

**COURT OF COMMON PLEAS OF MONROE COUNTY
FORTY-THIRD JUDICIAL DISTRICT
COMMONWEALTH OF PENNSYLVANIA**

**EVERGREEN FARMS AT COOLBAUGH : NO. 7623 CV 2022
TOWNSHIP C/O LEHIGH VALLEY :
UNDERGROUND, LLC, :**

Appellant

vs.

**ZONING HEARING BOARD OF
COOLBAUGH TOWNSHIP,**

Appellee

: LAND USE APPEAL

OPINION

This matter is before the trial court on a land use appeal filed by Evergreen Farms at Coolbaugh Township, c/o Lehigh Valley Underground, LLC (“Appellant”) from a decision by the Zoning Hearing Board of Coolbaugh Township. (“ZHB”). The Citizens for Pennsylvania’s Future was permitted to intervene in this matter. (“Intervenor”). At issue was the denial by the ZHB of a special exception application filed by the Appellant pursuant to Section 400.14 of the Coolbaugh Township Zoning Ordinance to construct a “warehouse” on property located at 174 Memorial Boulevard (a/k/a Pa. Route 611) in Coolbaugh Township, Monroe County, Pennsylvania. The ZHB determined that the proposed warehouse use is a secondary use, or incidental, to a distribution center/truck terminal, and denied Appellant’s special exception application, finding that such use is not allowed in the C-3 Commercial Village Zoning District where the property is located. This matter is being reviewed based upon the record made at the ZHB with no additional testimony.

FACTUAL AND PROCEDURAL HISTORY

I. First Set of Hearings and Appeals –

This matter was previously before the court following an appeal by the Appellant from the denial of a special exception application by the ZHB. In April 2022, Appellant submitted an application to the ZHB for a special exception pursuant to Section 400-14 of the Coolbaugh Township Zoning Ordinance (“zoning ordinance”) to construct a warehouse on the property. The ZHB held four public hearings on June 2, 2022, July 14, 2022, August 31, 2022 and September 27, 2022. The ZHB held one additional meeting on October 26, 2022 for the purpose of rendering a decision. The ZHB voted to deny the application. A written decision followed on October 27, 2022, finding that Appellant had failed to show that the proposed use was a warehouse under the definition of the zoning ordinance which allows warehouses in the C-3 zoning district by special exception.

Appellant filed a timely appeal to this court on November 22, 2022. Following review of the record and findings of the ZHB, the briefs of the parties, and oral argument, this court filed an Opinion and Order on April 5, 2023. The denial of the special exception was reversed, and the matter was remanded back to the ZHB for further findings. This court found that the proposed use included a warehouse on the property; however, it was not clear if the actual use was as a “distribution center/truck terminal,” and whether the warehouse was a secondary, or incidental use thereto. The C-3 zoning district allows a warehouse, but it does not allow a “distribution center/truck terminal.” Furthermore, the zoning ordinance definition for a warehouse specifically excludes retail sales or a truck terminal from being a warehouse. We instructed that the ZHB take additional testimony, if necessary, and determine whether the

proposed use is also a truck terminal, and the Board's interpretation of the zoning ordinance concerning the definitions of "warehouse" and "distribution center/truck terminal."

II. ZHB Remand Hearing and Decision –

On May 31, 2023, the ZHB held a hearing to take additional testimony. Appellant presented more testimony from a prior witness, Mark A. Bahnick, P.E., the project engineer; and Kimberly Jacobson, a commercial real estate broker. Intervenor called one witness, Daisy Wang, Ph.D., an Associate Professor of Business at East Stroudsburg University. James Miller, a township resident, also testified.

The ZHB met on August 14, 2023 to render a decision. The ZHB determined there is no conflict in the zoning ordinance between definitions for "warehouse" and for "distribution center/truck terminal," which includes warehouses as an incidental use. The ZHB voted that the proposed use of the property would actually be a "distribution center/truck terminal," which is not allowed in the C-3 zoning district. A written decision followed on August 31, 2023. A timely appeal was filed by the Appellant. The entire record, findings of the ZHB, and briefs of the parties have been filed. Oral argument was held on December 18, 2023.

