SCOTT OVERDORF, *et al*.,	:	IN THE COURT OF COMMON PLEAS OF
	:	LYCOMING COUNTY, PENNSYLVANIA
Plaintiff	:	
	:	
vs.	:	NO. 98-00,280
	:	
CLINTON TOWNSHIP BOARD OF SUPERVISORS,	:	
	:	
Defendant	:	

OPINION AND ORDER

The matter presently before the Court concerns a Zoning appeal filed February19, 1998, by Scott Overdorf, *et al*. (hereinafter "Appellants").[1] Appellants are appealing the denial by the Clinton Township Zoning Hearing Board (hereinafter "Hearing Board") of their substantive challenge to a township zoning ordinance adopted by the Clinton Township Supervisors (hereinafter "Supervisors"). This ordinance, enacted September 8, 1997, rezoned a zoning district in which Appellants own property from "C-1" (commercial) to "R-1" (residential).[2] Appellants, by letter dated October 1, 1997, notified the Hearing Board of their "substantive challenge" to the enactment of the ordinance and requested an evidentiary hearing. The Hearing Board held hearings December 16 and 17, 1997 and January 19 and 20, 1998. Upon conclusion of the hearings, the Hearing Board submitted a written decision in which it upheld the rezoning. That decision, dated January 20, 1998, was a result of a two to one vote: Hearing

[1] The Court notes the written Findings of Fact of the Clinton Township Zoning Hearing Board cite as Appellants Frederick G. Pfeiffer, Scott A. Overdorf and Virginia Overdorf. Findings of Fact 6-7 at page 3. However, Mr. Overdorf is the only Appellant named in any Court filing. None of the Appellants testified before the Hearing Board.

[2] Note the February 19, 1998, filing erroneously indicates the area was rezoned to an "R-II."

Board members Karen Bullis and Glen Emert voted to uphold the rezoning, while Hearing Board member Larry Wilcox dissented from the decision.

Appellants timely filed the instant appeal February 19, 1998, alleging the action taken by the Supervisors was arbitrary or an abuse of discretion, or violative of equal protection and due process of law, in that:

(1) it was insufficiently supported by planning;
(2) it contradicted existing planning;
(3) it resulted in the properties within the rezoning district being treated differently than other properties similarly situated;
(4) it was not supported by the reasons purported to justify the rezoning (either the reasons did not exist or they were not logically supportive of the rezoning);
(5) it constituted "special legislation" ("spot zoning") intended to benefit or accommodate the wishes of four property owners, each of whom was either a township official or closely related to a township official.

Appellants also challenge the Hearing Board's decision by disputing their finding (Hearing Board Finding No. 16) that "numerous" residents testified at the hearings concerning their support of the zoning change, claiming this finding is not supported by the evidence. Appellants further argue the Hearing Board agreed the rezoning ordinance lacked the necessary planning basis (which would support a conclusion the ordinance should not have been upheld) and one of the Hearing Board members had an undisclosed bias or conflict of interest which led to his approval of the ordinance. Appellants conclude that some of these contentions are involved in

the question whether the action constituted "spot zoning."[3] Appellants are not contending any procedural defects occurred in the enactment of the ordinance. *See* Clinton Township Zoning Hearing Board Findings of Fact, II(3)(a).

