

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

DUANE SCHLEICHER AND	:	
LAVONA SCHLEICHER,	:	
Appellants	:	
v.	:	No. 09-0441
BOWMANSTOWN BOROUGH ZONING HEARING	:	
BOARD,	:	
Appellee	:	
BOWMANSTOWN BOROUGH,	:	
Intervenor	:	

Stephen A. Strack, Esquire	Counsel for Appellants
Michael D. Muffley, Esquire	Counsel for Appellee
James F. Preston, Esquire	Counsel for Intervenor

Civil Law -     Zoning - Interpreting Terms in a Zoning Ordinance -  
                      Special Exception Use (Solid Waste Transfer  
                      Facility) - Objective vs. Subjective Requirements -  
                      Shifting Burdens of Proof

1. As a general proposition, undefined terms used in an ordinance must be given their common and approved usage. Such usage takes into account the context in which the words are used, the subject matter dealt with and the intention of the legislative body.
2. The interpretation of terms in an ordinance is a question of law. When ambiguity exists in the meaning of terms within a zoning ordinance, the Pennsylvania Municipalities Planning Code requires that language be interpreted broadly in favor of the property owner's use of property.
3. As applied to the processing of solid waste within a solid waste transfer facility, the term "processing" in the Bowmanstown Zoning Ordinance refers to the transfer of waste from short haul trucks, which collect and bring garbage to the transfer facility, to long haul trucks, which transport the consolidated loads to a landfill.
4. As a category of use, a use allowed by special exception in a zoning ordinance is a conditionally permitted use subject to review by the zoning hearing board.
5. To gain approval as a special exception use, the use must, at a minimum, satisfy all objective conditions and standards set forth in the zoning ordinance.

6. The applicant for a special exception has the initial burden of presenting evidence and persuading the zoning hearing board that the proposed use is in compliance with the objective standards of the zoning ordinance. If this burden is not met, the use is not permitted and the application must be denied.
7. A requested special exception use which satisfies the objective standards of a zoning ordinance is presumed to be consistent with the health, safety and welfare of the community, absent evidence to the contrary.
8. If a special exception use is shown to comply with the objective standards of the zoning ordinance, those opposing the use have the burden of presenting evidence which establishes to a high probability that the specific use proposed will generate adverse impacts not normally generated by such use, and that these impacts will pose a substantial threat to the health and safety of the community.
9. The burden of rebutting the presumption that a planned special exception use is consistent with the public health, safety and welfare is upon those opposing the proposed use. Ordinarily, this burden encompasses both the burden of going forward with evidence and the burden of persuasion. However, while the burden of presenting evidence against the presumption is always upon the objectors, the burden of persuasion may be placed upon the applicant by the terms of the particular zoning ordinance under review.
10. An applicant for a special exception use must demonstrate that the express standards and criteria of the zoning ordinance will be complied with, not that they can be complied with. Accordingly, while a zoning hearing board has the discretion to grant a special exception with reasonable conditions and safeguards, it is under no duty to do so, even if it is evident from the plan submitted that the plan can be revised to meet the requirements of the ordinance.
11. Zoning hearing board decision denying special exception application for solid waste transfer facility affirmed. Application fails to satisfy objective standards regarding fencing, buffer yards and off-site odors set forth in the zoning ordinance.

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MEMORANDUM OPINION

Nanovic, P.J. - August 13, 2010

Duane and Lavona Schleicher ("Schleichers") appeal from the decision of the Bowmanstown Borough Zoning Hearing Board ("Board") denying their application for a special exception to use property owned by them in the Borough of Bowmanstown ("Borough") as a solid waste transfer facility. For the reasons that follow, we affirm the Board's decision.

PROCEDURAL AND FACTUAL BACKGROUND

On March 20, 2008, the Schleichers submitted an application to the Borough's zoning officer requesting a special exception to develop their property at 700 Lehigh Street ("Property") as a solid waste transfer facility.<sup>1</sup> The Property

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<sup>1</sup> The application also requested that the Property be used for recycling. It was unclear, however, whether the request for recycling was as a principal

is located in an I/C (Industrial/Commercial) zoning district under the Borough's Zoning Ordinance of 1997 ("Zoning Ordinance"). Section 306.B of the Zoning Ordinance permits a solid waste transfer facility to be located in an I/C district by special exception. See Zoning Ordinance, Section 306.B. The Schleichers' Property is the only site within the Borough zoned

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use, which is permitted by right in an I/C zoning district, or as a necessary and permitted accessory use to a solid waste transfer facility. The Zoning Ordinance permits two principal uses on a property, provided the requirements for each are separately met. See Zoning Ordinance, Section 801.B.

This confusion has persisted throughout these proceedings, with the Board expressly denying the principal use of the Property as a recycling collection center since the Schleichers failed to establish the necessary requirements for such a use under Section 402.29 of the Zoning Ordinance. (Board Decision, Conclusion of Law ("C.O.L.") No. 11). While we believe this decision was correct, we also note that during the hearings before the Board, the Schleichers acknowledged the insufficiency of their evidence to support this use and, in fact, appeared to concede that the size of the Property was insufficient to accommodate both principal uses. (N.T. 5/21/08, p. 119; N.T. 8/13/08, pp. 481-82; N.T. 9/17/08, pp. 612-15; N.T. 10/1/08, pp. 726, 799, 815, 835-40, 859-61, 866-68; N.T. 10/20/08, pp. 895, 903-06, 954).

To the extent the Board's decision might be construed as denying any recycling activity on the Property in conjunction with its use as a transfer facility, assuming the Schleichers are able to meet the standards and criteria set by the Zoning Ordinance for operating a solid waste transfer facility, such decision would be contrary to law. As defined in the Zoning Ordinance, the operation of a solid waste transfer facility encompasses the separation of recyclables from solid waste. See Zoning Ordinance, Section 202 (Definition of Solid Waste Transfer Facility). Further, the Pennsylvania Department of Environmental Protection requires, as an ancillary feature of any approved solid waste transfer facility, that a certain minimum number of recycling bins be provided on site for the general public to deposit recyclable material. 25 Pa.Code § 279.272. Finally, Section 202 of the Zoning Ordinance defines an accessory use as "a use customarily incidental and subordinate to the principal use or building and located on the same lot with such principal use." See Aldridge v. Jackson Township, 983 A.2d 247, 255-56 (Pa.Cmwlt. 2009) (discussing the meaning of the phrase "customarily incidental" as commonly used in zoning ordinance definitions of the term "accessory use"). Hence, providing limited recycling (here, a proposed 25 by 18 foot area for bins) is not only customarily incidental to a solid waste transfer facility, it is a necessary and inseparable subordinate use.

Parenthetically, we note that not until the fifth day of hearing (i.e., 9/17/08), did the Schleichers' evidence disclose for the first time that a waste hauling operation was also being considered. No application has been made, original or amended, or public notice given for this use and it will not be addressed further in this opinion.

for and viable for use as a solid waste transfer facility. (N.T. 10/1/08, p. 843; N.T. 10/20/08, p. 957).

