

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA
CIVIL DIVISION

APPALACHIAN TRAIL CONSERVANCY, :
Appellant :
Vs. : No. 17-1280
LOWER TOWAMENSING TOWNSHIP :
ZONING HEARING BOARD, :
Appellee :
And :
VISTA LODGE DEVELOPMENT CO., :
LLC and THE TUTHILL CORPORATION :
and LOWER TOWAMENSING TOWNSHIP, :
Intervenors :

Donald W. Miles, Esquire	Counsel for Plaintiff
Holly Heintzelman, Esquire	Counsel for Defendant
Edward Hughes, Esquire	Counsel for Vista Lodge Development Co., LLC
Michael Ozalas, Esquire	Counsel for Tuthill Corp.
James R. Nanovic, Esquire	Counsel for Lower Towamensing Township

MEMORANDUM OPINION

Matika, J. - February 20, 2018

The question before the Court here is: "When does an entity, tasked with carrying out responsibilities for another entity, have standing to exercise those responsibilities before a Zoning Hearing Board?" The answer to that question is spelled out in this Opinion. For the reasons stated herein, this Court has determined that, this is not the case where standing exists to exercise those responsibilities. Accordingly, the Motion to Dismiss or Strike the Land Use Appeal of Appalachian Trial Conservancy (hereinafter "ATC") filed by Vista Lodge Development

[FM-7-18]

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Co., LLC and the Tuthill Corporation (hereinafter collectively "Vista") is **GRANTED**.

FACTUAL AND PROCEDURAL BACKGROUND¹

On February 17, 2017, Vista filed a zoning permit application to construct a condominium/hotel on a 1.95-acre parcel of land. This application was denied on February 20, 2017 by Zoning Officer Duane Dellecker, as the proposed use did not conform to the Lower Towamensing Township Zoning Ordinance. On February 28, 2017, Vista filed an appeal application requiring a hearing to consider a number of variances from the zoning ordinance requirements. A hearing on this application was scheduled for April 18, 2017 before the Lower Towamensing Township Zoning Hearing Board (hereinafter "ZHB"). Prior thereto, notice of that hearing was duly advertised in the Times News on March 27, 2017 and April 3, 2017. Notice of the hearing, as required by the Zoning Ordinance, was sent by Vista to all residences within two hundred (200) feet of the property that was the subject of the Zoning Hearing. One of the recipients of those mailings was the Northeast Region of the National Park Services in Philadelphia.²

¹ At the proceeding before this Court on December 5, 2017, this Court, requested and received authority to review the transcript and record of the proceeding before the ZHB in order to adjudicate the Motion to Dismiss. This record would normally only be reviewed in conjunction with the land use appeal itself. The factual and procedural backgrounds referenced in this Opinion are gleaned from that record.

² See hearing exhibit A-1 included in the certified record.

On April 18, 2017, the ZHB convened on the appeal application of Vista. At that hearing, the ZHB initially took testimony on the issue of whether ATC had standing to be a party to the proceeding. ATC offered Karen Lutz, its Regional Director, to explain ATC's relationship to the National Park Service (hereinafter "NPS"), an entity already determined to be a party by virtue of owning and possessing an easement within two hundred (200) feet of the subject property. Ms. Lutz testified that there is a "Cooperative Agreement" between ATC and NPS whereby, *inter alia*, ATC claims it is responsible to "respond, as appropriate, to proposed developments (including pipelines, power lines, communication towers, highways, and residential, commercial and industrial developments) that may affect the Appalachian Trail."³ ATC argued that it should be given party status by virtue of this agreement, and due to the fact that NPS had an easement regarding the Appalachian Trail in close proximity to the subject property.

After Ms. Lutz testified on behalf of ATC on this issue of standing, George McHugh of the Department of the Interior for the National Park Service testified. Prior to actually testifying, Mr. McHugh requested "to be accepted as an aggrieved party on behalf of the National Park Service." (N.T. 4/18/17 hrg. p.38). As a result, NPS was made a party to the zoning matter before the

³ This language is contained in Article III C.1.g. of the Cooperative Agreement between ATC and NPS, and which was marked and made part of the certified record as "ATC #2."