Scope of Review, Standard of Review[4] and Burden of Proof

If the record does not include findings of fact, or if additional evidence is taken by a trial court, a court is empowered to make its own findings of fact based on the record below as supplemented by the additional evidence, if any. 53 P.S. §11005-A. The court should then determine the case *de novo* on the merits. ***Boss v. Zoning Hearing Board of Borough of Bethel Park***, 443 A.2d 871 (Pa.Cmwlth. 1982). However, where a common pleas court does not take new evidence, its scope of review is limited to a determination whether the local zoning agency committed an error of law and whether its necessary findings are supported by substantial evidence. ***Nascone v. Ross Township Zoning Hearing Board***, 473 A.2d 1141 (Pa.Cmwlth. 1984); ***Ramondo v. Zoning Hearing Board of Haverford Township***, 434 A.2d 204 (Pa.Cmwlth. 1981). Substantial evidence is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion. ***Eichlin v. Zoning Hearing Board of New Hope Borough***, 671 A.2d 1173 (Pa.Cmwlth. 1996). The Court may not substitute its judgment for that of the local agency unless the board committed a manifest abuse of its discretion. ***Nascone***, *supra;* ***Ramondo***, *supra.* Under an abuse of discretion analysis, a Court may not weigh contradictory evidence

[3] We note that on March 2, 1998, the Township of Clinton filed a Notice of Intervention. Scott T. Williams, Esq., Township Solicitor, filed a brief on behalf of Clinton Twp., in which he advocates both the position of the Township and the Hearing Board.

[4] The terms scope of review and standard of review are terms often used interchangeably, but carry two distinct meanings and should not be so used. ***Morrison v. Com., Dept. of Public Welfare***, 646 A.2d 565, 570 (Pa. 1994). "Scope of review" refers to what is permissibly examined; "standard of review" refers to how the examination is conducted. *Ibid.*

offered by parties at board hearings. ***Appeal of deBotton***, 474 A.2d 706 (Pa.Cmwlth. 1984); the Hearing Board, as fact finder, is the ultimate judge of credibility and resolves all conflicts in the evidence. ***Eichlin***, *supra.* The fact that a court may have acted differently is not sufficient to reverse the action of the board. ***Angelo v. York Township Zoning Board***, 60 Pa. D.&C.2d 14 (1972). It is not within a court's province to conduct an independent review of the record and render a decision concerning the propriety of a zoning decision, because to do so would usurp the role assigned to the Hearing Board. ***Burnet v. Zoning Hearing Board***, 35 Leh.L.J. 474 (1974).

Here, by Order of Court dated November 3, 1998, Appellants were given the opportunity, subsequent to the hearings, to depose a Hearing Board member -- Glen Emert -- concerning possible bias and submit the deposition transcript and related exhibits. Appellants argued, in their brief filed January 21, 1999, that the Court's acceptance of this additional evidence entitled them to a *de novo* review. However, this additional evidence did not go to the merits of the case, in that it concerned only the issue of bias and "did not relate to any zoning or planning question in the case, nor did it relate to any issue considered by the Board." ***Amerikohl Mining v. Zoning Hearing Board***, 597 A.2d 219, 222 (Pa.Cmwlth. 1991). Accordingly, the evidence of bias offered was "not the type of additional evidence that requires the trial court under Section 1005-A [53 P.S. §11005-A] of the MPC [Municipal Planning Code] to make its own findings of fact on the underlying merits." *Ibid.* Therefore, at oral argument held February 2, 1999, the parties agreed that, as governed by ***Amerikohl***, this Court's review is limited to whether the Appellants have shown the Hearing Board committed an error of law or a manifest abuse of discretion in making a decision not supported by substantial evidence in the record.

Given the nature of the additional evidence received and applicable case law, this Court is satisfied it has no authority to engage in a *de novo* review.

This Court's duty in determining the appeal is further defined by case law. The case of ***Berman v. Board of Commissioners***, 608 A.2d 585 (Pa.Cmwlth. 1992) provides:

> [T]he function of judicial review, when the validity of a zoning ordinance is challenged, is to engage in a meaningful inquiry into the reasonableness of the restriction on land use in light of the deprivation of landowner's freedom thereby incurred. A conclusion that an ordinance is valid necessitates a determination that the public purpose served thereby adequately outweighs the landowner's right to do as he sees fit with his property, so as to satisfy the requirements of due process.