From the record and findings of the ZHB, Appellant seeks to construct, operate and use a "warehouse" on property located at 174 Memorial Boulevard ("Property") a/k/a Pa. Route 611, and bounded by Pa. Route 423, Interstate Route 380, state game lands, and several private properties. The Property consists of 48.91 acres with frontage on both PA Route 611 and PA Route 423. The Tobyhanna Creek, which is classified as a high quality stream, runs adjacent to, and at some points traverses the Property. The Property is one of five lots owned by the Lynch Corporation, all of which have close proximity to each other in the PA Route 611 corridor of Coolbaugh Township. Appellant claims to be the equitable owner of the Property pursuant to

an Agreement of Sale of Commercial Real Estate between the Lynch Corporation and Andrew Jason Micklos. That Agreement of Sale contains an assignment clause permitting Micklos to assign his rights under the Agreement of Sale to another entity. A Novation Agreement dated May 29, 2023 was admitted to the ZHB record following remand and indicates the new buyer of the property is Appellant, Evergreen Farms at Coolbaugh Township, c/o Lehigh Valley Underground, LLC.

The Property is located in the C-3 Commercial Village zoning district which allows for the use as a warehouse as a matter of right by special exception. By definition, a “warehouse” cannot include retail sales or a truck terminal per the zoning ordinance. Appellant submitted a proposal for a 426,000 square foot building with a single access from PA Route 423. The single access road from PA Route 423 will allow up to nine (9) tractor-trailers to stack along the access road before entering the parking area on the Property. The proposed use will have 248 parking spaces for employees. There will also be 96 loading docks attached to the building being proposed as the warehouse. There will be parking for up to 98 semi-trailers as well. The facility will operate 24 hours per day, Monday through Friday, in 3 shifts. The maximum anticipated traffic volume would be 1,972 trips in a 24 hour period. The Appellant proposes connection to public water and sewer, and if no capacity is available for public sewer, the Appellant will construct a Community Sewage Disposal System for the Property, and for the other lots owned by the Lynch Corporation. Appellant provided testimony that included, but was not limited to, the use of the Property, stormwater methods, water and sewer, traffic impact, and an environmental and community assessment.

The additional testimony on remand included Appellant’s project manager, Mr. Bahnick, who testified that the proposed building and site is more indicative of a simple

warehouse, and not a distribution center/truck terminal. Mr. Bahnick stated that a truck terminal typically contains a narrow structure, whereas the proposed building is 300 feet wide. He also stated that truck terminals load from both sides of a building, and here, the loading docks are proposed for a single side of the building. Mr. Bahnick testified there would be no servicing of trucks at the proposed facility, and no manufacturing, assembly or product processing. Mr. Bahnick testified the proposed facility would be used for a breakdown of large orders from a single source into smaller orders, to be distributed elsewhere. He stated the facility may also be used for consolidation of several orders into one large order for distribution. He also confirmed the proposed facility would be used for the storage and parking of trucks awaiting cargo.

Kimberly Jacobson, a commercial real estate broker, testified she also believed the facility was simply a warehouse, and not a truck terminal. She also testified about truck terminals being more narrow and able to load on both sides of the facility.

Daisy Wang, Ph.D., testified as an expert in the field of supply chain and strategic management. She opined that the facility is a distribution center/truck terminal within the definitions of the zoning ordinance, and is not simply a warehouse. Dr. Wang noted the Appellant's testimony about the facility being open 24 hours per day, 5 days per week, and will generate 270 trucks coming in and out of the facility every day, or one every 5-6 minutes. Dr. Wang also noted the number of loading docks, the size of the warehouse building, the proximity to Interstate 80, that there is no known end user, and other testimony of the Appellant, for qualifying the use as a distribution center/truck terminal, with the warehouse building being an incidental use thereto.

James Miller, who worked at a distribution center facility in Coolbaugh Township for fifteen (15) years, testified that the proposed facility is similar to the models of a distribution

center based upon the amount of storage space, the in-bound and out-bound traffic calculations and the number of loading docks.

DISCUSSION

The standard of review for land use appeals from the governing body or a zoning hearing board in which additional testimony is necessary is reviewed de novo. 53 Pa. C.S.A. Section 11005-A. Where no additional evidence is necessary or requested, the standard of review is as follows:

“If the record below includes findings of fact made by the governing body, board or agency whose decision is brought up for review and the court does not take additional evidence or appoint a referee to take additional evidence, the findings of the governing body, board or agency shall not be disturbed by the court if supported by substantial evidence.”

Id. In other words, where no additional evidence is taken, the scope of the court’s review is limited to determining whether the board committed a manifest abuse of discretion or an error of law, and the court may conclude that the board abused its discretion only if the findings were not supported by substantial evidence. See Visionquest Nat’l. v. Bd. of Supervisors, 569 A.2d 915 (1990); Valley View Civic Assn. v. Zoning Hearing Bd. of Adjustment, 962 A.2d 637 (Pa. 1983). Here, no new testimony was taken and we rely on the record made at the ZHB hearings.

