem Borough*, 496 A.2d 1328, 1330 (Pa. Commw. Ct. 1985) (quoting *Gardner v. Repasky*, 252 A.2d 704 (Pa. 1969)). However, an applicant must request recusal of the board member on the record in order to preserve the issue for appellate review. See *Danwell Corp. v. Zoning Hearing Bd. of Plymouth Township*, 540 A.2d 588, 591 (Pa. Commw. Ct. 1988). Since the board was not presented the right to rule on a recusal request, the issue was not preserved. See *Crandell v. Pennsbury Twp. Bd. of Supervisors*, 985 A.2d 288, 296 (Pa. Commw. Ct. 2009).

⁷⁵ Notice at 2.

⁷⁶ *Id.* at 3

⁷⁷ *Id.* Plaintiffs also raised issue with documents submitted into evidence; however, for reasons that will be clear below, those issues are moot. *Id.*

⁷⁸ Defendant's Brief in Opposition at 2 (Oct. 29, 2018) (hereinafter "Defendant's Brief").

⁷⁹ Defendant's Brief at 2-4.

DISCUSSION

Pursuant to Pennsylvania law, a zoning board is permitted to grant, deny, or place conditions on a special exception proposal based on criteria established in a zoning ordinance.⁸⁰ The Lycoming County Zoning Ordinance (the "Ordinance") states the following regarding "Special Exception Procedures,"

Special Exception uses have a special impact or uniqueness such that their effect on the surrounding environment cannot be determined in advance of the use being proposed for a particular location. The Zoning Hearing Board may grant Special Exceptions only for those uses as are provided in Section 3120, Table of Permitted Uses.

When such a use is proposed, a review by the Lycoming County Zoning Hearing Board will be conducted to determine whether the proposed use should be permitted. In making such a determination, the Board may attach reasonable conditions and safeguards, in addition to those already expressed in the Ordinance.⁸¹

In § 3120, an "Agricultural Accessory Business" is defined as:

A business, housed in a structure solely dedicated to said business, which is conducted on a single parcel or multiple adjoining parcels, provided the adjoining lots are under common ownership in conjunction with an established agricultural operation. Such uses include: food stand, winery, wine tasting room, produce processing/sales, special event venue; and other similar uses compatible with the character of the agricultural operation. . . .⁸²

Section 3120E further provides that this type of business "shall be compatible with the character of the dwelling or the immediate vicinity. The accessory business shall not produce offensive noise, vibration, dust, odors, pollution, traffic congestion, or other

⁸⁰ 53 P.S. § 10912.1.

⁸¹ Lycoming County, Pa., Zoning Ordinance § 10300, <http://www.lyco.org/Departments/Planning-and-Community-Development/Zoning> (last visited Dec. 7, 2018) (hereinafter "Ord.").

⁸² Ord. § 3210E(1).

objectionable conditions which are audible, visible, or otherwise detectable by human senses at the property line."⁸³

Regarding the board's findings, the Ordinance states:

No application for a Special Exception shall be approved unless the Lycoming County Zoning Hearing Board specifically finds that the proposed Special Exception use is appropriate in the location for which it is proposed. This finding shall be based on the following criteria:

[. . .]

B. The proposed use at the proposed location shall not result in a substantial or undue adverse effect on adjacent property, the character of the neighborhood, traffic conditions, parking, public improvements, public sites or right-of-way, or other matters affecting the public health, safety, and general welfare.⁸⁴

Further, the Ordinance outlines the proper procedure for the zoning board to rule on an "Application for Special Exception,"

Decision. Within forty-five (45) days of the last public hearing on the application, unless an extension of this time is granted by the Zoning Hearing Board pending the submittal of additional information from the applicant, the Zoning Hearing Board shall render a decision to grant the application for a Special Exception Permit, grant it subject to conditions, or deny it. *The application shall be denied if the Zoning Hearing Board finds any of the following:*

(a) The application and record fail to establish compliance with the standards made applicable to the proposed development by the provisions of this Ordinance.

