

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

SUNRISE RIDGE PROPERTY OWNERS :  
ASSOCIATION, INC., :  
Appellant :  
Vs. : No. 19-1246  
THE PENN FOREST TOWNSHIP :  
ZONING HEARING BOARD, :  
Appellee :  
and :  
SCOTT A. DIETRICH, :  
Intervenor :

Geoffrey Worthington, Esquire      Counsel for Appellant  
Michael S. Greek, Esquire          Counsel for Appellee  
Robert Frycklund, Esquire        Counsel for Intervenor

MEMORANDUM OPINION

Matika, J. - February 26 , 2020

Before the Court is the Zoning Appeal of Sunrise Ridge Property Owners Association, Inc. taken from the decision of the Penn Forest Zoning Hearing Board which granted a special exception to Scott A. Dietrich to utilize a portion of his three hundred and seventy (370) acre parcel of land located in Penn Forest Township for purposes of establishing eight (8) campsites thereon. In addition to the Zoning Appeal, the Sunrise Ridge Property Owners Association, Inc. filed a Motion to Strike an answer and new matter filed in this case by Scott A. Dietrich. For the reasons stated in this Opinion, the Motion to Strike will be granted, but the Appeal will be denied.

[FM-5-2020]

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## FACTUAL AND PROCEDURAL BACKGROUND

On or about January 26, 2019, property owner and Intervenor herein, Scott A. Dietrich (hereinafter "Dietrich") filed an application for a special exception and for a variance<sup>1</sup> to utilize a portion<sup>2</sup> of the property that he owns located at 44 Acacia Drive, Jim Thorpe, Pennsylvania as a camp where a number of campsites will be built and rented. Pursuant to §306.B.1 of the Penn Forest Township Zoning Ordinance (hereinafter "Ordinance"), a camp is a permitted use by special exception in a residential district, the district in which Dietrich's property is located. Additionally, pursuant to Section 116.C of this Ordinance, applications for special exceptions are referred directly to the Penn Forest Zoning Hearing Board (hereinafter "ZHB"). On March 7, 2019, the ZHB met at a duly advertised meeting to consider Dietrich's special exception request. The Appellant herein, Sunrise Ridge Property Owner's Association, Inc. (hereinafter "Sunrise"), appeared at the hearing as well to object to this proposed use.

At that hearing, Dietrich testified that there presently exists one recreational cabin and one Tentrr<sup>3</sup> site on this parcel.

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<sup>1</sup> The request for a variance was withdrawn at the hearing held on March 7, 2019.

<sup>2</sup> Dietrich's parcel consists of over four hundred acres, however only three hundred and seventy acres are located in Penn Forest Township.

<sup>3</sup> According to Dietrich, Tentrr is similar to AirBNB in that Tentrr seeks out qualified locations and property owners interested in allowing campsites to be located on their land to then be rented out to others. Tentrr brings in all necessary equipment and builds these campsites. These sites are also equipped with "Lews" campsite toilets. A Lew works off of the principle that a person

He proposes anywhere from three to seven additional Tentrr sites situated at various locations throughout the entire parcel. The rental of these camps is limited to the warmer months. When these camps are rented, Dietrich himself, or a family member will be staying in the cabins already existing on this site. These individuals would be responsible for ensuring that the camps are maintained properly and that fires are extinguished after the campers leave. Dietrich also testified that he does not intend to cut down any trees within 75 feet of any property line for these tent sites.<sup>4</sup> Occupants of these sites will not "live" there full time and will pay a nightly fee. Dietrich also indicated that none of this property is located in a flood plain nor does he intend to add any impervious cover. Access to these sites would be through either Acacia Drive or Bear Creek Drive and parking would be on a gravel driveway.

Dietrich also testified that in order to access his property through either Acacia Drive or Bear Creek Drive, one must travel through a development, either Marty Axman, Sunrise Ridge or an unnamed development. Should the special exception be granted and Dietrich permitted to create up to eight sites, he anticipates no more than eight vehicles sporadically travelling on either of these

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utilizing this toilet voids into a pail like device containing a bag filled with certain chemicals and gels. This bag is then wrapped up and disposed of with regular garbage. The Lew waste is approved for disposal in landfills.

