In the case at bar, the preliminary injunction sought by Norland would be mandatory in that it would compel Yurek to discontinue his present and on-going practice of medicine. Consequently, a higher standard of proofs is imposed on Norland. We conclude the "clear right" test requires Norland to demonstrate a probability of success on the merits.

In our judgment the evidence presented establishes that there was a total failure of consideration for Yurek's promise not to practice medicine in the area defined by paragraph 14 of Agreement No. 2. Therefore, we also conclude that at this time and on-the-record before us, there is no clear right in Norland to a preliminary injunction. Having reached this conclusion, we will not discuss the other prerequisites to the issuance of a preliminary injunction.

ORDER OF COURT

NOW, this 11th day of August, 1989, the motion of Norland Family Practice, P.C., for a preliminary injunction is denied.

Trial on all matters at issue in the above-captioned matter shall commence on 9:00 a.m. on October 16, 1989.

Exceptions are granted Norland Family Practice, P.C.

VALLEY QUARRIES, INC. v. BOARD OF SUPERVISORS OF GREENE TOWNSHIP, C.P. Franklin County Branch, Misc. Docket Y, Page 569

Zoning Appeal - Pennsylvania Municipalities Planning Code Additional Evidence to the Court

1. On an appeal from a zoning hearing board, the Court may not conduct a limited hearing for the purpose of admitting additional photographic exhibits.
2. Section 11005-A of the Pennsylvania Municipalities Planning Code of

1988 provides the Court *shall* make its own findings of fact based on the record *below* and the Court may not ignore such a strong statement.

Phillip S. Davis, Esq., Counsel for Appellant

Richard W. Davis, Esq., Counsel for Appellant

Robert E. Graham, Jr., Esq., Counsel for Appellant

Paul F. Mower, Esq., Counsel for Greene Township, Board of Supervisors

Welton J. Fischer, Esq., Counsel for Greene Township Zoning and Hearing Board

David C. Cleaver, Esq., Counsel for Greene Township Environmental Association

KELLER, P. J., September 19, 1989:

This matter commenced January 16, 1986 when Valley Quarries, Inc., hereafter appellant, filed an application with Greene Township for a conditional use permit seeking approval to surface mine sand in an R-1 Zoning District (low density residential) with approximately three-fourths of the land located in a flood hazard district. The appellant's land is bounded by Woodstock Road, Brindle Road, Walker Road and privately owned agricultural land. The Greene Township Board of Supervisors on March 18, 1986 denied appellant's application and on April 12, 1986 a notice of zoning appeal to this Court was filed. On July 7, 1987 this Court filed its Opinion and Order disposing of two legal issues posed by the parties, and remanding the case to the Board of Supervisors of Greene Township, Pennsylvania for further proceedings consistent with its Zoning Ordinance and applicable law.

On or about September 15, 1987 the appellant's application for a conditional use permit was re-submitted. After public hearing November 2, 1987 the Greene Township Planning Commission recommended that the Board of Supervisors disapprove the application. The Greene Township Board of Supervisors after public hearing December 1, 1987 denied the appellant's request for a variance and for issuance of a conditional use permit. An appel to the Greene Township Zoning Hearing Board was perfected and hearings were held March 28 and 30, 1988; April 4, 25 and 28, 1988;

May 10, 1988; and June 27, 1988. At the last hearing the Zoning Hearing Board, hereafter ZHB, denied appellant's application for a variance and for issuance of a conditional use permit. Formal notice of the decision of ZHB was given appellant by letter of Marvin Borror, Zoning Officer, dated June 28, 1988. On July 26, 1988 the appellant's notice of appeal was filed in the office of the Prothonotary of Franklin County. Twenty-six (26) grounds for appeal were alleged in sections and subsections of the appeal notice. The notice concluded with the request for a hearing "for presentation of additional evidence coming into existence subsequent to June 27, 1988, after which, argument is requested with submission of briefs". All relevant documents, exhibits and a 542-page transcript of the testimony before ZHB were filed of record.

On July 5, 1989 counsel for appellant presented a Petition for Leave to Supplement and Amend Record, and an order was signed the same date scheduling a hearing on the petition for 9:30 a.m., Monday, July 24, 1989. The petition alleged "certain pertinent and material evidence was not available for presentation at the final hearing before ZHB and should be included in the record for consideration by the Court in the present appeal and certain other relevant and material evidence has developed since the date of the last ZHB hearing, which should be made a part of the record. The matters referred to are indentified as:

(a) Certain photographs taken by appellant's expert witness, William J. Daylor, did not develop and therefore could not be offered into evidence and made part of the record of the hearing before the ZHB, and appellant seeks to have the record opened to admit the photographs, properly marked and coordinating with the witness' recorded testimony.

(b) A description of the "inimical and hostile atmoshpere" in which the ZHB hearings were conducted to support the grounds for appeal allegation that the decision of the ZHB was "not solely and substantialy a legal decision based upon competent evidence, but more political in nature. [Presumably 4(e)(2)].