Berman at 587 (citation omitted). Moreover, we must begin with the presumption that the ordinance is valid. Appellants have the burden to "clearly establish" otherwise:

> When considering the constitutionality of an ordinance, a court must begin with the premise that the ordinance is valid and constitutional. [B]efore a court may declare a zoning ordinance unconstitutional, the challenging party must clearly establish the provisions are arbitrary and unreasonable and have no relation to the public health, safety, morals, and general welfare and if the validity is debatable the legislative judgment is allowed to control.

In re Fayette County Ordinance No. 83-2, 509 A.2d 1342, 1345 (Pa.Cmwlth. 1986) (citations omitted). "A zoning ordinance is presumed to be valid and constitutional, and the challenging party has the heavy burden of proving otherwise." ***Sharp v. Zoning Hearing Board***, 628 A2d 1223, 1227 (Pa.Cmwlth. 1993).

> A zoning ordinance, like other legislative enactments, is presumed to be valid, and a challenger must meet a heavy burden of proving otherwise. The United States Supreme Court has held that a zoning ordinance is valid when: (1) it promotes public health, safety or welfare; and (2) the means are substantially related to the desired end.

> Pennsylvania courts have employed a substantive due process analysis for evaluating the validity of a zoning ordinance. Such an analysis requires that a reviewing court balance the public interest involved against the impact of the ordinance on individual rights. Before a court may declare that a zoning ordinance is unconstitutional, the challenging party must clearly establish that the ordinance provisions are arbitrary and unreasonable and have no relation to the public health, safety, morals and general welfare.

Shohola Falls Trails v. Zoning Hearing Board, 679 A.2d 1335, 1340 (Pa.Cmwlth. 1996) (citations omitted). Again, "[i]f the validity of the legislative judgment is fairly debatable, the legislative judgment must be allowed to control." ***In re Glorioso's Appeal***, 196 A.2d 668, 671 (Pa. 1964); ***Berman***, *supra*. There is no precise formula for determining whether a classification of property constitutes spot zoning, and cases should be decided on the facts guided by case law. ***Sharp***, *supra* at 1228.

Discussion

The area in question[5] is bordered by an R-1 district to the north and an I-1 (industrial) district to the east. To the west is T-538 (Brouse Road); west of Brouse Road appears (from the maps presented) to be a C-1 district. The southern border of the area fronts on Route 405, an undisputed minor arterial highway. Across Route 405 appears (in the maps) to be an industrial district. Historically, the area was designated an R-2 district, but in the mid-1980's, the area was rezoned as C-1. Currently, the area has thirty-seven developed single family residential parcels, two developed commercial parcels (a sub shop and a beauty shop) and one pending commercial development – a gas station/convenience market. Four remaining parcels are undeveloped (Board Finding No. 5). Appellant Frederick G. Pfeiffer purchased property

[5] The following description is garnered from a review of the entire record, including hearing transcripts and exhibits.

within the rezoned district on March 15, 1996, for $48,000.00. Appellants Scott A. and Virginia Overdorf purchased their property October 19, 1991, for $45,000.00. Findings of Fact II(6) and (7).

In determining whether a challenged ordinance is defective, a zoning hearing board must consider, *inter alia*, (1) the impact of the proposal upon roads, sewer facilities, water supplies, schools and other public service facilities; (2) the suitability of the site for the intensity of the proposed use and impact upon flood plains and other natural features, and; (3) the impact upon other land uses which are essential to public health and welfare. 53 P.S. §10916.1(5).[6]

Arbitrariness/Lack of Planning

The board is required to issue an opinion which sufficiently reveals the board's reasoning to show its action was reasoned rather than arbitrary. ***Transguch v. Zoning Hearing Board***, 505 A.2d 410 (1986). Such an opinion was issued to support the Board's oral determination made of record after the evidentiary hearing.