<sup>4</sup> See applicant's exhibit 2. Tents are denoted thereon with an encircled "4".

two roads.

At the conclusion of the March 7, 2019 hearing, it was announced that the ZHB would like time to review some things including the testimony presented at that hearing and possibly consider opening the record for certain other documentation. As a result, an additional meeting was scheduled for and held on March 26, 2019. At that proceeding, no additional evidence or documents were submitted and the ZHB moved to grant the special exception with conditions. A written decision dated May 1, 2019 was executed by members of the ZHB, but a copy was never mailed to one of the objectors, the Appellant herein, Sunrise, until May 31, 2019. Thereafter, on June 21, 2019, Sunrise filed the instant timely appeal. On July 24, 2019, Dietrich sought intervention in this matter. On August 19, 2019, an order was signed approving Dietrich's status as Intervenor. Thereafter, Dietrich filed an answer and new matter to the zoning appeal. On September 18, 2019, Sunrise filed a motion to strike that answer and new matter alleging that this type of pleading is not permitted in a land use appeal.

In its Zoning Appeal, Sunrise alleged that the actions of the ZHB were arbitrarily, unreasonable, a manifest abuse of its discretion and contrary to law as follows:

- a. The Board based its decision on its "conclusions of law", which include the Board's conclusion that "The Application



meets the requirements for a special exception to the Penn Forest Township Zoning Ordinance pursuant to Section 402.A.13 in that: a) the 370 acres located within the Township exceeds the minimum lot area of five acres; b) the proposed camp sites are located at least 75 feet from every lot line; c) the location of the camp sites contains a woodland area as a buffer and screening; d) none of the existing proposed camp sites are located within a 100-year flood plain; e) the Applicant and his use of the residential cabin constitutes a bona fide resident manager caretaker who does not reside on the property more than six months out of the calendar year and only occasionally and when the camp sites are rented; and f) no recreational vehicles will exist on the property."

- b. The "requirements" cited by the Board are not, in fact, special exception requirements but are only the specific use requirements applicable to "Camp" uses.
- c. In its Decision, the Board failed to cite, discuss, or even mention the special exception criteria applicable to all special exception uses as set forth at Section 116.C of the Ordinance and failed to conclude that Dietrich had met any of those criteria.
- d. Because the Board failed to make any findings whatsoever that Dietrich had met the mandatory special exception criteria set

forth at Section 116.C of the Ordinance, the Board abused its discretion in granting Dietrich a special exception for a "Camp" use on the Property.

Argument was held on the Motion to Strike and Zoning Appeal on November 7, 2019. These matters are now ripe for disposition.

### LEGAL DISCUSSION

#### I. MOTION TO STRIKE ANSWER AND NEW MATTER

As a threshold matter, we will address Sunrise's Motion to Strike the answer and new matter that Dietrich filed to the Zoning Appeal.

Dietrich, as the owner of the property that is the subject of this appeal, filed a Petition to Intervene pursuant to Pennsylvania Rule of Civil Procedure 2326 et seq. Pennsylvania Rule of Civil Procedure 2328(a) states that:

"Application for leave to intervene shall be made by a petition in the form of and verified in the manner of a plaintiff's initial pleading in a civil action, setting forth the ground on which intervention is sought and a statement of the relief or the defense which the petitioner desires to demand or assert. **The petitioner shall attach a copy of any pleading which the petitioner will file in the action if permitted to intervene or shall state in the petition that the petitioner adopts by reference in whole or in part certain named pleadings or parts of pleadings already filed in the action.**" Pa.R.C.P. 2328(a) (emphasis ours).

In lieu of attaching any such pleading, Dietrich averred in paragraph 13 of the petition that "Because no answer is required to be filed in a land use appeal, Petitioners are not attaching a

copy of a pleading to be filed in the above captioned matter if permitted to intervene." Interestingly however, in the proposed order to the Petition to Intervene was the following verbiage: "ORDERED and DECREED that the Petitioner, Scott A. Dietrich, shall be permitted to file an answer, preliminary objections and/or other appropriate responsive pleading to the Plaintiffs' complaint within twenty (20) days of the date of the this Order of Court."