The Property is 5.29 acres in size, pie-shaped, and bounded on each side by a state highway: Route 248 on the North, Route 895 (a/k/a Lehigh Street) on the West, and Bank Street on the South and East. The I/C zoning district within which the Schleichers' Property is located is completely surrounded by a district zoned for commercial use. Moreover, all but one of the adjoining properties are used for commercial purposes.

Under the Schleichers' proposed use, municipal solid waste<sup>2</sup> would be collected curb side, primarily from residential households, and transported by dump trucks (a/k/a short haul trucks) to a building on the Property where the contents would

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<sup>2</sup> The facility is being designed solely to handle municipal waste. (N.T. 5/21/08, p. 97). Municipal waste is

any garbage, refuse, industrial lunchroom or office waste and other material including solid, liquid, semisolid or contained gaseous material resulting from operation of residential, municipal, commercial or institutional establishments and from community activities and any sludge not meeting the definition or [sic] residual or hazardous waste hereunder from a municipal, commercial or institutional water supply treatment plant, waste water treatment plant, or air pollution control facility.

35 P.S. § 6018.103.

As proposed, the waste collected for transfer on the Property would involve primarily residential household garbage as well as refuse collected from trash dumpsters at office buildings and construction sites. Thomas G. Pullar, an expert presented by the Schleichers, testified as follows:

The largest percentage [of municipal solid waste] is actually paper, based on [Environmental Protection Agency] studies. Paper is about a third of the waste, about 33 percent. Then yard waste and food waste are about 12 percent each. Then there's plastics, metal and textiles. Those would be less than 10 percent each. Then you get down to the smaller fractionals where you get wood and other miscellaneous.

(N.T. 7/16/08, p. 358). There will be no liquids or sludge, and no infectious or hazardous waste, accepted. (N.T. 7/16/08, p. 351). There will be no burning or incineration of trash. (N.T. 8/13/08, p. 387).

be unloaded, combined with other loads, and transferred onto larger trucks (a/k/a long haul trucks) for transportation to a regulated Department of Environmental Protection ("DEP") landfill. The location of this building, as depicted on site plans submitted by the Schleichers, would be a minimum of 150 feet from all public streets, exterior lot lines, and waterways, and a minimum of 300 feet from any residential structure. (Exhibit A-1). The entire process of transferring waste from incoming short haul trucks to outgoing long haul trucks will occur within this building and will be fully enclosed, except for where the trucks enter and leave.<sup>3</sup> The building will have an impervious concrete floor which will be washed daily. All leachates and fluids will be drained to a holding tank to be monitored and emptied off-site in accordance with DEP regulations.

The facility proposed has been designed to process 1,200 tons of garbage a day. (N.T. 9/17/08, p. 700; N.T. 10/1/08, p. 736). Based on these numbers, Robert Cox, the engineer who designed the site layout for the Schleichers, projected that approximately 95 trucks will be entering and

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<sup>3</sup> The building proposed as a transfer station has yet to be built, and its exact dimensions need to be determined. During the hearings before the Board, the size of this building was downsized from that shown in the original application, approximately 10,625 square feet (85 feet by 125 feet), to 3,281 square feet. (N.T. 6/18/08, p. 174). The reason for this reduction was to comply with the 150 and 300 feet setback requirements of the Zoning Ordinance. (N.T. 5/21/08, pp. 128-29; N.T. 7/16/08, p. 348); see also Zoning Ordinance, Section 402.34 (a) and (b).

leaving the Property on a daily basis. This number appears low. A more realistic estimate based on the testimony of Pete Nowlan, a concerned citizen who works for a firm that provides services to waste management facilities and testified in opposition to the application, is a minimum of 150 trucks per day.<sup>4</sup>

The proposed facility is expected to employ between six to ten people. (N.T. 8/13/08, pp. 431-32; N.T. 10/1/08, p. 717). Although the days of operation were not stated, the maximum hours of proposed operation are from 7:00 A.M. until 9:00 P.M. (N.T. 9/17/08, p. 677). An employee would be on duty at all times.

The site plan presented by the Schleichers depicts two access points: Access A and Access B. Access A on Bank Street will be the primary access. The second, Access B on Route 895, will be "severely restricted" because of its proximity to the entrance and exit ramps to Route 248. (N.T. 8/13/08, p. 500; N.T. 9/17/08, pp. 569, 574, 604, 620).<sup>5</sup>

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<sup>4</sup> Mr. Nowlan's estimate is based on 1,200 tons of garbage being brought to the site daily. Mr. Nowlan testified that long haul trucks on average haul 40 tons of trash which equates to 30 trucks to carry 1,200 tons. Because the load for short haul trucks averages between 6 and 10 tons each, a minimum of 120 trucks would be required to deliver 1,200 tons. The total number of trucks on a daily basis, using these numbers, is 150. (N.T. 10/20/08, p. 996).

<sup>5</sup> Trucks traveling north on Route 895 would be permitted to make a right-hand turn to enter the facility and trucks leaving the facility at this point would be allowed to make a right-hand turn to gain access to Route 248. No left-hand turns will be permitted from Route 895 to enter the facility or from the facility onto Route 895. (N.T. 9/17/08, pp. 579-80).

A gate is to be placed at the bottom of the entrance from Bank Street. Trucks which arrive prior to opening hours will be permitted to line up in the area between the gate and Bank Street. (N.T. 10/1/08, pp. 739-40).

As trucks enter or leave the facility, they will be weighed.<sup>6</sup> At the scale, incoming trucks will be examined. If a load is leaking fluid or contains radioactive materials, the truck will be diverted and sequestered pending directions from the DEP. (N.T. 7/16/08, pp. 353-54; N.T. 8/13/08, pp. 406, 443-44). If the load is accepted for further handling, the truck will be directed into the processing building where the waste will be emptied onto the floor, then transferred into a long haul truck. (N.T. 7/16/08, pp. 354-56).

The Property where the transfer facility is proposed was formerly owned and used by Prince Manufacturing Company ("Prince") for over fifty years in its manufacturing operations. (N.T. 6/18/08, p. 157). Prince manufactured pigments from inorganic ores and also made mineral mixes for animal feeds. (N.T. 7/16/08, p. 272). Its operations utilized heavy equipment and machinery, depended on the use of large trucks for deliveries and shipments, and often resulted in complaints about dust, odors, and noise related to the operation of the plant. (N.T. 6/18/08, pp. 217-26; N.T. 7/16/08, pp. 274, 287-89, 311-12, 327, 341).

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<sup>6</sup> The Schleichers intend to use the scales which already exist on the Property and which were used by the previous owner, Prince Manufacturing Company. These scales are located on the northern side of the Property, near Route 248, and will not be enclosed by the processing building. They are within 150 feet of the property line and within 300 feet of a dwelling not owned by the Schleichers.