(b) The proposed use, developed in the proposed manner, and at the proposed location, would be inconsistent with the standards pursuant to the provisions of this Ordinance.

(c) The adverse impacts on the overall public health, safety, and welfare are not balanced by the public or private benefits of the proposal. The Zoning Hearing Board shall

⁸³ Ord. § 3210E(3)(b). "Offensive noise," as a phrase or individual words, is not defined in the Ordinance. See Ord., art. 14. Of note, Plaintiffs are not contesting the validity of Ord. § 3210E. See 53 P.S. § 11006-A(a).

⁸⁴ Ord. § 10310(B).

include in this determination any proposals of the applicant and any conditions that it might impose on the development, pursuant to the provisions of this Ordinance, to ameliorate problems associated with the development.

Conditions and Restrictions

(a) The Zoning Hearing Board may, in approving the application for any Special Exception Permit, impose such restrictions and conditions on such approval, the proposed use, and the premises to be developed or used pursuant to such approval, as it determines are required by the general purposes, goals, and objectives of the County Comprehensive Plan and this Ordinance to prevent or minimize adverse effects from the proposed use and development on other properties in the neighborhood and on the general health, safety, and welfare of the County.

(b) All conditions imposed upon any Special Exception permit approval, with the exception of conditions made applicable to such approval by the express terms of this Ordinance, shall be expressly set forth in the granting of such Special Exception permits.⁸⁵

Defendant is afforded deference,⁸⁶ but Defendant's decision must be based on "substantial evidence."⁸⁷ Plaintiffs bear the burden of showing a "manifest and flagrant abuse of discretion" before this Court.⁸⁸ Regarding special exceptions, the Commonwealth Court of Pennsylvania has noted a "presumption that the governing body considered the effect of the use when enacting the ordinance and determined that the use is consistent with the health, safety, and welfare of the community so long as it

⁸⁵ Ord. § 10320(B)(3)-(4) (emphasis added).

⁸⁶ See *MarkWest Liberty Midstream & Res., LLC v. Cecil Twp. Zoning Hearing Bd.*, 102 A.3d 549, 555 (Pa. Commw. Ct. 2014).

⁸⁷ 53 P.S. § 11005-A. "Substantial evidence is defined as 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *In re Thompson*, 896 A.2d 659, 667 n.3 (Pa. Commw. Ct. 2006) (quoting *Valley View Civic Ass'n v. Zoning Bd. of Adj.*, 462 A.2d 637, 640 (Pa. 1983); *Collier Stone Co. v. Twp. of Collier Bd. of Comm'rs*, 735 A.2d 768 (Pa. Commw. Ct. 1999)).

⁸⁸ See *Perelman v. Bd. of Adj.*, 18 A.2d 438, 440 (Pa. Super. Ct. 1941).

meets the objective requirements of the ordinance.”⁸⁹ Therefore, if the applicant satisfies that its proposed exception is defined in the ordinance, then the burden shifts to the objectors to rebut this presumption by presenting sufficient evidence.⁹⁰ In *Marr Development Mifflinville, LLC v. Mifflin Township Zoning Hearing Board*, the Commonwealth Court specifically notes:

It is important to appreciate that the burden placed on the objectors is a heavy one. “*They cannot meet their burden by merely speculating as to possible harm, but instead must show a high degree of probability that the proposed use will substantially affect the health and safety of the community.*”⁹¹

The zoning board in *Marr Development* was considering the proposed construction of eleven single-family attached dwellings and heard testimony regarding the special exception request from the zoning officer, the applicant's vice-president, and residents voicing their objections—which included storm water management, flooding, traffic, and “effect on neighborhood aesthetics.”⁹² The board denied the applicant's request and found that the objectors had met their burden.⁹³ The trial court affirmed.⁹⁴ The Commonwealth Court reversed, finding that the objectors “merely speculate[d] as to the possible harm.”⁹⁵

Additionally, the Court noted that the objectors failed to present evidence that the proposal would “generate adverse effects greater than that normally expected.”⁹⁶ In this vein, the Court noted that an increase in the number of dwellings would “[o]bviously”

⁸⁹ *Marr Dev. Mifflinville, LLC v. Mifflin Twp. Zoning Hearing Bd.*, 166 A.3d 479, 483 (Pa. Commw. Ct. 2017).