(c) The facts that while ZHB was considering appellant's application and denying the same, the Greene Township Supervisors on recommendation of the Greene Township Planning Commission approved the application of R&A Bender, Inc. to expand the applicant's landfill when features of both applications are the same or similar, and the unequal treatment was discriminatory and unconstitutional.

It should be noted that during the 1986 proceeding certain citizens had filed a notice of intervention and the appellant had filed a petition to strike that notice. On September 6, 1986 appellant and those citizens filed a stipulation identifying a class of persons who would be permitted to intervene. This class has adopted the name Green-Guilford Environmental Association, and will hereafter be referred to as Association. At the hearing on July 24, 1989 no evidence was presented. The appellant offered a brief in support of the petition and counsel for appellant presented oral argument. Responding arguments were heard by counsel for appellee, counsel for ZHB, and counsel for the Association. At the conclusion of the argument the Court requested the appellant and appellee to submit briefs in support of their position. On July 25, 1989 the Court wrote to counsel for all parties suggesting a briefing schedule and identifying specific areas of concern to be addressed in the brief.

Subsequently, the Court was informed that the appellant desired to offer in evidence via expert witness Daylor, approximately, but not to exceed 12, photographs. The Court was also advised that the Greene Township Board of Supervisors rendered its favorable decision on the Bender application on July 19, 1988; whereas the ZHB's denial of appellant's application occurred June 27, 1988.

We understand from appellant's oral argument and briefs that it desires and envisions the Court holding a "mini-hearing" for the sole purpose of adding new evidence to the rather vast body of evidence accumulated in the proceedings before the Greene Township Planning Commission, the Board of Supervisors of Greene Township, and the Greene Township Zoning and Hearing Board. The Court would then receive briefs and hear argument of the appellant, appellee and Association on the merits of the appeal based upon all of the evidence, including the newly admitted evidence which would be a part of the record of the case. Then, according to the appellant's theory, if the Court concluded the ZHB had erred or abused its discretion, it would hold a de novo hearing on appellant's application, receive all admissible evidence either side offered, and then make its own findings of fact, conclusions of law and decision on the ultimate issue of whether or not the application for the conditional use permit and the variance would be granted. The appellant relies upon the Act of 1988, December 21 P.L. 1329 No. 170, §101, 53 P.S. 11005-A (1989) Supplemental Pamphlet).

To the contrary, the ZHB and the Association contend that there is no such thing in the law as a "mini-hearing" to admit additional evidence in an appeal from the decision of a Zoning and hearing Board. Their position is that if the Court sees fit to admit any additional evidence of any kind for the purpose of considering it in the context of the appeal, then the Court is bound to follow the procedures outlined in the Pennsylvania Municipalities Planning Code by holding a hearing de novo and making its own findings of fact, conclusions of law, and ultimate decision.

Section 1010 of the Pennsylvania Municipalities Planning Code of 1968, as amended, 53 P.S. 11010 provides:

> If upon motion it is shown that proper consideration of the zoning appeal requires the presentation of additional evidence, a judge of te court may hold a hearing to receive additional evidence or may remand the case to the body, agency or officer whose decision or order has been brought up for review or may refer the case to a referee to receive additional evidence provided that appeals brought before the court pursuant to sections 1004 and 1005 shall not be remanded for further hearings before any body, agency or officer of the municipality. If the record below includes findings of fact made by the governing body, board or agency whose decision or action is brought up for review and the court does not take additional evidence or appoint a referee to take additonal evidence, the findings of the governing body, board or agency shall not be disturned by the court if supported by substantial evidence. If the record does not include findings of fact, or if additional evidence is taken by the court or by a referee, the court may make its own findings of fact based on the record below as supplemented by the additonal evidence, if any.

Section 11005-A of the Pennsylvania Municipalities Planning Code of 1988, December 21 P.L. 1329 No. 170 §101, 53 P.S. 11005-A (1989 Supplemental Pamphlet) provides:

> If, upon motion, it is shown that proper consideration of the land use appeal requires the presentation of additional evidence, a judge of the court may hold a hearing to receive additional evidence, may remand the case to the body, agency or officer whose decision or order has been brought up for review, or may refer the case to a referee to receive additional evidence, provided that appeals brought before the court pursuant to section 916.1 shall not be remanded for further hearings before any body, agency or officer of the municipality.

> If the record below includes findings of fact made by the governing body, board or agency whose decision or action 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. If the record does not include findings of fact or if additional evidence is taken by the court or by a referee, the court *shall* make its own findings of fact based on the record below as supplemented by the additional evidence, if any. (Unerlining ours)

An analysis of these two sections discloses that with a few stylistic changes, not here applicable, the 1988 section is a mirror image of the older section. For the purposes of the issue here under consideration, the last sentence in each section is the most significant and the use of the word "shall" by the Legislature in 1988 may not be ignored.