Prince was open daily, sometimes on weekends, and employed between 54 and 57 employees. (N.T. 6/18/08, p. 215; N.T. 7/16/08, pp. 274-76). After Prince ceased its operations in August 2006, the Property was dormant. (N.T. 6/18/08, pp. 191-92; N.T. 7/16/08, pp. 270, 309-10). The buildings that Prince used still exist and for the most part are intended to be kept intact, in part to block from view the activities which will come about if the Property is used as a solid waste transfer facility.

Between May 21, 2008, and November 10, 2008, eight hearings were held before the Board on the Schleichers' application.<sup>7</sup> During these hearings, the Schleichers presented four expert witnesses: Robert Cox, a civil engineer who developed the site plan and analyzed the projected traffic flow for the project; Thomas G. Pullar, an environmental engineer who designed the operational components of the project and explained the operations of the proposed facility; John Kuller, the Fire Chief for the Lehighton Borough Volunteer Fire Department, which has a mutual aid agreement with Bowmanstown, and who testified to the accessibility of the site in the event of fire; and Eric Conrad, who served with the Pennsylvania DEP for twenty-five years, the last three years as Deputy Secretary for field

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<sup>7</sup> These hearings were held on Wednesday, May 21, 2008; Wednesday, June 18, 2008; Wednesday, July 16, 2008; Wednesday, August 13, 2008; Wednesday, September 17, 2008; Wednesday, October 1, 2008; Monday, October 20, 2008; and Monday, November 10, 2008.

operations responsible for reviewing and citing all landfills, transfer stations, and recycling programs in the Commonwealth of Pennsylvania. Mr. Conrad testified as to the applicable DEP regulations governing the use of property as a solid waste transfer facility to ensure its operation in a safe, environmentally sound manner and the suitability of the Property for these purposes. The Borough presented the testimony of Paul Pendzick, a civil engineer, whose firm represents the Borough as Borough engineer.

Legal argument was heard before the Board on December 8, 2008. On January 14, 2009, the Board voted to deny the application. This was followed by written Findings of Fact, forty-five in number, and Conclusions of Law ("C.O.L."), twenty-two, wherein the Board concluded that the Schleichers' plan failed to meet the specific requirements for a solid waste transfer facility set forth in Section 402.34 of the Zoning Ordinance, failed to comply with the general requirements for special exceptions set forth in Section 116.C of the Zoning Ordinance, and failed to satisfy the requirements of Section 803.D of the Zoning Ordinance, pertaining to buffer yards.

On February 20, 2009, the Schleichers appealed the Board's decision to this Court and the Borough filed a notice of intervention. The issues were briefed and argued on October 14, 2009. No new evidence was presented to the Court.

## DISCUSSION

To receive approval for a special exception use, applicants must demonstrate compliance with the specific conditions and standards set forth in the Zoning Ordinance. As the reviewing court, where no new evidence is taken, our review is limited to determining whether the Board clearly abused its discretion or committed an error of law. See Elizabethtown/Mt. Joy Associates, L.P. v. Mount Joy Township Zoning Hearing Board, 934 A.2d 759, 763 n.5 (Pa.Cmwlth. 2007), *appeal denied*, 953 A.2d 542 (Pa. 2008).

A conclusion that the [Zoning Hearing Board ("ZHB")] abused its discretion may be reached only if its findings are not supported by substantial evidence. Substantial evidence has been defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Questions of credibility and evidentiary weight are solely within the province of the ZHB as fact finder, and the ZHB resolves all conflicts in testimony.

Id. (citations omitted).

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).<sup>8</sup>

The Zoning Ordinance for Bowmanstown contains certain general requirements applicable to all special exception uses and additional requirements for each specific principal use, as well as general requirements, some applicable for certain districts only and some applicable for all districts. Section 116.C provides, as to all special exception uses:

Approval of Special Exception Uses. The Zoning Hearing Board shall approve a proposed special exception use if the Board finds adequate evidence that any proposed use will comply with specific requirements of this Ordinance and all of the following standards:

1. Other Laws. Will not clearly be in conflict with other Borough Ordinances or State or Federal laws or regulations known to the Board.
2. Traffic. The applicant shall show that the use will not result in or substantially add to a significant traffic hazard or significant traffic congestion.
3. Safety. The applicant shall show that the use will not create a significant hazard to the public health and safety, such as fire, toxic or explosive hazards.

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<sup>8</sup> In In re Appeal of Thompson, the Commonwealth Court further stated:

A reviewing court must accept the credibility determinations made by the municipal body which hears the testimony, evaluates the credibility of the witnesses and serves as fact finder. The reviewing court is not to substitute its judgment on the merits for that of the municipal body. Assuming the record demonstrates the existence of substantial evidence, the court is bound by the municipal body's findings which are the result of resolutions of credibility and conflicting testimony.

896 A.2d 659, 668 (Pa.Cmwlt. 2006) (citations omitted), *appeal denied*, 916 A.2d 636 (Pa. 2007).

4. Storm Water Management. Will follow adequate, professionally accepted engineering methods to manage storm water.
  - (1) Stormwater shall not be a criteria of a decision under this Ordinance if the application clearly would be subject to a separate engineering review and an approval of storm water management under another ordinance.
5. Neighborhood. Will not significantly negatively affect the desirable character of an existing residential neighborhood, such as causing substantial amounts of heavy truck traffic to travel through a residential neighborhood, or a significant odor or noise nuisance or very late night/early morning hours of operation.
6. Site planning. Will involve adequate site design methods, including plant screening, berms, site layout and setbacks as needed to avoid significant negative impacts on adjacent uses.

Specific to solid waste transfer facilities, Section 402.34 provides:

ADDITIONAL REQUIREMENTS FOR SPECIFIC PRINCIPAL USES.  
Each of the following uses shall meet all of the following requirements for that use:

Solid Waste Transfer Facility.

- a. All solid waste processing and storage shall be kept a minimum of 150 feet from all of the following features: public street right-of-way, exterior lot line or creek or river.
- b. All solid waste processing and storage shall be kept a minimum of 300 feet from any dwelling that the operator of the Transfer Facility does not own.
- c. The applicant shall prove to the Zoning Hearing Board that the use: a) will have adequate access for firefighting purposes, and b) will not routinely create noxious odors detectable off of the site.

- d. The use shall not include any incineration or burning.
- e. All solid waste processing and storage shall occur within enclosed buildings or enclosed containers. All unloading and loading of solid waste shall occur within an enclosed building, and over an impervious surface that drains to a holding tank that is adequately treated.
- f. The use shall be surrounded by a secure fence and gates with a minimum height of 8 feet.
- g. The use shall have a minimum lot area of 5 acres, which may include land extending into another municipality.
- h. The use shall be operated in a manner that prevents the attraction, harborage or breeding of insects, rodents or other vectors.
- i. An attendant shall be on duty all times of operation and unloading.
- j. Under the authority of Act 101 of 1988, the hours of operating shall be limited to 7 a.m. and 9 p.m.
- k. Tires - see "Outdoor Storage" in Section 403.
- l. No radioactive, chemotherapeutic, infectious or toxic materials shall be permitted on-site.