⁹⁰ *See id.*

⁹¹ *Id.* (quoting *E. Manchester Twp. Zoning Hearing Bd. v. Dallmeyer*, 609 A.2d 604, 610 (Pa. Commw. Ct. 1992)) (emphasis added).

⁹² *Id.* at 482.

⁹³ *Id.*

⁹⁴ *Id.* at 481.

⁹⁵ *Id.* at 484.

result in an increase in traffic; however, an outcry regarding a general increase in traffic was insufficient.⁹⁷ Specifically, the Commonwealth Court found the objectors' testimony regarding "their opinion that traffic would increase" to be insufficient.⁹⁸ The Court reiterated that the board could not undermine the legislative presumption that a special exception is conditionally permitted if allowed in the zoning district.⁹⁹

In the present case, the record below is void of substantial evidence to support Defendant's decision. Based on the record, an argument could be posited that the following statements are not purely speculation: (1) Ann Kudak's statement that she can hear people speaking when they prepare a boat at the north boat dock or while on the water;¹⁰⁰ (2) Ms. Jackson's statement that she cannot walk her dogs on Lake Road when vehicles are approaching as there is no sidewalk;¹⁰¹ (3) Ms. Jackson's statement that she has only seen four policemen respond to the area in the last four years;¹⁰² (4) Ms. Jackson's statements regarding being able to hear across Rose Valley Lake;¹⁰³ (5) Jimmy Rodgers statement that Rose Valley Lake is a "no motor lake";¹⁰⁴ (6) Mr. Brady's admonishment that when he sneezed on May 22nd while on his driveway, someone across the lake said "God Bless You,"¹⁰⁵ and (7) Mr. Kline's statement that Lake Road allows two vehicles to pass each other.¹⁰⁶ Yet, even if these statements were considered non-speculative, no evidential support was provided by the objectors.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* The Commonwealth Court noted that no traffic study had been presented. *Id.*

⁹⁹ *Id.* at 484-85.

¹⁰⁰ T1 at 35-36.

¹⁰¹ *Id.* at 68-69.

¹⁰² *Id.* at 70.

¹⁰³ *Id.* at 68-69.

¹⁰⁴ *Id.* at 80.

¹⁰⁵ T2 at 33.

¹⁰⁶ T2 at 36.

Nevertheless, even if the objectors had provided such support for their claims, the above referenced statements are insufficient to meet the objectors' heavy burden and support Defendant's decision.

Regarding Defendant's belief that § 3210E(3) is controlling regarding appropriate noise levels, not § 5130, the Court disagrees. The Ordinance fails to define "offensive noise" in § 3210E(3); however, § 5110 states:

No use shall be permitted which is noxious or offensive in the immediate surrounding areas by reason of odor, dust, smoke, gas, vibration, illumination, or noise, or which constitutes a public hazard whether by fire, explosion, toxicity, or otherwise. In determining whether a proposed use is noxious, hazardous, or offensive, the following standards shall apply. The proposed operation shall not:

[. . .]

2. Result in noise or vibration exceeding the average intensity of ambient noise or vibration occurring from other causes at the boundary line.

[. . .]