Board. Subsequently, McHugh read a letter outlining the position of the NPS *vis-a-vis* Vista's appeal and the concerns of NPS as the development may affect the trail. Thereafter, he was questioned by counsel for Vista and counsel for ATC. Through these inquiries, it was his belief that, under the Cooperative Agreement, ATC was "required to appear here and ask to be a party" for the zoning hearing. (N.T. 4/18/17 hrg. p. 64-65). Mr. McHugh also testified that he did not know if he, or even other representatives of NPS, would appear at future proceedings in this matter, but if they did not, ATC would "speak on our behalf." (N.T. 4/18/17 hrg. p 67).

Shortly after McHugh completed his testimony, the ZHB determined that ATC did not have party status and could not participate further as a party in the zoning hearing. The ZHB did allow others to testify both in support of and in opposition to the application, and then concluded the testimony that evening.

On May 30, 2017, the ZHB issued a decision in which it granted six (6) of the seven (7) variances⁴ requested by Vista, along with a special exception.

On June 26, 2017, ATC filed an appeal of the ZHB decision relative to the six (6) variances and one (1) special exception grant. Vista intervened in this instant action on July 12, 2017

⁴ Vista had filed a separate appeal to the Court of Common Pleas regarding the denial of this one variance request; however, Vista subsequently withdrew that appeal.

and subsequently filed, on September 28, 2017, the Motion to Dismiss which is currently before the Court. In that Motion, Vista argues that ATC is not an aggrieved party to the underlying zoning matter, as determined by the ZHB, and therefore has no standing to appeal its decision. Argument was held on December 18, 2017, and this matter is now ripe for disposition.

LEGAL DISCUSSION

Our scope of review in a zoning appeal where this court takes no additional evidence is limited to determining whether the zoning hearing board committed an abuse of discretion or error of law. *Rural Route Neighbors v. E. Buffalo Twp. Zoning Hearing Bd.*, 870 A.2d 388, 391 n.4 (Pa. Commw. Ct. 2005). An abuse of discretion by a hearing board, warranting a reversal of its decision, may be established if its findings are not supported by substantial evidence, which is such relevant evidence as a reasonable mind might accept as adequate to support its conclusions. *Baily v. Upper Southampton Twp.*, 690 A.2d 1324, 1325 n.1 (Pa. Commw. Ct. 1997). "Assuming the record demonstrates the existence of substantial evidence, the Court is bound by the Board's findings which are the result of resolutions of credibility and conflicting testimony rather than a capricious disregard of evidence. The Board, as fact finder has the power to reject even uncontradicted testimony if the Board finds the testimony to be lacking in credibility." *Vanguard Cellular System, Inc. v. Zoning Hearing*

Bd. of Smithfield Twp., 568 A.2d 703 (Pa. Commw. Ct. 1989) (citations omitted); See also 2 Pa.C.S.A. § 754(b) (setting forth the proper scope of review on appeal from an agency's decision). However, even before determining whether the ZHB abused its discretion or committed an error of law on the issue of standing, this Court must first address the propriety of Vista's "Motion to Dismiss."

In its brief, ATC argues that preliminary objections filed pursuant to the Pennsylvania Rules of Civil Procedure are not permitted in statutory zoning appeals. As a result, ATC asserts that Vista's Motion to Dismiss or Strike the Appeal is inapplicable to this matter and the Motion itself should be denied on that basis. In support of this position, ATC cites the case of *Takacs v. Indian Lake Borough*, 10 A.3d 416 (Pa. Commw. Ct. 2010). In *Takacs*, the trial court granted the preliminary objections filed by Indian Lake Borough, which in effect dismissed the zoning appeal of the appellant, Mary Jo Takacs. *Id.* at 417. On appeal, *Takacs* argued that preliminary objections are not permitted in a zoning appeal and that the trial court erred in granting them. *Id.* at 418. The Commonwealth court agreed, and reversed and remanded the case back to the trial court. *Id.* However, ATC's reliance on this case is misplaced. Motions to dismiss or strike take many forms. While most are couched as preliminary objections, that is not the case here as the Motion to Dismiss is in response to the Land Use

Appeal filed by ATC to the issue of standing. In this fashion, as in many zoning appeal cases that came before it, a motion to dismiss or strike is the proper procedural tool to challenge the standing of a party. Accordingly, ATC's request to deny Vista's Motion to Dismiss or Strike the Appeal is **DENIED**.