A solid waste transfer facility is defined in the Zoning Ordinance as:

Solid Waste Transfer Facility. Land or structures where solid waste is received and temporarily stored, at a location other than the site where it was generated, and which facilitates the bulk transfer of accumulated solid waste to a facility for further processing or disposal. Such facility may or may not involve the separation of recyclables from solid waste. Such facility shall not include a junkyard, leaf composting, clean fill or septage or sludge application.

Zoning Ordinance, Section 202.<sup>9</sup>

Finally, Section 401.A of the Zoning Ordinance provides that the requirements for specific principal uses set forth in Section 402 are in addition to "the sign, parking, environmental and other general requirements of this Ordinance and the requirements of each District" which also apply. This includes Section 803.D under Article 8, General Regulations, which pertains to buffer yards and is discussed further in this opinion.

The Board in denying the Schleichers' application to operate a solid waste transfer facility on their Property found the following criteria required by Section 116.C were not met:

A. The evidence presented was not sufficient to establish that the increased truck traffic would not cause significant traffic hazards or congestion.

B. The evidence presented was not sufficient to establish that the proposed use would not negatively affect the desirable character of the existing residential neighborhood with regards to

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<sup>9</sup> This definition is narrower than that appearing in the Solid Waste Management Act, 35 P.S. §§ 6018.101-6018.1003, and the regulations promulgated thereunder, which define a "transfer facility" as

[a] facility which receives and processes or temporarily stores municipal or residual waste at a location other than the generation site, and which facilitates the transportation or transfer of municipal or residual waste to a processing or disposal facility. The term includes a facility that uses a method or technology to convert part or all of such waste materials for offsite reuse. The term does not include a collection or processing center that is only for source-separated recyclable materials, including clear glass, colored glass, aluminum, steel and bimetallic cans, high-grade office paper, newsprint, corrugated paper and plastics.

35 P.S. § 6018.103 (Definitions); see also 25 Pa.Code § 271.1 (Definitions). The Solid Waste Management Act, also known as Act 101 of 1988, is the same statute referred to in Section 402.34(j) of the Zoning Ordinance.

the creation of significant odors beyond the boundary of the property.

C. Applicants' site plan did not contain any specifics with regards to plant screenings.

(Board Decision, C.O.L. No. 13). With respect to the requirements of Section 402.34, the Board found the Schleichers' proposed use did not comply with the following:

A. Solid waste will be processed within 150 feet of a public right-of-way and exterior lot line.

B. Solid waste will be processed within 300 feet of a dwelling.

C. Insufficient evidence was presented that would establish that noxious odors would not be detectable off of the site.

D. In so much as the scales are not enclosed, all solid waste processing will not occur within an enclosed building.

E. No evidence was presented that the scales were on an impervious surface or that they drain into an adequately treated holding tank.

F. While the testimony established that gates would be established at the entrance on the access road from Bank Street, no testimony was presented regarding the type of fencing that would be erected.

(Board Decision, C.O.L. No. 19). Finally, the Board found that the Schleichers' evidence was insufficient to determine whether the requirements of Section 803.D (Buffer Yards) would be met in relation to the overnight parking of tractor-trailer trucks on the Property. (Board Decision, C.O.L. Nos. 20-22).

#### Legal Standard - Special Exceptions

Before deciding whether the Board properly denied the application for these reasons, or abused its discretion and

committed legal error, as the Schleichers contend, the shifting burden of persuasion that applies when examining compliance with the conditions and criteria for granting a special exception must be understood. 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.Cmwlt. 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.Cmwlt. 1991) (citations omitted); see also Elizabethtown/Mt. Joy Associates, 934 A.2d at 764.

The objective requirements which must be met include "specific requirements applicable to such kind of use even when not a special exception - e.g., setback limits or size maximums or parking requirements applicable to that type of use whenever allowed, as a permitted use or otherwise." Sheetz, Inc. v. Phoenixville Borough Council, 804 A.2d 113, 115 (Pa.Cmwlt. 2002), *appeal denied*, 820 A.2d 706 (Pa. 2003). "The 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)).

In consequence of the foregoing, in reviewing the Board's findings, we must distinguish between those criteria which are specific and objective, and those which are general and subjective, and must also account for language in the Zoning Ordinance which places the burden of persuasion on the applicant. As part of this evaluation, it is necessary first that we interpret the meaning of the word "processing" as used in Section 402.34, setting specific standards to be applied in granting or denying a special exception for use of property as a solid waste transfer facility. This is purely a question of law.

1). Meaning of the term "Processing"

Underlying the Board's findings that solid waste will be processed within 150 feet of a public right-of-way and exterior line, within 300 feet of a dwelling,<sup>10</sup> and will occur outside of an enclosed building, is a fundamental disagreement between the parties as to what constitutes the "processing" of solid waste. The term is not defined in the Zoning Ordinance,

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<sup>10</sup> Although we deal in this appeal only with zoning issues, we note that the Zoning Ordinance requirement that all solid waste processing and storage be kept a minimum of 300 feet from any dwelling is separate and apart from the DEP's regulations which require that the entire facility be a minimum of 300 feet from an occupied dwelling. See Zoning Ordinance, Section 402.34(b); 25 Pa.Code § 279.202(a) (3).

nor is its intended meaning clear from the face of the Zoning Ordinance.

As a general proposition, "[u]ndefined terms used in an ordinance must be given their common and approved usage." In re Appeal of Thompson, 896 A.2d 659, 669 (Pa.Cmwlth. 2006), appeal denied, 916 A.2d 636 (Pa. 2007). Similarly, the Borough's Zoning Ordinance provides:

Any word or term not defined in this Ordinance shall have its plain and ordinary meaning *within the context of the Section*. A standard reference dictionary shall be consulted.

Zoning Ordinance, Section 201.F (emphasis added); see also 1 Pa.C.S.A. § 1903 (words and phrases in a statute shall be construed in accordance with their common and accepted usage).

All of this begs the essential question: What is the "common and approved usage" or the "plain and ordinary meaning" when used in the context of processing solid waste? See Broussard, 907 A.2d at 500 ("[Z]oning ordinances should receive a reasonable and fair construction in light of the subject matter dealt with and the manifest intention of the local legislative body."). In tracking this meaning, "[w]here a court needs to define a term, it may consult definitions found in statutes, regulations or the dictionary for guidance, although such definitions are not controlling." Manor Healthcare, 590 A.2d at 68.