Service of the Petition to Intervene accompanied by the proposed order was made on counsel for Sunrise on or about July 24, 2019.<sup>5</sup>

Thereafter on August 19, 2019, counsel for Dietrich, Sunrise and the ZHB executed, in counterparts, a stipulation to permit Dietrich to intervene in this matter. Attached to that stipulation was the exact proposed order which was attached to the Petition to Intervene. Upon presentation to this Court, that stipulation was approved and the order of court signed by this Court on August 20, 2019. Notwithstanding Dietrich's representation in his Petition to Intervene, by virtue of the stipulation and order, he was granted permission to file "an answer . . . and/or other appropriate responsive pleading to the Plaintiffs' (sic) Complaint." As this is a land use appeal in which a complaint is and was not filed, the filing by Dietrich of an answer and new

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<sup>5</sup> See Certificate of Service executed by Dietrich's counsel and attached to the Petition to Intervene filed of record.

matter are nullities. Thus, Sunrise's Motion to Strike the answer and new matter will be granted.

## II. LAND USE APPEAL

### A. Timeliness of Appeal

In this matter, Dietrich initially raises the argument that the appeal filed by Sunrise is untimely. In support of this argument, Dietrich references §1002(A)(a) of the Municipalities Planning Code,<sup>6</sup> which reads:

"All appeals from all land use decisions rendered pursuant to Article IX shall be taken to the court of common pleas of the judicial district wherein the land is located and shall be filed within 30 days after entry of the decision as provided in 42 Pa. C.S. §5572 (relating to time of entry of order) or, in the case of a deemed decision, within 30 days after the date upon which notice of said deemed decision is given as set forth in section 908(9) of this act. It is the express intent of the General Assembly that, except in cases in which an unconstitutional deprivation of due process would result from its application, the 30-day limitation in this section should be applied in all appeals from decisions.

Dietrich argues that because the ZHB issued its written decision on May 1, 2019 and Sunrise did not file its appeal until June 21, 2019, 52 days later, it is untimely. While 1002(A)(a) does stand for the proposition that land use appeals must be filed within thirty days after the entry of the decision, the effective date which commences that time is not May 1, 2019, but rather May

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<sup>6</sup> 53 P.S. §11002-A

31, 2019 the date of mailing of a copy to Sunrise. The Appeal filed on June 21, 2019 is within thirty (30) days of the entry of the decision and is therefore timely.<sup>7</sup>

#### B. Substance of Appeal

In order for an applicant to obtain an approval from a zoning hearing board for a special exception use, he or she must evidence compliance with certain conditions and standards as set forth in the zoning ordinance. Further and as the case is here, where no new evidence is taken the review of the court is to solely determine whether the ZHB abused its discretion or committed an error of law. *Hamilton Hills Group, LLC v. Hamilton Township Zoning Hearing Board*, 4 A.3d 788, 790 n.2 (Pa. Cmwlth. Ct. 2010). An abuse of discretion will only be found when the decision of the Board is not supported by substantial evidence. *Larsen v. Board of Adjustment of City of Pittsburgh*, 672 A.2d 286, 289 (1996). Substantial evidence is defined as "such relevant evidence as a

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<sup>7</sup> 53 P.S. §10908(10) states that "a copy of the final decision or, where no decision is called for, of the findings shall be delivered to the applicant personally or mailed to him not later than the day following its date. To all other persons who have filed their name and address with the board not later than the last day of the hearing, the board shall provide by mail or otherwise brief notice of the decision or findings and a statement of the place at which the full decision or findings may be examined." The "all other persons" referenced includes Sunrise. Further, pursuant to 42 Pa.C.S.A. § 5572, "[t]he date of service of an order of a government unit, which shall be the date of mailing if service is by mail, shall be deemed to be the date of entry of the order for the purposes of this subchapter." (emphasis ours). Therefore, for purposes of determining the timeliness of the appeal, the entry of the decision is the date mailed to "all other persons" or in this case counsel for Sunrise. This date or mailing was May 31, 2019. Thus, the June 21, 2019 appeal was timely. [See *Hanna v. Zoning Hearing Board of Adjustment of Pittsburgh*, 437 A.2d 115 (Pa. Cmwlth. Ct. 1981) (The date of mailing and thus service of mail of the decision operated to commence the 30-day period for filing the appeal).