Now we turn to the issue of standing raised by Vista in that motion. As explained by our Supreme Court in *Spahn v. Zoning Bd. of Adjustment*, 977 A.2d 1132, 1149-50 (Pa. 2009):

"Aggrieved person" has acquired a particular meaning in the law. In *William Penn*, we explained that the core concept of standing was that a party had to be "aggrieved." 346 A.2d at 28-81. And, "aggrieved" when used in terms of standing is generally understood to mean that the person "has a substantial, direct and immediate interest in the claim sought to be litigated" as set forth in *William Penn*. See, e.g., *Hospital & Health System Ass'n of Penn. v. Dep't of Public Welfare*, 585 Pa. 106, 888 A.2d 601, 607 (Pa. 2005) (explaining that under *William Penn* "where a person is not adversely affected in any way by the matter challenged, he is not aggrieved and thus has no standing to obtain a judicial resolution of that challenge."); *Bergdoll v. Kane*, 557 Pa. 72, 731 A.2d 1261, 1269 (1999); see also *Sparacino v. Philadelphia Zoning Bd. of Adjustment*, 728 A.2d 445, 448 (Pa. Commw. Ct. 1999) (explaining that 2 Pa.C.S. § 752, which provides that "any person aggrieved" by an adjudication of a local agency, means that the person must establish standing under *William Penn*).

(See also *Whitehall Manor, Inc. v. Planning Comm'n of City of Allentown*, 79 A.3d 720, 726 (Pa. Commw. Ct. 2013) (discussing aggrieved person standard)).

Additionally, the party or objector must still show that they have a substantial, direct and immediate interest in the outcome.

"A 'substantial' interest is an interest in the outcome of the litigation which surpasses the common interest of all citizens in procuring obedience to the law." *S. Whitehall Twp. Police Serv. v. S. Whitehall Twp.*, 521 Pa. 82, 86, 555 A.2d 793, 795 (1989). "A 'direct' interest requires a showing that the matter complained of caused harm to the party's interest." *Id.* at 86-87, 555 A.2d at 795. "An 'immediate interest' involves the nature of the causal connection between the action complained of and the injury to the party challenging it, and is shown where the interest the party seeks to protect is within the zone of interests sought to be protected by the statute or constitutional guarantee in question." *Id.* at 87, 555 A.2d at 795 (citations omitted).

Whitehall Manor, Inc. at 728.

It would appear from its Motion that Vista concedes and this Court so finds that NPS is a party and has standing in this case by virtue of its ownership of an easement which abutted Vista's property. NPS possesses an interest in subject matter that may have a direct, immediate and substantial impact on its easement. Therefore, NPS would be a party before the ZHB and could be aggrieved by the decision of the ZHB, and thus would have the right to file an appeal if deemed appropriate.

However, our analysis of NPS' standing is not necessarily dispositive of standing *vis-à-vis* ATC.

As noted, ATC and NPS have entered into a "Cooperative Agreement" for the "Cooperative Management of the Appalachian National Scenic Trail." This Agreement not only outlines the fact that the "overall responsibility for the Administration of the Appalachian National Scenic Trail rests with the Secretary of the

Interior as is carried out by the National Park Service," but also recognizes ATC's roles and responsibilities in the preservation of the Appalachian National Scenic Trail. Under Article III, Statement of Work, it goes on to read, in pertinent part, that "both parties shall provide planning and evaluation services such as, but not limited to the following: . . .

9. Respond, as appropriate, to proposed development (welding, pipelines, power lines, communication towers, highways, and residential, commercial, and industrial developments) that may affect the Appalachian Trail."