Taking "process" to mean "a method of doing something, with all the steps involved" as defined in Webster's New World Dictionary, the Board concluded that "[t]he weighing of vehicles containing solid waste as vehicles enter and exit the property is a part of the solid waste processing." (Board Decision, C.O.L. Nos. 17, 18). In response, the Schleichers argue that in the context of its use within the Zoning Ordinance - in reference to a solid waste transfer facility as well as how the Zoning Ordinance defines this type of use - and its usage within the industry, the processing of solid waste vis-à-vis the Schleichers' intended use is limited to the transfer of waste from short haul trucks, which collect and bring garbage to the transfer facility, to long haul trucks, which transport the consolidated loads to a landfill.<sup>11</sup> (N.T. 8/13/08 pp. 435-38, 443-44, 462; N.T. 11/10/08, pp. 1108, 1131, 1154). Because both meanings are plausible, the term, at a minimum is ambiguous.

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<sup>11</sup> The regulations which implement the Solid Waste Management Act define "processing" as:

[t]echnology used for the purpose of reducing the volume or bulk of municipal or residual waste or technology used to convert part or all of the waste materials for offsite reuse. Processing facilities include, but are not limited to, transfer facilities, composting facilities and resource recovery facilities.

25 Pa.Code § 271.1. Processing in this sense will not occur at the proposed facility. Although the waste is compacted to some extent when collected and transported in short haul trucks, the Schleichers' expert specifically denied that compacting will occur at the solid waste facility. (N.T. 7/16/08, p. 352; N.T. 8/13/08, pp. 509-10). Instead, the waste is to be consolidated with other waste for bulk shipment to a landfill. This end result is wholly consistent with the Zoning Ordinance's definition of a solid waste transfer facility as a location which "facilitates the bulk transfer of accumulated solid waste to a facility for further processing or disposal." Zoning Ordinance, Section 202.

See Aldridge v. Jackson Township, 983 A.2d 247, 253 (Pa.Cmwlth. 2009) ("An ambiguity exists when language is subject to two or more reasonable interpretations and not merely because two conflicting interpretations may be suggested.").

The question then becomes: Should we defer to the Board's interpretation? Absent an abuse of discretion or an error of law, the Board's interpretation of the Zoning Ordinance should be given great weight and deference and should not be substituted by the judgment of the trial court. See Thompson, 896 A.2d at 669; see also Broussard, 907 A.2d at 500 ("[C]ourts ordinarily grant deference to the zoning board's understanding of its own ordinance because, as a general matter, governmental agencies are entitled 'great weight' in their interpretation of legislation they are charged to enforce.").

The Schleichers argue, however, that if we accept the Board's definition, it leads to an absurdity: since all steps in the handling of solid waste at a transfer facility (i.e., its receipt, weighing, sequestration, unloading and reloading, storage, and shipping out) would be a part of processing, the requirements of the Zoning Ordinance as they apply to the "processing" of solid waste would be either impossible or impractical to meet. How, for instance, could any facility comply with the setback requirement from a public street or boundary line if the delivery of solid waste, its receipt into

the facility, is itself part of processing? (N.T. 8/13/08, p. 461). Further, the Schleichers assert that the requirement that all processing occur within an enclosed building or enclosed container would require, under the Board's interpretation, that the entire site be enclosed.<sup>12</sup> "An interpretation of an ordinance which produces an absurd result is contrary to the rules of statutory construction." Thompson, 896 A.2d at 669; see also 1 Pa.C.S. § 1922(1) (in ascertaining legislative intent it is presumed that the general assembly did not "intend a result that is absurd, impossible of execution or unreasonable").

In addition, we find the Board's construction is inconsistent with the rules of statutory construction set forth in the Pennsylvania Municipalities Planning Code, 53 P.S. §§ 10101-11202.<sup>13</sup> As between two viable meanings, restrictions

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<sup>12</sup> In its Conclusions of Law, the Board found that because the weighing scales are not enclosed, all solid waste processing would not occur within an enclosed building. (Board Decision, C.O.L. No. 19(D)). Implicit in this conclusion is the Board's belief, not only that the temporary containment of waste within the body of a truck for transportation purposes is not storage, with which we agree, but also that such containment does not meet Section 402.34(e)'s requirement that all processing of solid waste occur within an enclosed building or enclosed container.

The interpretation of the word "processing" as found by the Board blurs any distinction between the processing of solid waste and the management of solid waste of which processing is only one phase. Under the Solid Waste Management Act, "management" is defined as "[t]he entire process, or any part thereof, of storage, collection, transportation, processing, treatment, and disposal of solid wastes by any person engaging in such process." 35 P.S. § 6018.103 (Definitions).

<sup>13</sup> Section 603.1 of the Municipalities Planning Code provides that "[i]n interpreting the language of zoning ordinances to determine the extent of the restriction upon the use of the property, the language shall be interpreted, where doubt exists as to the intended meaning of the language written and

imposed by a zoning ordinance are to be interpreted broadly in favor of the property owner's use of property. See Aldridge, 983 A.2d at 257-58.

Permissive terms in [a] zoning ordinance must be construed expansively, so as to afford the landowner the broadest possible use and enjoyment of his land. Conversely, "[R]estrictions on a property owner's right to free use of his property must be strictly construed and all doubts resolved in his favor."

Manor Healthcare, 590 A.2d at 69. "It is an abuse of discretion for a zoning hearing board to narrow the terms of an ordinance and further restrict the use of property." Greth Development Group, 918 A.2d at 189 n.7.

Contrary to the meaning ascribed by the Board, we find that the object of a "solid waste transfer facility" as defined in the Zoning Ordinance and the requirements of the Zoning Ordinance which apply to this use make it clear that the term "processing" does not include the ingress or egress of vehicles, or the weighing, sequestration, or transportation of vehicles containing waste. In defining "processing" as it did, we conclude the Board committed legal error and its interpretation is erroneous.<sup>14</sup>

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enacted by the governing body, in favor of the property owner and against any implied extension of the restriction." 53 P.S. § 10603.1.

<sup>14</sup> Because of our disposition of this issue, we do not address the Schleichers' precautionary validity challenge to the Zoning Ordinance as *de facto* exclusionary and violative of the law under constitutional grounds. See Procito v. Unemployment Comp. Bd. of Review, 945 A.2d 261, 266 (Pa.Cmwlth. 2008) ("[W]hen faced with a case raising constitutional and non-

Since it is undisputed that the location of the building where processing will occur meets the setback requirements of the Zoning Ordinance for processing, the Board's Conclusions of Law, Nos. 19(A) and (B), constitute errors of law. It also follows from our interpretation of "processing" that the Board's Conclusions 19(D) and 19(E) are erroneous as well.<sup>15</sup>

## 2). Specific Criteria

In its Conclusions of Law, numbers 19(F) and 22, the Board cites two express standards and criteria of the Zoning Ordinance which the Schleichers failed to meet: Section 402.34(f) (Fencing) and Section 803.D (Buffer Yards). See also note 20 *infra*. The applicant for a special exception has the initial burden of showing compliance with the objective requirements of the Zoning Ordinance. Unless and until the applicant meets this burden, there is no obligation on the objectors to present evidence that the plan is contrary to the

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constitutional grounds, a court must decide the matter on non-constitutional grounds and avoid constitutional questions if possible.")