reasonable mind might accept as adequate to support a conclusion." *Valley View Civil Association, v. Zoning Board of Adjustment*, 462 A.2d 637, 640 (1983). "Questions of credibility and evidentiary weight are solely within the province of the Zoning Hearing Board as fact finder and the Zoning Hearing Board resolves all conflict in testimony." *Elizabethtown/Mt. Joe Associates, L.P. v. Mount Joy Township Zoning Hearing Board*, 934 A.2d 759, 763 n.5 (Pa. Cmwlth. Ct. 2007), *appeal denied*, 953 A.2d 542 (Pa. 2008).

"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 Board of Smithfield Township*, 568 A.2d 703, 707 (Pa. Cmwlth. 1989) (citations omitted), *appeal denied*, 590 A.2d 760 (Pa. 1990); see also 2 Pa.C.S.A. § 754(b) (setting forth the proper scope of review on appeal from an agency's decision).

The Penn Forest Zoning Ordinance identifies certain general requirements applicable to all special exceptions uses as well as additional requirements for the specific principal use proposed. Section 116.C of the Ordinance provides, as to all special exceptions uses:



Consideration of Special Exception Applications. When special exceptions are allowed by this Ordinance, the Zoning Hearing Board shall hear and decide requests for such special exceptions in accordance with standards established by the Ordinance, including the following:

1. Compliance with this Ordinance. The applicant shall establish by credible evidence that the application complies with all applicable requirements of this Ordinance. The applicant shall provide the Board with sufficient plans, studies or other data demonstrate this compliance.
2. Compliance with Other Laws. The approval may be conditioned upon the applicant later showing proof of compliance with other specific applicable Township, state and federal laws, regulations and permits. Required permits or other proof of compliance may be required to be presented to the Township prior to the issuance of any zoning permit, building permit, certification of occupancy and/or recording of an approved plan.
3. Traffic. The applicant shall establish that the traffic from the proposed use will be accommodated in a safe and efficient manner that will minimize hazards and congestion, after considering any improvements proposed to be made by the applicant as a condition on approval.
4. Site Planning. The application shall include proper site layout, internal circulation, parking, buffering, and all other elements of proper design as specified in this Ordinance.
5. Neighborhood. The proposed use shall not substantially change the character of any surrounding residential neighborhood, after considering any proposed conditions upon approval such as limits upon hours of operation.
6. Safety. The proposed use shall not create a significant hazard to the public health and safety, such as fire, toxic or explosive hazards.
7. Natural Features. The proposed use shall be suitable for the site, considering the disturbance of steep slopes, mature woodland, wetlands, floodplains, springs and other important natural features.

Dietrich proposes in his applicant, the special exception use of a "camp."<sup>8</sup> Specific to camps, §402.A.13 of the Ordinance reads:

Campground, Camp or Recreational Vehicle Campground

- a. Retail sales shall be allowed as an accessory use, provided that in a residential district, the store is primarily intended to serve persons camping on the site.
- b. Minimum lot area - 3 acres in an allowed commercial or industrial district, 5 acres in any other district where the use is permitted under Article 3.
- c. All campsites, recreational vehicle sites, and principal commercial buildings shall be setback a minimum of 75 feet from any lot line. Within this buffer, the applicant shall prove to the maximum extent feasible that any existing healthy trees will be maintained and preserved. Where healthy mature trees do not exist within this buffer, and if practical considering soil and topographic conditions, new trees shall be planted within this buffer.
  - (1) The screening of evergreens provided in Section 803 between business and residential uses is not required if the tree buffer would essentially serve the same purpose, or if removal of mature trees would be needed to plant the shrubs.
- d. Buildings used for sleeping quarters shall not be within the 100-year floodplain.
- e. No person other than a bona fide resident manager/caretaker shall reside on the site for more than 6 months in any calendar year. No recreational vehicle shall be occupied on the site for more than 6 months in any calendar year by any one individual or one family, other than a resident manager/caretaker.