At the hearing, Todd Pysher, Township Supervisor and Clinton Township planning commission member, testified as to his traffic pattern concerns if the C-1 classification was maintained and the lack of traffic control devices, which would likely be necessary in the event of future commercial development and the cost of which might have to be borne by the township. January 20, 1998, N.T. 8-10. He further pointed out the current lack of sidewalks or walkways for pedestrians. *Id.* at 12. Supervisor Pysher also testified that if the area were developed commercially, he had concerns that the increase in "impervious" surface area would

[6] We note the Hearing Board heard testimony that alternative room for commercial development was available with the Township along Route 15. *See, e.g.*, December 16, 1997, N.T. 114.

cause water to run across the ground, as opposed to into the ground. The increased water volume could not be adequately handled by existing drainage ditches and pipes; failure to increase those "facilities" would increase the potential for flooding. *Id.* at 19-21. Supervisor Pysher was asked specifically if, when considering the enactment of this ordinance, he considered the health, safety and general welfare of the public. He replied "Yes," *(id.* at 23), explaining he meant the public at large (*id.* at 24).[7] He stated: "Safety, though, is and was the major issue, primarily traffic safety." *Ibid.*

Among the reasons given for their allegations the rezoning was improper, Appellants cite the lack of planning, including lack of any traffic study, before the decision to rezone was made. It is true that testimony revealed prior action taken concerning rezoning took eight or nine months in the planning stages and involved the planning commission.[8] The Hearing Board did find "the planning process could have been more orderly and documented more thoroughly." Findings of Fact 6. However, the Hearing Board found that it could not say the actions taken by the Township Supervisors in this instance require a finding that rezoning was arbitrary. Similarly, we cannot say the Hearing Board's determination was without reason, nor was it an arbitrary decision.

The minutes of the June 23, 1997, township meeting show that a discussion was had at that time concerning the rezoning. A motion to rezone was made by Township Supervisor Harold Swisher and seconded by Diane Sampsell, then passed unanimously by Supervisors Todd Pysher, Harold Swisher and Diane Sampsell. The Zoning officer was asked to contact the

[7] Similar testimony was elicited from Supervisor Sampsell. December 16, 1997, N.T. 110.

township solicitor about the procedure and present the plans to the planning commission. On July 30, 1997, Richard P. Barto, Chairman of the Clinton Township planning commission, advised the Township Supervisors the commission had voted to rezone the area as requested. The reason the change was recommended was "because this area has developed into a residential area. Commercial development has not met expectations."

Appellants rightly point out the statement made by Supervisor Sampsell, that "I think this was something that we had to do immediately and then plan later." December 16, 1997, N.T. 57. However, the facts show the action was not taken "immediately" upon suggestion, but rather after referral to the local and county planning commissions. We cannot agree with Appellants (Appellants' Brief p. 7) that Supervisor Sampsell's statement "is essentially an admission of zoning law invalidity" (emphasis in original). Further, Supervisor Sampsell continued that the entire "1987 zoning ordinance" undoubtedly needs to be reviewed and the Supervisors have gone "about as far" as they can in revising and amending it. She continued: "But we needed to do something, you know, consistent with our zoning ordinance…what you're proposing is something that would take considerable planning. And at that point, maybe we will do that when we do that planning to rewrite the zoning ordinance…So we try to be consistent with the way things are done in the book now instead of confusing – make it any more confusing than it already is." *Id.* at 57-58. The record supports that Supervisor Sampsell was speaking of "immediacy" in the instant case (approximately two months) in contrast to the time it would take to overhaul the entire set of zoning ordinances (which she

[8] Supervisor Sampsell stated it involved "a lot of planning" (December 16, 1997, N.T. 43), arguably more than may have been taken in the instant case. This prior action appears to be the 1987 action which implemented the present Zoning Ordinance of the Township.

understandably felt would take considerably longer, given her prior experience in 1987, where several zoning changes made at the same time took eight or nine months. *Id.* at 43-44.).