It is this language that ATC argues gives it the right to represent the interests of NPS, the owner of the easement adjacent to Vista's property. This Court agrees that this language would allow ATC to represent the interests of NPS at the ZHB and file an appeal; however, NPS was a party at the ZHB meeting and did not need another mouthpiece to carry out its responsibilities regarding the presentation of the Appalachian Trail.

At the hearing before the ZHB, George McHugh, the Chief of Administration at the Appalachian National Scenic Trail Unit of the National Park Service, Department of the Interior, stated, *inter alia*, that the NPS believed that some of the proposed variances will adversely impact the Appalachian Trail experience. Upon completion of his reading of the NPS letter and another letter from the Pennsylvania Department of Conservation and Natural

Resources, Mr. McHugh was subjected to examination by Counsel for Vista and Counsel for ATC, Attorney Miles.⁵ The examination of Mr. McHugh by Attorney Miles centered on the relationship between NPS and ATC under the Cooperative Agreement. Specifically, Attorney Miles asked Mr. McHugh: "Under the Agreement between the National Park Service and the Appalachian Trail Conservancy, if the Conservancy believes that there is an impact on the Trail that might be adverse, under that Agreement, are they required to appear here and ask to be a party?" Mr. McHugh responded "This is correct."

ATC argues that under the terms of the Agreement and as acknowledged by Mr. McHugh, ATC has an obligation to appeal and "ask to be a party." This ATC did; however, this Court believes the ZHB was correct in denying ATC status as a party "on behalf of" NPS since NPS itself was present, postured its position on the variances through Mr. McHugh's statement, and exercised its responsibilities under the Cooperative Agreement. It did not need ATC to do the same on its behalf, and the ZHB concluded this as well. It was not error to do so. Nor can ATC be found to be an aggrieved party independent of NPS. It may have a contractual relationship with NPS to undertake the same responsibilities as NPS, but it does not have that same property interest that NPS has

⁵ It should be noted that Attorney Miles acknowledged that NPS, through Mr. McHugh, was a party to this Zoning Hearing Board proceeding. (N.T. 4/18/17 hrg. p.51).

as an adjoining property owner. Further, an organization, standing alone and not on behalf of another party which has an interest in the subject matter, cannot establish standing simply as virtue of its organizational purposes, or in this case, by virtue of the agreement. *Spahn*, Supra at 1152.

ATC also posits that it should be considered an aggrieved party with the right to appeal the ZHB decision by virtue of the fact that it was permitted to participate in the hearing before the ZHB. In support of this argument, ATC cites to the case of *Active Amusement Co. v. Zoning Bd. of Adjustment*, 479 A.2d 697 (Pa. Commw. Ct. 1984). This case stands for the proposition that Active Amusement had standing to appeal because it was allowed to participate in the underlying zoning proceeding. However, *Active Amusement* is distinguishable from the present case: The applicants did not object to Active Amusement's participation and "[t]he Board permitted Active to place on the record its opposition to the grant of the certificate and to argue that the applicants had presented no evidence of unnecessary hardship to warrant the grant of a variance." *Active Amusement Co.* at 699. In the case at bar, Vista objected to ATC becoming a party and ATC was only permitted to present a witness in support of the standing issue and briefly question another in that same regard they were not otherwise permitted to participate in the proceeding on any other issue.

Thus, the case cited by ATC bears no support for its standing argument.

CONCLUSION

This Court therefore concludes that ATC is not a party aggrieved and consequently had no right to appeal the decision of the Lower Towamensing Township Zoning Hearing Board. Accordingly, it enters the following Order:

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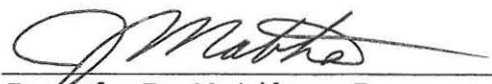
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ORDER OF COURT

AND NOW, this 20th day of February, 2018, upon consideration of Vista Lodge Development Co., LLC's "Motion to Dismiss or Strike Land Use Appeal" the brief lodged in support thereof, the brief lodged in opposition thereto, and after argument thereon, it is hereby **ORDERED and DECREED** that said Motion is **GRANTED** and the Land Use Appeal filed by Appalachian Trail Conservancy is **DISMISSED**.

BY THE COURT:


Joseph J. Matika, J.

[FM-7-18]