The issue of whether a proposed use falls within a given categorization in a zoning ordinance is a question of law. Aldridge v. Jackson Twp., 983 A.2d 247 (Pa. Cmwlth. 2009). The primary intent of interpreting ordinances is to determine the intent of the legislative body that enacted the ordinance. Id.

In determining whether to grant approval of a special exception application, the zoning hearing board does not look to make an exception to the zoning ordinance, rather only

whether the use is expressly permitted in that zoning district and that there will be no detrimental effect on the community. Manor Healthcare Corp. v. Lower Moreland Township Z.H.B., 590 A.2d 65 (Pa. Cmwlth. 1991). The applicant for the use must show that the proposed use satisfies the objective requirements of the ordinance to grant the special exception. Id. A special exception is unlike a variance where one needs to show a hardship as to why they cannot meet the requirements of a zoning ordinance. Rather, a special exception is merely a review of a permitted use to prevent any detrimental effects that may be caused by the use, and a chance to set reasonable requirements on the use. Id. A detrimental effect is a negative effect on health, safety and welfare. Siya Real Estate, LLC v. Allentown City ZHB, 210 A.3d 1152 (Pa. Cmwlth. 2019).

At the outset, an applicant for a special exception must show that the use proposed is one permitted by special exception. Lower Merion Twp. v. Enokay, Inc., 233 A.2d 883 (Pa. 1967); Bray v. Zoning Bd. of Adjustment, 410 A.2d 909 (Pa. Cmwlth. 1980). Here, the Appellant would need to establish that a “warehouse” is permitted by special exception in this zoning district, and that the use of the Property will be for a “warehouse” as defined by the township zoning ordinance.

The first decision of the ZHB was that the Appellant did not present sufficient evidence that the proposed use was a warehouse. The ZHB agreed that a warehouse is a permitted use by special exception in a C-3 zoning district and that the Property is located within the C-3 zoning district. The ZHB specifically found as follows:

“The Applicant (Appellant) presented absolutely no evidence to prove this large building was in fact a ‘warehouse.’ This omission is particularly curious because the Applicant (Appellant) was aware that certain objectors believed the large building would be used as a ‘distribution center/truck terminal.’ (Public Exhibit No. 5). And, in fact, much of the evidence which was presented would

lead one to believe that the proposed use of the building was more akin to a 'distribution center/truck terminal' than a 'warehouse.' This would include trucks coming and going Monday through Friday 24 hours a day, 248 parking spots for 3 shifts of employees, 96 docks for 'continuous truck loading,' and 98 spots to store trailers on site. The Board is not deciding that the proposed use is a 'distribution center/truck terminal.' It is only deciding that the applicant (Appellant) has failed to prove that the proposed use is a 'warehouse.'"

ZHB Decision p. 13.

This determination failed to consider that the proposed use fit the definition of a warehouse in the zoning ordinance, but could have been an incidental use to an additional or primary use as a distribution center/truck terminal. We reversed and remanded to determine if the use was a truck terminal which is specifically excluded from the definition of a warehouse, and for an interpretation of "distribution center/truck terminal" under the zoning ordinance, as that use is not allowed in the C-3 zoning district.

On remand, the ZHB found the use was similar to a truck terminal, that this was actually a distribution center/truck terminal as defined in the zoning ordinance, and that the special exception was again denied. The ZHB made 71 factual findings on remand, together with the prior factual findings. The ZHB noted the following conclusions of law following remand:

- “1. The Property is owned by Lynch Corporation.
2. The equitable owner is Appellant.
3. The Property is located in the C-3 Commercial Village district.
4. “Warehouses” are permitted in the C-3 zoning district by special exception.
5. Pursuant to the Zoning Ordinance, a “warehouse” is defined as:

A building or group of buildings primarily used for the indoor storage, transfer and distribution of products and materials, but not including retail sales or a truck terminal.

6. Pursuant to the Zoning Ordinance, a “distribution center/truck terminal” is defined as:

An establishment engaged in the receipt, storage and distribution of goods, products, cargo and materials, including transshipment by boat, rail, air or motor vehicle. Breakdown of large orders from a single source into smaller orders and consolidation of several orders into one large one for distribution to several recipients and vice versa are often part of the operation. The operation may include the storage or parking of trucks awaiting cargo as well as facilities for servicing of trucks. Storage facilities, such as warehouses, incidental to the principal use may also be part of the operation. Retail sales, manufacturing and assembly, or product processing, are not considered part of a distribution center/truck terminal.