A July 28, 1997, letter from the Lycoming County Planning Commission to the Township Supervisors, introduced by Appellants, would seem to indicate disapproval of the rezoning to an R-1 classification. However, a follow-up letter, written November 7, 1997, stated: "In our July 28, 1997 letter we did not endorse either the C-1 or R-1 Districts. Perhaps this could have been stated more clearly." Moreover, the author of the first letter, Mr. Bill Harris, testified before the Hearing Board. He stated the points made in his letter "are recommendations to the municipality. The decision itself rests with the township. And in my opinion, my review overall did not weigh down one side or the other for or against this zoning." December 17, 1997, N.T. 44. The ordinance was enacted September 8, 1997, over two months after first discussed by the Supervisors.

Moreover, there was testimony before the Hearing Board that, although the matter came to a head because of certain activities involving development of a commercial property in the area (known as "Scullin Oil"), concerns with regard to traffic safety had been discussed for some time prior.

For example, Richard Barto, the Clinton County planning commission chairman, testified that the issue had come up "over a period of a few years." December 17, 1997, N.T. 113. Mr. Barto said that although he had to admit it looked "like it was done pretty fast," in fact the change, in his opinion, was well thought out. *Id.* at 129.

Supervisor Pysher was asked if he agreed the township didn't give adequate consideration to the impact of the ordinance before passing it. He indicated he did not agree.

Supervisor Pysher stated that if not doing enough "means that we didn't hire an engineer and we didn't hire a planning consultant or a traffic consultant and pay a certain sum of money to do a lengthy study to come to some conclusion…" then that was a correct statement. He continued: "However, I don't believe that that's always necessary. And, again, common sense generally dictates in many things, including this issue." January 20, 1998, N.T. 25.

Appellants also argued that the zoning change was against a comprehensive plan. Yet their own witness, Mr. Bill Harris from the Lycoming Planning Commission, stated he did not think the change was drastic enough for him to say it was inconsistent with the plan. December 17, 1997, N.T. 52. Further, Supervisor Pysher testified he believed the rezoning was consistent with the general objectives as set forth in section 105 of the Clinton Township Zoning ordinance. January 20, 1998, N.T. 29-35.

Appellants ask: "Why would the Supervisors forego the study and analysis *required* for a valid rezoning Ordinance?" Appellants' Brief p. 7 (emphasis supplied). However, Appellants have not presented any authority to demonstrate to this Court just what period of time or type of study is "required" to constitute adequate planning. The Hearing Board found on the record that the planning process was "a little quick" (comment by Mr. Wilcox, January 20, 1998, N.T. 95) and "probably not" the result of an orderly planning process (comment by Ms. Bullis, *id.* at 96). However, the members also stated it really hadn't been made clear whether the process taken was orderly or "unorderly" (comment by Mr. Emert, *id.* at 97). Accordingly, based upon the evidence presented them, all three Hearing Board members found *Appellants* had not met their burden of showing the process was not orderly (comments by Ms. Bullis, Mr. Wilcox and Mr. Emert, *id.* at 97-98).

This Court now finds Appellants have not demonstrated the Hearing Board abused its discretion in making this decision. The issue was certainly considered by the Hearing Board. No evidence was presented to support the contention that the Township's comprehensive plan was violated. The proposed ordinance was submitted to both the County and Township planning commissions; the input of those commissions did not advise the Supervisors that the contemplated change would be inconsistent or contrary to the existing planning statements.

Appellants further argue the Hearing Board's finding that "numerous" residents testified in favor of rezoning is not supported by the record. Our review indicates six residents testified they supported the rezoning: Ms. Phyllis Houtz (Zoning officer), Ms. Diane Emery (Hearing Board member who recused herself), Ms. Diane Sampsell (Township Supervisor and secretary), Cathy and Scott Sampsell (son and daughter-in-law of Diane Sampsell) and Glenn Houtz (son of Phyllis Houtz). However, the Hearing Board also found "numerous" residents voiced an objection to the rezoning; this finding was *not* contested by Appellants. By our count, those property owners numbered five: Mr. Elmer Drum, Ms. Beverly Fox, Ms. Joyce Swartz, Mr. Robert Aunkst and Mr. Nathan Yoder (with respect to an opinion letter written on behalf of Yoder Builders).[9] We do not find the characterization of "numerous" to be in error with respect to either finding. However, what is important is not the amount of people who testified for or against the zoning change; rather, the notable point is that all who wished to present testimony for or against the rezoning were given the opportunity to do so. There is nothing in the record to suggest that anyone was denied this opportunity.