Further, a camp is defined in 202 of the Ordinance as:

"An area that includes facilities and structures for primarily outdoor recreational activities by organized groups, and/or that involves overnights stays within seasonal cabins or temporary tents by organized groups and/or transient visitors to the area. This term shall only include facilities that are primarily used during warmer months, and which have a maximum

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<sup>8</sup> In the R-2 Zoning District where the subject property is situated' a "camp" is a special exception use as identified in §306 of the Ordinance.

impervious coverage of 5 percent. This term shall not include a Recreational Vehicle Campground."

With these concepts and requirements in mind, we now turn to the legal standards that must be met to establish entitlement to a special exception use and what is necessary for any objectors to establish in order to refute an applicant's request. To begin, a special exception is a conditionally permitted use under a zoning ordinance. "A special exception is neither special nor an exception, but a use expressly contemplated that evidences a legislative decision that the particular type of use is consistent with the zoning plan and presumptively consistent with the health, safety and welfare of the community." *Greth Development Group, Inc. V. Zoning Hearing Board of Lower Heidelberg Township*, 918 A.2d 181, 188 (Pa. Cmwlth. 2007), *appeal denied*, 929 A.2d 1163 (Pa. 2007). "If an applicant makes out a *prima facie* case, the application must be granted unless the objectors present sufficient evidence that the proposed use has a detrimental effect on the public health, safety, and welfare." *Id.*

In *Manor Healthcare Corporation v. Lower Moreland Township Zoning Hearing Board*, the Court stated:

A special exception is not an exception to the Zoning Ordinance, but rather a use which is expressly permitted, absent a showing of a detrimental effect on the community. The applicant for the special exception has both the duty of presenting evidence and the burden of persuading the Zoning Hearing Board that the proposed use satisfies the objective requirements of the ordinance for grant of special exception.

Once the applicant has met his burden of proof and persuasion, a presumption arises that it is consistent with the health, safety and general welfare of the community. The burden then normally shifts to the objectors of the application to present evidence and persuade the Zoning Hearing Board that the proposed use will have a generally detrimental effect on health, safety and welfare or will conflict with the expressions of general policy contained in the ordinance.

However, the Zoning Ordinance may, as here, place the "burden of proof" on the applicant as to the matter of detriment to health, safety and general welfare. Such a provision in the Zoning Ordinance however, merely places the persuasion burden on the applicant. The objectors still retain the initial presentation burden with respect to the general matter of the detriment to health, safety and general welfare.

590 A.2d 65, 70 (Pa. Cmwlth. 1991) (citations omitted); see also *Elizabethtown/Mt. Joy Associates*, 934 A.2d at 764.

When analyzing the testimony and evidence of the applicant, "[t]he function of the board when an application for an exception is made is to determine that such specific facts, circumstances and conditions exist which comply with the standards of the ordinance and merit the granting of the exception." *Greth Development Group*, 918 A.2d at 186 (quoting *Broussard v. Zoning Board of Adjustment of City of Pittsburgh*, 831 A.2d 764, 769 (Pa. Cmwlth. 2003)).

Sunrise argues that the ZHB granted the special exception notwithstanding the absence of any reference to the specific special exception criteria outlined in Section 116.C in terms of

either the findings or conclusions identified in their written decision of May 1, 2019.

1) General Special Exception Use Conditions

After reviewing the testimony and documentary evidence presented by Dietrich and in light of the findings of fact and conclusions of law reached by the ZHB and notwithstanding that the ZHB did not specifically identify which findings of fact and which conclusions of law applied to which of these seven (7) factors or beyond, we find a sufficient basis for the ZHB determine that Dietrich met these special exception use requirements. Additionally, Sunrise points to no specific finding nor conclusion that erroneously identified "substantial evidence" of compliance with these conditions. By invariably granting the special exception use, the ZHB has implicitly found, without providing a "legal schematic," that Dietrich's testimony and evidence met these requirements. We find no error in that ultimate decision.