7. A distribution center/truck terminal is not permitted in the C-3 zoning district.

8. The stated purpose of the C-3 zoning district is:

The Commercial Village District recognizes those areas in Coolbaugh Township that have developed as a mix of residential and commercial uses, such as the villages of Tobyhanna and Pocono Summit. The intent of the district is to continue the development of such areas while maintaining the neighborhood commercial village atmosphere.

9. The Appellant failed to present credible evidence that its proposed use of the Property was a “warehouse” as defined in the Zoning Ordinance.

10. The Appellant failed to produce credible evidence sufficient to sustain its persuasion burden that its proposed use of the Property was a “warehouse” as defined in the Zoning Ordinance.

11. The Township made a policy decision to specifically exclude distribution centers and truck terminals from the C-3 zoning district.

12. A “distribution center/truck terminal” is a principal use that is distinct from the principal use of a building or facility for a “warehouse.”

13. Storage facilities, such as warehouses, are included within the definition of a “distribution center/truck terminal,” provided they are incidental to the principal use.

14. There is not a conflict between the definition of “warehouse” and “distribution center/truck terminal” in the Zoning Ordinance, because these are two distinct principal uses of a property.

ZHB Decision 8/31/23, pp. 10-12

As noted in our prior opinion, Appellant met many of the requirements for a special exception. Mr. Terry is a traffic engineer who explained the different types of warehouse uses and how storage is categorized therein. He explained that he chose the high cube warehouse type for traffic calculations because it is the highest trip generator for vehicles and would cover any possible warehouse use.¹ Mr. Terry’s testimony was based solely on the use of the Property as a warehouse. He testified to the anticipated average daily trips, what percentage of trips would come from which roads and directions, and the PennDOT requirements for access based on those number of daily trips. Mr. Terry concluded that the Property was appropriate as a location for a warehouse of this size and that the proposed use will not impact traffic different to or greater than normally associated with any other warehouse use of this size. Finally, Mr. Terry stated the Appellant would have to do a full traffic impact study as part of a land development plan submitted to the Township, and for consideration and approval by PennDOT.

¹ The Appellant conceded that they did not know what would be stored at the facility and that they were unable to give more definitive information regarding actual number of trips to be generated because a buyer/user of the site had not yet been identified. Appellant plans to build on spec. for a user to be identified and found later. This appears to be the basis for Mr. Terry choosing the highest warehouse use trip generator statistics available.

These opinions address and meet the requirements of the ordinance to show no adverse effects on traffic conditions or public improvements, adequacy of traffic access, etc. Mr. Terry testified that a warehouse will create traffic. He then estimated how much traffic would be generated with specific trip numbers; that the Appellant would have to adhere to PennDOT requirements for access; and, that no adverse effects beyond a normal increase in trips to the Property as a result of this use would occur. His opinion included a calculation for 1,972 trips generated every 24 hour period by 247 trucks and 1,725 cars.

An Environmental and Community Assessment was also completed, and there appears to be water and sewer capability. Ultimately, we find that Mr. Terry's testimony, and the other testimony presented to the ZHB, addresses most of the concerns of the special exception requirements as to impact on the community, etc. The underlying issue to be determined is the actual use of the property and whether permitted in the C-3 zoning district.

The ZHB has now addressed the issue of the definition of "warehouse," as opposed to "distribution center/truck terminal," has found no conflict, and has interpreted how those definitions impact this application by the Appellant. The ZHB found that the Appellant's proposed use, while including a warehouse, is incidental to the use as a distribution center/truck terminal. As that use is prohibited in the C-3 zoning district, the ZHB denied the special exception. We affirm the decision of the ZHB.

The ZHB found no conflict or ambiguity between the definition of a warehouse and a distribution center/truck terminal. A "warehouse" is defined by the zoning ordinance as "a building or group of buildings used for storage, transfer, and distribution of products and materials, but specifically not including retail sales or a truck terminal." In other words, a use of a building for retail sales or as a truck terminal do not qualify as a warehouse under the zoning

ordinance. Otherwise, a warehouse is a building used for storage, transfer and distribution of products.