[9] Curiously, the Appellants before the Hearing Board, Mr. Pfeiffer and Mr. and Mrs. Overdorf, did not testify during these hearings.

Bias

Appellants raise two issues before this Court concerning bias: First, that the rezoning was undertaken solely for the benefit of Township officials who live in the area (such as Supervisor Sampsell and Zoning Officer Houtz) or their close relatives who also live in the area; Second, that Hearing Board member Glen Emert was biased due to a conflict of interest, in that at the time the Hearing Board rendered its decision, Mr. Emert was the chief of a volunteer fire company which was trying to obtain a permit for a new firehouse from the Supervisors.

In determining claims of bias, the Court is guided by the principal that "a municipal officer should disqualify himself from any proceeding in which he has a personal or pecuniary interest that is immediate or direct." ***Danwell Corp. v. Zoning Hearing Board***, 540 A.2d 588, 591 (Pa.Cmwlth. 1988); ***Amerikohl***, *supra* at 222.

We note, initially, that Appellants make numerous claims in their brief that cannot be substantiated from the record before this Court.[10] For example, Appellants ask rhetorically why the Supervisors would forego the study and analysis required, then answer the reason is troublesome and further evidence that what occurred was spot zoning. Appellants then find support for this statement by claiming Supervisor Sampsell admitted "there were but four property owners living in that district asking for the rezoning, and she admitted that they objected because of their own sense of aesthetics. T1, pp. 80-81." Appellants' Brief pp. 7-8. Our review

[10] We do not wish to imply disapproval of the manner in which counsel has presented this appeal. We understand it is the duty of counsel to point out, in the most persuasive manner possible, those portions of the record most favorable to his clients. However, it is the duty of this Court to fairly evaluate all of the testimony presented; in several instances, we find the record supports inferences, findings and conclusions which differ considerably from those counsel would have us accept.

of the testimony reveals Supervisor Sampsell not only testified repeatedly that the rezoning came up in relation to a review of the Scullin Oil plans (*e.g.*, December 16, 1997, N.T. 60, 66 and elsewhere as discussed in this Opinion) and *not* because of complaints (*Id*. at 75), but in the statements referenced by Appellants she actually said she thought the Supervisors took a count and there were as many people for the rezoning as against it. *Id.* at 77. She had no idea how many were on each side; in response to questioning by Appellants' counsel, she was able to recall four names *against* the zoning change, not for it, although she didn't mean to say there weren't more. *Id.* at 77-80. Appellant's counsel then asked "is it fair to say that there was a concern over the aesthetics (as opposed to Appellants' inference this was the *main* concern);" Supervisor Sampsell replied "I would think so." *Id.* at 81. Later, with respect to her own daughter-in-law, Supervisor Sampsell indicated when the issue was discussed, the proposed rezoning had already been advertised and the letters mailed out. *Id.* at 89.

Another example where this Court questions an assertion made in Appellants' brief is where Appellants argue that Zoning Officer Phyllis Houtz, a resident of the district, stated she was opposed to commercial development because it "would be a real hindrance to (her) lifestyle." Appellants' Brief p. 8. However, Ms. Houtz actually stated she was not in favor of commercial development because: "Our particular street is very nice, very quiet. We have no crime. We have lots of children in the area, small children, school children. We have bus stops there. And commercial development would be a real hindrance to *our* lifestyle." January 20, 1998, N.T. 77. We believe a fairer characterization of Ms. Houtz' testimony is that she was personally against commercial growth, but the reasons she gave reflected her concerns about the

adverse effects upon the entire community, particularly as to the perceived negative impact on the residential character of the area.