7. Create any other objectionable condition in an adjoining area which will endanger public health or safety or be detrimental to a permitted continuing use of the surrounding area.¹⁰⁷

Concomitantly, § 5130 addresses the appropriate "Noise Protection Levels."¹⁰⁸ Despite the parties believing *their* chosen section governs this dispute, the Court finds ambiguity in the noise requirements of § 3210E(3).¹⁰⁹ Precedent instructs the Court to rely on "common usage of words and phrases and construe[] language in a sensible

¹⁰⁷ Ord. § 5110.

¹⁰⁸ Ord. § 5130. The purpose of Article 5 concerns environmental protection standards.

¹⁰⁹ The Court does not view this present matter as concerning an interpretation issue between a specific provision and general provision, as neither § 3210E(3) nor Article 14 ("Definitions") define § 3210E(3)'s terms. See *MarkWest Liberty Midstream & Res., LLC*, 102 A.3d at 557.

manner" when interpreting ambiguous ordinances.¹¹⁰ However, the general dictionary definitions for "offensive" or "noise" are not particularly enlightening.¹¹¹ In the Court's view, based on tenets of ordinance construction, § 3210E(3) and § 5130 should be read in tandem.¹¹² Hence, § 3210E notes that "offensive noise" can be prohibiting criteria and § 5130 denotes the emission of unacceptable decibel levels.

Based on this construction, there simply are no facts on the record to support Defendant's findings regarding the appropriate noise levels of Plaintiffs' proposed event venue. Similarly, Defendant's imposition of sound conditions on Plaintiffs' other proposed businesses was not "reasonable,"¹¹³ or supported by sufficient facts.

¹¹⁰ *City of Hope v. Sadsbury Twp. Zoning Hearing Bd.*, 890 A.2d 1137, 1143-44 (Pa. Commw. Ct. 2006) (quoting *Steeley v. Richard Twp.*, 875 A.2d 409, 414 (Pa. Commw. Ct. 2005) (internal quotation marks omitted)).

¹¹¹ See *Header v. Schuylkill Cty. Zoning Hearing Bd.*, 841 A.2d 641, 645 (Pa. Commw. Ct. 2004); "Noise," "Offensive," *Webster's New Collegiate Dictionary* 778, 797 (G. & C. Merriam Co. 1977) ("any sound that is undesired and interferes with one's hearing of something," "giving painful or unpleasant sensations").

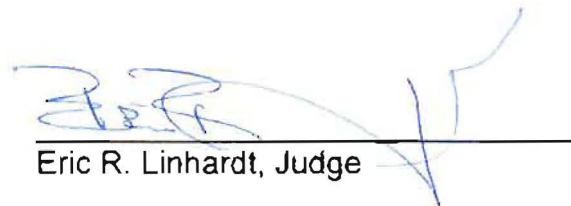
¹¹² 53 P.S. § 10603.1 ("In interpreting the language of zoning ordinances to determine the extent of the restriction upon the use of the property, the language shall be interpreted, where doubt exists as to the intended meaning of the language written and enacted by the governing body, in favor of the property owner and against any implied extension of the restriction."); accord *Williams Holding Grp., LLC v. Bd. of Sup'rs of W. Hanover Twp.*, 101 A.3d 1202, 1213 (Pa. Commw. Ct. 2014).

CONCLUSION

For the reasons discussed above, the decision of the Zoning Board of Lycoming County is REVERSED. The matter is REMANDED to proceed consistent with this opinion.¹¹⁴ Defendant shall re-notice and host a new hearing on Plaintiffs' proposal. The decision rendered shall be based on sufficient evidence, as discussed above.

IT IS SO ORDERED this 17th day of December 2018.

BY THE COURT,


Eric R. Linhardt, Judge

cc:

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¹¹³ Ord. § 10300.

¹¹⁴ 53 P.S. § 11006-A; see *Soble Const. Co. v. Zoning Hearing Bd. of Borough of E. Stroudsburg*, 329 A.2d 912, 916 (Pa. Commw. Ct. 1974) (noting a remand is appropriate when the lower court is reviewing the record for an abuse of discretion and, therefore, is prevented from making its own findings of fact).