The Appellant offered witnesses who testified this is not a truck terminal. The main qualifiers from their testimony is that a truck terminal consists of a long, but more narrow building or structure than proposed here, with loading docks for tractor-trailers on both sides of the building or structure. Neither of Appellant's witnesses noted any conflict or ambiguity concerning the definitions of warehouse or distribution center/truck terminal. We had previously associated truck terminals with open ended structures utilized by such dedicated common carriers as "Roadway," "Consolidated Freight" or "Federal Express," with trucks and trailers that come into the facility, are quickly off-loaded, with various shipments placed in other trailers in which trucks leave soon thereafter for delivery, and with no real storage time. (*See Trial Court Opinion, 4/5/23, p. 15, footnote 3*). It also makes sense that truck terminals can be places where trucks are refueled, repaired, stored, and loaded and unloaded.

The zoning ordinance is silent as to the definition of a truck terminal. The ZHB found that Dr. Wang, an expert in supply management, testified credibly that in today's world, a truck terminal is considered a type of distribution center, and it is appropriate to use a single definition for both terms. The ZHB found Dr. Wang's testimony to be the most credible and convincing, and we see no reason to disturb that finding. As Dr. Wang noted, the sheer scope and size of the facility, the number of loading bays, the anticipated truck traffic, and running three (3) shifts per day for 24 hours, indicate an operation where trucks are constantly loading and unloading. By any measure, that is a truck terminal. The ZHB received what they found to be compelling testimony from Dr. Wang, on which they relied, over the testimony of Appellant's two witnesses, who only differentiated based upon the shape of the building (long and wide as

opposed to long and narrow), and the access of loading docks on both sides of the building. We find no reason to question the ZHB's reliance on Dr. Wang's testimony and the evidence presented. The ZHB may not have specifically found that the use is a truck terminal, which is expressly exempt from being a warehouse, but it did have sufficient evidence to find no ambiguity in the ordinance, and that the use was actually a distribution center/truck terminal.

A warehouse cannot be for retail sales or used as a truck terminal. However, as the ZHB noted, a warehouse can be an incidental use to a principal use as a combined definition of distribution center/truck terminal. The ZHB found no conflict or ambiguity in that regard. First, as stated, the ZHB relied on Dr. Wang's testimony that a truck terminal is now considered a type of distribution center, and the two terms can be combined for one definition as it appears in the zoning ordinance. A distribution center/truck terminal is defined in the zoning ordinance as:

“An establishment engaged in the receipt, storage and distribution of goods, products, cargo and materials, including transshipment by boat, rail, air or motor vehicle. Breakdown or large orders from a single source into smaller orders and consolidation of several orders into one large one for distribution to several recipients and vice versa are often part of the operation. The operation may include the storage or parking of trucks awaiting cargo as well as facilities for servicing of trucks. Storage facilities, such as warehouses, incidental to the principal use may also be part of the operation. Retail sales, manufacturing and assembly, or product processing, are not considered part of a distribution center/truck terminal.”

The definition includes the use proposed by the Appellant. Testimony was that storage and distribution of goods would take place, that large orders would be placed into smaller orders for distribution and vice versa. The operation would include parking of trucks awaiting cargo. Furthermore, the proposed warehouse can be incidental to the principal use as part of the overall operation. In other words, a warehouse can be part of a distribution center/truck terminal.

The testimony of the witnesses, including some of Appellant's own witnesses, supports the ZHB's finding that there is no conflict or ambiguity in the zoning ordinance, and that the proposed use is actually a distribution center/truck terminal.

The ZHB found Dr. Wang credible in her testimony that the testimony of the Appellant's own witnesses was more indicative of a warehouse that is incidental to the primary use as a distribution center/truck terminal. We find the testimony supported the finding of the ZHB and see no reason to disturb the ZHB's fact finding or credibility determinations. The sheer volume of daily trips, the number of tractor-trailers coming and going, the number of employees working three (3) shifts, 24 hours per day, and the size of the building supports the findings of Dr. Wang and the ZHB that this is a distribution center/truck terminal, and not just a warehouse.

As the ZHB found that the use is not solely as a warehouse, but rather a warehouse building to be used as a distribution center/truck terminal, and that there was no conflict in the definitions of the zoning ordinance, and we see no reason to disturb those findings, the use cannot be permitted. The property is located in a C-3 Commercial Village zoning district. A distribution center/truck terminal is not an allowed use in the C-3 zoning district. As Appellant has not proposed an allowable use, the ZHB was correct in denying the special exception.


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ORDER

AND NOW, this 11th day of January, 2024, following argument, review of the record and the briefs of the parties, the Appellant's Land Use Appeal is DENIED.

BY THE COURT:



DAVID J. WILLIAMSON, J.

cc: Zachary A. Sivertsen, Esquire/Joseph J. Piperato, Esquire
Thomas S. Nanovic, Esquire
Emma H. Bast, Esquire

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Monroe County PA Prothonotary
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