Appellants point out the testimony of a Mr. Aunkst, who stated only four people at the Township Supervisor's meeting voiced opposition to the commercial zoning designation. Appellants' Brief p. 8. Also, Mr. Pat Dietrick agreed with counsel's statement (question) that four people at the meeting were in favor of the zoning change; more were against the change than supported it. December 17, 1997, N.T. 6-7. However, this evidence, even if accepted in full by the Hearing Board, does not compel a determination that the action taken by the Supervisors in contravention of the vote was therefore biased. As stated previously in this Opinion, the "mere popularity or desirability of a result does not necessarily create a permissible zoning objective." ***Berman v. Board of Commissioners of the Township of Lower Merion***, 608 A.2d 585, 590 (Pa.Cmwlth. 1992).

Given the overall vote to uphold the ordinance, it is clear the Hearing Board members accepted that the main reason the rezoning occurred had to do with the traffic safety and other concerns as stated. We note that Board member Mr. Wilcox did state he felt "the fact that some of the relation of the supervisors lived at that area, that had probably played a part in the rezoning." January 20, 1998, N.T. 99. This statement is in keeping with the overall vote to uphold the ordinance, wherein Mr. Wilcox was the dissenting vote.

The Hearing Board was aware that Supervisor Sampsell's son and daughter-in-law resided in the affected district, as did Phyllis Houtz, the Zoning Officer and Glen Houtz, son of the Zoning officer. A Hearing Board member, Diane Emery, also lives within the area, but recused herself from acting on the appeal. *See* Findings of Fact 7, 14. The Hearing Board

concluded, however, that these residents were not benefited to a different degree than others in the district. Findings of Fact 7. Moreover, notwithstanding Appellants' claim that the rezoning was done for the benefit of these particular residents, the Hearing Board determined the rezoning was not taken because of any special access to the Supervisors, as alleged by Appellants. *Ibid.* Over the course of four hearings, those against whom Appellants make this claim of bias testified and were cross-examined by Appellants. All denied the rezoning was undertaken to benefit only those few. *See* testimony of Cathy Sampsell, daughter-in law of Diane Sampsell, December 17, 1997, N.T. 81-89; testimony of Scott Sampsell, son of Diane Sampsell, December 17, 1997, N.T. 98, 100; testimony of Glenn Houtz, son of township code officer Phyllis Houtz, December 17, 1997, N.T. 106-5-106. Issues of credibility are for the Hearing Board as the finder of fact. ***Eichlin***, *supra.* The Hearing Board believed, based upon the testimony presented, that the reason behind the rezoning action taken had to do with concerns over the safety and general welfare of the district (Conclusions of Law 7).

Support for this conclusion can be found throughout the hearings. One example is the testimony of Richard Barto (author of the Clinton Township planning commission approval letter, *supra*) that the planning commission "thought that traffic was definitely a problem." December 17, 1997, N.T. 114. Mr. Barto supported the contention that, rather than the concern arising from the request a favored few, the issue had come up in the context of discussion of the "Scullin Oil" property and "it flowed over into this meeting, that problem." *Ibid.* Asked why his letter to the Supervisors approving the zoning change failed to say anything about traffic, Mr. Barto indicated he really couldn't answer that, but he knew "traffic was discussed." December 17, 1997, N.T. 120.

Similarly, Supervisor Swisher testified the idea of rezoning first came up in connection with a PennDOT permit being issued to Scullin Oil. December 16, 1997, N.T. 27. Supervisor Swisher believed if there was more traffic, there would be traffic problems. *Id.* at 30. He stated increased traffic would cause more work for the police, (including increased vehicular accidents), who should be patrolling elsewhere. *Id.* at 37. Supervisor Swisher believed the existing industrial districts did not require support by commercial uses. *Id.* at 31.