<sup>15</sup> Under the Zoning Ordinance, the processing and storage of solid waste must occur within an enclosed building or an enclosed container. As interpreted by this Court, the weighing of solid waste, before unloading, involves neither the processing nor storage of solid waste. In addition, the Zoning Ordinance requires only that the unloading and loading of solid waste occur over an impervious surface that drains into a holding tank that is adequately treated. See Zoning Ordinance, Section 402.34(e). There is no Zoning Ordinance requirement that the scales where trucks containing waste are weighed be on an impervious surface or drain into a holding tank. Nevertheless, the Schleichers' evidence showed that any leakage at the scales would be collected and directed to the holding tank into which liquids in the processing building will drain. (N.T. 8/13/08, pp. 484-85).

public health, safety and welfare. See Thompson, 896 A.2d at 670.

(a) Fencing

Section 402.34(f) requires with respect to a solid waste transfer facility that "[t]he use shall be surrounded by a secure fence and gates with a minimum height of 8 feet." This requirement is mandatory and not advisory. See Zoning Ordinance, Section 201.C (Definition of "shall").

Neither the Schleichers' site plan nor the testimony presented show that the Property will be surrounded by the required fencing and gates. (N.T. 8/13/08, p. 458; N.T. 10/20/08, p. 984). On this issue Mr. Pullar testified only that such fencing and gates "will be part of the design. It will either be a fence or the building that will prevent access to the site." (N.T. 8/13/08, pp. 429-30). Mr. Pullar further stated that the building "will act as a fence." (N.T. 8/13/08, pp. 430, 458). This evidence is insufficient to show compliance with the Zoning Ordinance.<sup>16</sup>

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<sup>16</sup> On several occasions when the Schleichers failed to demonstrate full compliance with the Zoning Ordinance, their witnesses testified that the details of the plan were still being worked on and would be finalized at later stages of the permitting and approval process, promising that the final plan would conform with the requirements of the Zoning Ordinance. While there is truth to what the Schleichers say - that ordinarily the details of the design of a proposed land use occur later in the land development process - the applicant must nevertheless demonstrate that the express standards and criteria of a zoning ordinance that relate specifically to a special exception will be complied with, not that they can be complied with. On this point, the Court in Elizabethtown/Mt. Joy Associates L.P. v. Mount Joy Township Zoning Hearing Board, stated:

(b) Buffer Yards

The Schleichers' site plan, Exhibit A-7, depicts 29 parking spaces for the overnight parking of both short haul and long haul trucks on the south side of the site. (N.T. 9/17/08, pp. 608-612 (showing separate locations for the parking of 13,

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Even if an applicant demonstrates that it can comply with the ordinance requirements and promises to do so, the ZHB does not err in denying the application. Simply put, a concept plan is insufficient to warrant the granting of a special exception; rather, to be entitled to receive a special exception, the applicant must come forward with evidence detailing its compliance with the necessary requirements. "Evidence is not a 'promise' that the applicant will comply because that is a legal conclusion the [ZHB] makes once it hears what the applicant intends to do and then determines whether it matches the requirements set forth in the ordinance."

934 A.2d 759, 768 (Pa.Cmwlth. 2007) (citation omitted), *appeal denied*, 953 A.2d 542 (Pa. 2008).

A zoning hearing board has the discretion to grant a special exception, with reasonable conditions and safeguards; however, it is under no duty to do so. See Elizabethtown/Mt. Joy Associates, 934 A.2d at 768, 768 n.14; see also 53 P.S. § 10912.1. This is true even though it is evident from the plan submitted that the property is sufficient and/or that the plan can be revised to meet the requirements of the applicable zoning ordinance. See Appeal of Baird, 537 A.2d 976, 977-78 (Pa.Cmwlth. 1988), *appeal denied*, 557 A.2d 344 (Pa. 1989). As further stated in Elizabethtown/Mt. Joy Associates:

The proper function of conditions is to reduce the adverse impact of a use allowed under a special exception, not to enable the applicant to meet his burden of showing that the use which he seeks is one allowed by the special exception. Where, as here, the applicant fails to meet all of the ordinance requirements for a special exception, we have long held that the ZHB properly denies the application.

934 A.2d at 768 (citations omitted); see also Lafayette College v. Zoning Hearing Board of the City of Easton, 588 A.2d 1323, 1326 (Pa.Cmwlth. 1991) (holding that the proper function of a condition imposed upon a special exception is to reduce the adverse impact of that permitted use, and not to enable the applicant to meet its burden of showing compliance with the express standards of the ordinance); Broussard v. Zoning Board of Adjustment of the City of Pittsburgh, 907 A.2d 494, 501-02 (Pa. 2006) (holding that "where the plan, as submitted, addresses all of the ordinance's prerequisites for the special exception sought, and reasonably shows that the property owner is able to fulfill them in accordance with the procedures set forth by the zoning code (as reasonably interpreted by the board), a reviewing court should not reverse the grant of such an exception on the sole basis that some of the items described in the plan may be completed at a later date"; noting further that the Lafayette College/Baird line of cases had as their distinctive feature that the property owner failed to include in his submissions before the zoning board any indication of an intention to fulfill the conditions associated with the special exception at issue).

7, and 9 trucks)). The location of these spaces is within 250 feet of the right-of-way for Bank Street.

Section 803.D of the Zoning Ordinance provides that a buffer yard, a minimum of 10 feet in width with evergreen screening, is required along side and rear lot lines of a newly developed area routinely used for the keeping of three or more tractor-trailer trucks or trailers of a tractor-trailer combination if visible from and within 250 feet of a public street or dwelling.<sup>17</sup> The plan as submitted by the Schleichers and the evidence presented does not address this requirement of

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<sup>17</sup> Section 803.D(1) of the Zoning Ordinance states:

Buffer Yards. Buffer yards and screening complying with the following standards shall be required under the following situations:

1. Buffer Yard Width, When Required. Buffer yards shall have a minimum width of 10 feet, unless a larger width is required by another provision of this Ordinance. Buffer yards shall include evergreen screening and shall be required in the following situations, or where otherwise required by this Ordinance:

Buffer Yard to be Provided by the Following:	When the Use Providing the Screen and Buffer is:
1. Along side and rear lot lines of any newly developed or expanded principal commercial or industrial use, other than along a "street".	Abutting or across a street or alley from a primary residential use within a residential district.
2. Along side and rear lot lines of any newly developed or expanded portion of: a) an industrial storage or loading area (other than within an enclosed building), or b) an area routinely used for the keeping of 3 or more: tractor-trailer trucks or trailers of a tractor-trailer combination.	Visible from and within 250 feet of a public street or dwelling.