2) "Camp" Conditions

In addition to satisfying the above criterial, Dietrich was obligated to present evidence to meet the conditions set forth in §402.A.13. That testimony, as it relates to these conditions and the findings of fact made by the ZHB are as follows:

- a. Retail Sales - There was no mention nor findings that a retail sales office will be part of this camp. References were made

however that Dietrich would be "supplying" such things like firewood, water, and other miscellaneous items as needed;

b. Minimum Lot Area - Dietrich testified that his entire property in Penn Forest Township and subject to this special exception use application is 370 acres and in an R2 zoning district (See also finding of fact #3);

c. Setbacks/Buffer - Dietrich testified that all setbacks will be a minimum of seventy-five (75) feet from adjacent property lines. Dietrich did testify that in construction the campsites themselves, he would only be clearing a small area to accommodate the wooden platform and surrounding area but not in the area of the setback buffers (See also findings of fact 6 and 12);

d. Flood Plains - As the property in question does not sit in a floodplain, this condition is not a concern (See findings of fact 13);

e. Fulltime Occupants/RV's - Dietrich testified that at present he utilizes the existing residential cabin on occasion throughout the periods of warmer weather and when the guests are using the one existing Tentrr site. He anticipates doing the same should this special exception be granted. He does not plan on having any recreational vehicles on site (See also findings of fact 14, 15, 17, and 19).



Based upon this testimony and the findings made by the ZHB we likewise do not find that the ZHB committed any errors or abused their discretion in this regard.

We now turn to the testimony of the objectors to determine if this special exception use would have a detrimental effect on the health, welfare and safety of the public. The testimony presented by the objectors either themselves or through the cross-examination of Dietrich, centered around traffic and fire and their concerns related thereto.

These concerns were addressed by Dietrich. He stated that with only 8 campsites, the vehicular traffic would be limited in number and since the uses of the campsites would be only in the warmer months, traffic would be limited in terms of time. On the issue of fire, Dietrich testified that he will provide each camp with a five (5) gallon container of water, an axe and a shovel, fire ring and cover, and firewood cut to fit within the fire ring. Dietrich also testified that he or whichever family member may be present, would be checking all campsites once vacated. According to Dietrich, there is also additional water in a nearby creek. Based upon what was presented by any objectors, the ZHB did not make any findings or conclusions suggesting that this use would be detrimental to the health, welfare and safety of the public. We agree.

Further, out of concern for the issue of fire, the ZHB conditioned the grant of the special exception and continuation thereof by requiring Dietrich to present a fire prevention plan to both DCNR and the Penn Forest Township Fire Chief annually for them to review. Pursuant to §116D of the Zoning Ordinance "In granting a special exception, the Board may require such reasonable conditions and safeguards (in addition to those expressed in this Ordinance) as it determines are necessary to implement the purposes of this Ordinance. Conditions imposed by the Zoning Hearing Board shall automatically become conditions of the building permit issued pursuant thereto, and any failure to comply with said conditions shall be a violation of this ordinance." Thus, this condition in particular should help to satisfy the concerns of the neighbors *vis-à-vis* fire safety measures.

#### CONCLUSION

Based upon our extensive review of the record created before the ZHB in conjunction with the findings of fact, conclusions of law and decision and order of the Zoning Hearing Board, we find no errors of law committed by the Zoning Hearing Board nor abuses of their discretion and accordingly we enter the following order:

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Intervenor :

Geoffrey Worthington, Esquire	Counsel for Appellant
Michael S. Greek, Esquire	Counsel for Appellee
Robert Frycklund, Esquire	Counsel for Intervenor

ORDER OF COURT

AND NOW, this ~~26th~~ day of February, 2020, upon consideration of the Appellant's Land Use Appeal, and Counsels' argument and submissions thereon, and in accordance with our Memorandum Opinion of this same date, it is hereby **ORDERED and DECREED** that Appellant's Motion to Strike is **GRANTED** but the appeal from the decision of the Penn Forest Township Zoning Hearing Board is **DENIED**.

BY THE COURT:

  
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Joseph J. Matika, J.

**FILED**  
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