We find the mandate of the last sentence of Section 11005-A clearing compatible with prior decisions of our appellate courts. In *Lutz vs. East Hanover Township Zoning Hearing Board,* 17 Commonwealth Ct. 501 (1975), on a zoning appeal the trial court accepted in evidence two topographical maps, photo-graphs of the subject property, and a letter from the Soil Conservtion Service as exhibits, which had been prepared subsequent to the decision of the Zoning Board. The trial court ruled that the acceptance of the exhibits did not amount to the taking of additional evidence. On appeal the Commonwealth Court/remanded for de novo consideration of the issues, and held " 'The shape of the case with the new exhibits is not the same as without it.' " (*Lutz,* at page 504).

In *Boss et ux. vs. Zoning Hearing Board, Borough of Bethel Park,* 66 Commonwealth Ct. 89, 92 (1982), the Court held,

> "Additional evidence, even if characterized as inconsequential or as adding nothing new to the case, requires the lower court to decide the case on the merits since the posture of the case with the new evidence is not the same as without it."

In *Board of Supervisiors of Upper Merion Township et al. vs Wawa,, Inc.,* 95 Commonwealth Ct. 263 (1986), the trial judge and all parties made an on-site inspection of the premises. The Commonwealth Court held that the unobjected to view constituted the receipt of additional evidence, and consequently the courts's action

constituted a de novo hearing in which the court properly made its own findings.

We, therefore, conclude that the appellant is in error in its claim that this Court may conduct a limited hearing for the purpose of admitting as exhibits the 9 to 12 photographs presumably relied upon by expert witness Daylor, evidence of the threatening or intimidating atmosphere prevelant at the public hearing of the ZHB, and evidence of the grant of Bender's application for landfill expension when the underlying facts applicable to the appellant and Bender are "so similar".

Mr. Daylor testified at the May 10, 1988 ZHB public hearing, and on cross examination related that he had another 25 or 30 slides that he was going to present that didn't come out because there was a problem with photo processing. (N.T. 47). At the conclusion of the May 10, 1988 hearing, the Chairman of ZHB announced that a decision on the application would be rendered at the June 27, 1988 meeting at 7:30 p.m. Counsel for appellant did not at the May 10th hearing request leave to offer the missing photographs in evidence; nor did counsel between May 10th and June 27 make any request to the ZHB for leave to offer the photographs in evidence.

We have not carefully reviewed the 542-page transcript, but in our cursory review found no on-record objections by appellant to audience hisses, boos, catcalls or other misconduct which might be interpreted as hostile, inimical, threatening or intimidating to appellant's witnesses or to the ZHB. We have a great deal of difficulty in visualizing how appellant would prove such an intangible as hearing atmosphere, and what objective standards would be applied to such evidence to reach a conclusion whether the decision of the ZHB was the result of audience misconduct.

Since the Board of Supervisors' decision granting the Bender application occurred approximately three weeks after the instant ZHB decision, it would seem to the Court that if the Supervisors' decision was in any way admissible in the instant matter, it should have been considered as after discovered evidence, and an effort made to bring it to the attention of the ZHB by appropriate petition. By way of a caveat, we do not by this comment suggest any opinion as to the admissibility of such evidence since we have no information as to the nature of the record presented in the Bender proceeding, and decline to consider the question of relevancy where the two decisions were rendered by different municipal bodies.

Under all of the circumstances, we conclude that a vast amount of time, effort and money has been expended in the developement of the record before the Court, and at this stage we decline to reach a

conclusion that a de novo hearing is required. At this stage we have no opinion as to the propriety of remanding the matter for a further hearing by the ZHB on the evidentiary questions here presented. The petition as presented will be denied.

ORDER OF COURT

NOW, this 19th day of September, 1989, the petition of Valley Quarries, Inc. is denied.

SHETLER V. ZEGER, ET AL., C.P. Franklin County Branch, No. A.D. 1988-425

Automobile Accident - Punitive Damages - Protective Order - Photographs by Newspaper - Shield Law

1. In certain factual curcumstances, the risks presented by a drunken driver may be so obvious and the probability that harm will follow so great that outrageous misconduct may be established without reference to motive or intent.
2. Allegations of a blood alcohol level in excess of 0.10, failure to stop at a stop sign, failure to yield the right of way and failure to maintain a diligent lookout before entering an intersection are sufficient to allow the case to proceed to trial on the issue of punitive damages.
3. The Pennsylvania Shield Law is not violated by a request for photographs of an accident scene where a newspaper photographer took photos shortly after the accident.
4. The purpose of the Shield Law is not promoted by protecting all information in a newspaper's possession where disclosure of information would not reveal the identity of a confidential informant.

Denis M. DiLoreto, Esq., Counsel for Plaintiffs
Thomas J. Williams, Esq., Counsel for Defendant
Edward I. Steckel, Esq., Counsel for Petitioners

WALKER, J., June 1, 1989:

On May 6, 1987, plaintiff, Julie A. Shetler, and defendant, Brian R. Zeger, were involved in an automobile accident at the intersection of Warm Spring (Pennsylvania Route 995) and Leafmore Roads in Hamilton Township, Franklin County, Pennsylvania. On