the Zoning Ordinance. (N.T. 10/20/08, p. 986); see also Sheetz, 804 A.2d at 115.<sup>18</sup>

### 3). General Criteria

Finally, the Board found that the Schleichers' plan failed to show that the proposed use would not result in increased traffic causing significant traffic hazards or congestion, would not cause significant or noxious odors adversely affecting surrounding properties, and would not have significant negative impacts on adjacent uses because specifics with regard to plant screenings were not provided.<sup>19</sup> These standards, while clearly related to the public interest, are not

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<sup>18</sup> In Thompson, the Court succinctly summarized the Sheetz decision on this point, as follows:

In Sheetz, the applicant sought a conditional use permit for construction of a service station. The application was denied by borough council on the grounds that the applicant failed to demonstrate compliance with requisite standards of a "service conditional use." The application did not show the required 40-foot buffer zone or planted buffer screen, which were required for the conditional use for a service station. The borough council reasoned that the applicant was not entitled to approval of its application by allowing them to establish compliance later in the context of a land development plan application. Thus, the applicant failed in its burden of establishing its application's compliance with the necessary requirements as a precondition to approval. We opined, the applicant "is not permitted to evade these requirements because a service station is a conditional use, and upon review, Borough Council properly denied the application." [Sheetz, Inc. v. Phoenixville Borough Council, 804 A.2d 113, 115 (Pa.Cmwlth. 2002), *appeal denied*, 820 A.2d 706 (Pa. 2003).]

896 A.2d at 671.

<sup>19</sup> It is unclear from the Board's decision if this last deficiency refers to plant screenings in buffer yards, or screenings in some other location. If intended to reinforce the deficiency under Section 803.D, that issue has already been discussed. If intended to impose a general site design requirement, incapable of precise measurement, the ensuing discussion pertaining to local concerns relating to the general public health, safety, and welfare applies.

objectively measurable.<sup>20</sup> The Zoning Ordinance, for instance, contains no traffic counts or odor levels which are not to be exceeded. They are instead subjective measurements of the public health, safety, and welfare which are presumed to be met once compliance with the specific objective requirements of the Zoning Ordinance has been demonstrated, absent evidence to the contrary.

Provided the applicant for a special exception convinces the Board that the proposed use meets the objective requirements of the Zoning Ordinance, a presumption arises that the proposed use is consistent with the general health, safety, and welfare of the neighboring community. The burden then shifts to the municipality and any objectors to rebut this presumption by proving "a high probability that the use will generate adverse impacts not normally generated by this type of

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<sup>20</sup> With one caveat: Section 402.34(c)'s requirement that the use not routinely create noxious odors detectable off of the site is an express objective standard distinguishable, we believe, from the subjective standard for odors set forth in Section 116.C(5) of the Zoning Ordinance. As such, the initial burden of proving that noxious odors will not routinely be detectable offsite was upon the Schleichers. The Board found that the Schleichers' evidence was insufficient to meet this burden. (Board Decision, C.O.L. 19(C)).

While the Schleichers presented significant and substantial evidence directed to this issue, we conclude we would be usurping the Board's fact-finding authority were we to find otherwise, in effect overriding the Board's resolutions of credibility and conflicting testimony. On this point, the Board could legitimately find from circumstantial evidence - the odors which accompany short haul trucks hauling waste and the proximity of the scales on which these trucks will be weighed to Route 248 - that noxious odors will be routinely detectable offsite. In this context, we further note that notwithstanding the Schleichers' testimony that the DEP regulations referable to transfer facilities prohibit offsite odors, the regulations are more circumspect and require only that the operator control and minimize conditions which create odors. 25 Pa.Code §§ 279.107, 279.219(b). Accordingly, the standard imposed by Section 402.34(c) of the Zoning Ordinance is stricter than that imposed by the regulations.

use, and that these impacts will pose a substantial threat to the health and safety of the community." Freedom Healthcare Services, Inc. v. Zoning Hearing Board of the City of New Castle, 983 A.2d 1286, 1291 (Pa.Cmwlth. 2009), *appeal denied*, 995 A.2d 355 (Pa. 2010); *see also* Thompson, 896 A.2d at 679. This is so even if the ordinance places the burden of proving that there will be no harmful effects upon the applicant, as it does here with respect to traffic and odor conditions, since such a provision shifts only the burden of persuasion, not the burden of production. *See* Freedom Healthcare Services, 983 A.2d at 1291. Not until the Borough satisfies this burden of production does the burden of persuasion shift to the Schleichers to show that the harmful effect claimed will not occur. *See* Manor Healthcare, 590 A.2d at 70.<sup>21</sup>

Before the Board, the Schleichers' expert testimony established that the impact of the proposed solid waste transfer facility would be no greater than that of any similarly situated solid waste transfer facility. (N.T. 8/13/08, p. 422; N.T. 11/10/08, p. 1121). The Schleichers' witnesses repeatedly reminded the Board that all aspects of solid waste management are highly regulated under the law - including but not limited to 25 Pa.Code Chapters 271 (Municipal Waste Management - General

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<sup>21</sup> Our discussion of this issue is not intended in any manner to imply that the Schleichers have demonstrated compliance with the express standards and criteria of the Zoning Ordinance: they have not. We do so to complete our analysis of the shifting burdens presented in this case.

Provisions), 279 (Transfer Facilities) and 285 (Storage, Collection and Transportation of Municipal Waste) - to ensure the safe, sanitary, and sound operation of a solid waste transfer facility.<sup>22</sup>

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<sup>22</sup> This testimony included:

1. Solid waste transfer facilities may only accept waste from licensed hauling operations. (N.T. 11/10/08, pp. 1117-18);
2. Trucks hauling municipal waste must be dedicated to hauling waste, and cannot be used for other purposes. (N.T. 11/10/08, pp. 1122-23); see also 25 Pa.Code § 285.219;
3. Trucks hauling municipal waste to and from a transfer facility in Pennsylvania are required to be licensed by DEP and must be regularly inspected. (N.T. 7/16/08, p. 367; N.T. 10/1/08, p. 723; N.T. 11/10/08, p. 1116); see also 25 Pa.Code § 285.215(c);
4. Trucks hauling municipal waste are gasketed and sealed to prevent the leaking of leachate, must be regularly maintained in a road worthy condition which is required to be documented in maintenance logs, are subject to random inspections, and must further maintain manifests to show what, when, and where waste was picked up, transported, and deposited. Each vehicle must also be bonded as a part of a licensed hauling operation. (N.T. 7/16/08, p. 367; N.T. 8/13/08, p. 516; N.T. 11/10/08, pp. 1118-20, 1125); see also 25 Pa.Code §§ 285.213 (a)(2), (b), (c) and 285.217;
5. Transfer facilities must log in every vehicle and report the weight and origin of waste for each truck. (N.T. 7/16/08, p. 370; N.T. 8/13/08, p. 395; N.T. 11/10/08, p. 1121); see also 25 Pa.Code §§ 279.214(a), 279.251;
6. All processing of waste at a transfer facility must occur indoors on an impervious floor which is washed down daily. (N.T. 6/18/08, p. 166; N.T. 7/16/08, pp. 361-62; N.T. 8/13/08, pp. 395-96, 435-38; N.T. 11/10/08, p. 1159); see also 25 Pa.Code §§ 279.215(a), 279.216(b), and 285.214(a);
7. All leachate and fluids from the processing of waste and the washing down of the transfer station floor, and the vehicles and equipment involved in this processing, will be collected, drained into a holding tank, and emptied according to DEP regulations at a site that will not be situate in Bowmanstown - there will be no pollution running to the watershed or to the municipal waste water treatment plant or water supply. (N.T. 7/16/08, pp. 358-62, 370; N.T. 8/13/08, pp. 456-57); see also 25 Pa.Code §§ 285.114(d), 285.122;
8. Waste must be removed within 24 hours of its receipt. (N.T. 7/16/08, p. 361; N.T. 8/13/08, p. 403; N.T. 10/1/08, pp. 728, 743); see also 25 Pa.Code § 279.217(b);
9. All transfer stations must have a litter control plan, including fencing to prevent litter from leaving the site. (N.T. 8/13/08, p. 404; N.T. 9/17/08, p. 605; N.T. 11/10/08, pp. 1123-24); see also 25 Pa.Code § 279.221;
10. Trucks containing waste will not be parked outside overnight. (N.T. 8/13/08, pp. 522-24; N.T. 9/17/08, p. 611; N.T. 10/1/08, p. 718); and

The residents of Bowmanstown who appeared before the Board and opposed the application, while legitimately concerned about the effect of having this type of facility in their neighborhood and naturally wary of the Schleichers' assurances, presented no competent, substantive evidence that the Schleichers' intended use was abnormal, would pose a substantial threat to the environment or to the health or safety of the community, or would create an adverse impact not normally generated by the type of use proposed. Notably absent was any expert or other bona fide evidence that there was a high probability that the Schleichers' use of the Property will generate traffic or create odors not normally associated with such use or that the traffic or odors created would substantially threaten the public welfare.

In addressing similar concerns to a request to construct a skilled nursing home in a residential district, the Commonwealth Court stated the following, in language which is equally apropos here:

The objectors, when presenting evidence, must "raise specific issues concerning the proposal's general detrimental effect on the community

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11. The Property, although located in a floodplain, is approvable by DEP for use as a solid waste transfer facility. (N.T. 8/13/08, pp. 449-50; N.T. 11/10/08, pp. 1110-11, 1127). The floor of the building where waste is to be transferred will be above the high water mark for the 100-year floodplain, thereby protecting against unloaded waste on the floor of the building from becoming wet. The facility can be and will be, designed to conform with all applicable laws and regulations. (N.T. 6/18/08, p. 171; N.T. 7/16/08, pp. 363-65); see also 25 Pa.Code 279.202(a) (1).

before the applicant is required to persuade the fact finder that the intended use would not violate the health, safety and welfare of the community." The objectors cannot meet their burden by merely speculating as to possible harm, but instead must show "a high degree of probability that it will [substantially] affect the health and safety of the community."

The trial court found that at most, the objectors' testimony amounted to allegations of mere possibilities and fell far short of the "high degree of probability" standard necessary to sustain the objectors' burden of production. After a review of the relevant testimony we agree with the trial court and find that substantial evidence does not exist to support the Zoning Hearing Board's findings.

Most of the evidence presented by the Township consisted of the testimony of nine neighbors who testified as to the possibility that traffic problems could result from the increased traffic generated by the facility. The objectors testified that major traffic problems already exist. The Township did not present any testimony from its Township planner or any other individual qualified on this issue. We find that such speculative testimony from concerned neighbors is insufficient to establish a "high degree of probability" of specific detrimental consequences to the public welfare.

An increase in traffic alone is insufficient to justify the refusal of an otherwise valid land use. The objectors must show a high probability that the proposed use will generate traffic patterns not normally generated by this type of use and that this abnormal traffic will pose a substantial threat to the health and safety of the community. Moreover, "the fact that a proposed use would contribute to projected traffic congestion primarily generated by other resources is not a sufficient basis for denying a special exception."

Manor Healthcare, 590 A.2d at 71 (citations omitted); see also Freedom Healthcare Services, 983 A.2d 1286 (methadone clinic); Zoning Hearing Board of Upper Darby Township v. Konyk, 290 A.2d 715, 719 (Pa.Cmwlth. 1972) (gasoline service station) (stating "[w]hile these questions may be of valid interest and concern to the neighborhood, they assume the posture of suggestions to meet a potential danger rather than positive evidence of a present injurious effect. This being so, they are appropriate when submitted to the legislative body while it considers regulatory ordinances."). We understand the very real concerns residents of the Borough have raised in this case, however, neither the Borough nor these residents have met their burden of proving to a high degree of probability - and not just speculation of possible harms - that the proposed use would substantially affect the health and safety of the community to a greater extent than what is normally expected for a solid waste transfer facility.

#### CONCLUSION

"A special exception is a conditionally permitted use, legislatively allowed where specific standards and conditions detailed in the ordinance are met." Agnew v. Bushkill Township Zoning Hearing Board, 837 A.2d 634, 637 (Pa.Cmwlth. 2003), appeal denied, 852 A.2d 313 (Pa. 2004). When the specific criteria for a special exception have not been met, as here, the

burden never shifts to those opposing the application to show the applicant's proposed use will have an adverse effect on the general public and the Board is within its right to deny the requested use. It has no duty, as suggested by the Schleichers, to conditionally approve the application and to provide the applicant an opportunity to correct these deficiencies.

Accordingly, we affirm the Board's decision denying the Schleichers' application for a special exception to use the Property as a solid waste transfer facility.

BY THE COURT:

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P.J.

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA

CIVIL ACTION

DUANE SCHLEICHER AND	:	
LAVONA SCHLEICHER,	:	
Appellants	:	
v.	:	No. 09-0441
BOWMANSTOWN BOROUGH ZONING HEARING	:	
BOARD,	:	
Appellee	:	
BOWMANSTOWN BOROUGH,	:	
Intervenor	:	
Stephen A. Strack, Esquire	Counsel for Appellants	
Michael D. Muffley, Esquire	Counsel for Appellee	
James F. Preston, Esquire	Counsel for Intervenor	

ORDER

AND NOW, this 13th day of August, 2010, upon consideration of the Appellants' 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 Appellants' appeal from the decision of the Bowmanstown Borough Zoning Hearing Board is DENIED.

BY THE COURT:

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P.J.