Testimony was also given by Township Supervisor and (Clinton Township) planning commission member Todd Pysher that the discussion prior to passing the ordinance was raised because of, and had to do with, traffic patterns in the area of the Scullin Oil site. January 20, 1998, N.T. 5, 8-9, 66. Mr. Pysher also referred to a letter of complaint, dated April 30, 1997, regarding the flow of traffic along Route 405 having been received by the Supervisors. January 20, 1998, N.T. 10-12.

The discussions of the Hearing Board at the conclusion of the hearings demonstrate they considered the foregoing testimony. The weight and credibility to be given to the testimony was for them to decide. The Appellants have not clearly demonstrated that the Hearing Board's decision constituted an arbitrary or capricious disregard of the evidence.

Moreover, we cannot say the Hearing Board's conclusion constituted an error of law. In ***Amerikohl Mining Inc***., *supra,* appellant's sole evidence of bias involved the fact that the residences of one board member and another board member's parents-in-law were sufficiently close to the location of a proposed strip mining site. The board denied a special exception for the surface coal mining operations. The denial was upheld by the trial court and that decision was appealed. The Commonwealth Court declined to accept appellant's argument

that it need only show an *appearanc*e of bias and a showing of actual bias was not required. The Court agreed with the trial Court that neither board member had an immediate or direct personal or pecuniary interest in the subject matter of the application and there was nothing in the record to indicate either board member conducted himself in a biased or prejudicial manner. *Id.* at 223.

Here, Appellants have fairly raised the issue of bias. However, two of the three Board members apparently accepted as credible the testimony that the reasons for the rezoning did not include special access to, or undue influence of, Township officials. This encompasses the testimony of Supervisor Sampsell that being a resident of the rezoned district, as well as having family members also within the area, did not motivate her to bring the question of rezoning before the Supervisors.[11] Arguably, had Supervisor Sampsell recused herself from voting in this matter, the question of bias may have been avoided, or at least more easily determined by the Hearing Board. However, Supervisor Sampsell was not required to recuse herself. Supervisor Sampsell received no benefit (or, in fact, detriment) to a greater degree than any other property owner within the district. Moreover, although no information is before the Court in this regard, it would not be surprising that generally, in small communities, community officials are involved in making decisions which directly impact the area in which they live.

With respect to Supervisors Pysher and Swisher, there is nothing in the record to indicate they had a direct or personal interest in the rezoning. In short, Appellants have raised an appearance of bias, but have not provided proof of actual bias sufficient to overturn the Findings and Conclusions of the Hearing Board.

[11] We note further that if we accept Appellants' contention the commercial zoning classification actually enhanced the market value of the properties, then Ms. Sampsell acted contrary to her pecuniary interests and those of her family, if not their personal interests.

Concerning the alleged bias of Mr. Emert, we have reviewed the Additional Evidence in this regard, filed by Appellants January 21, 1999. The deposition transcript reveals Mr. Emert is a volunteer fire chief (for the Clinton Township Fire Company). N.T. 3. While in attendance at a June 23, 1997, regular meeting of the township supervisors, Mr. Emert spoke concerning construction bids for the fire house. Plaintiff's Exhibit No. 3. Later during that same meeting, Supervisor Sampsell moved to appoint Mr. Emert to the Hearing Board. *Ibid.* The motion was seconded by Supervisor Swisher and the motion was unanimously approved. Also discussed that evening was the rezoning change currently under review. *Ibid.*

During his deposition, Mr. Emert testified that in 1997, the fire company was in the process of constructing a new building. N.T. 6. It was within the jurisdiction of the township supervisors to issue a needed occupancy permit for the building. N.T. 10-11. A prerequisite to the occupancy permit was the approval of a storm water plan; the engineer who had to approve the storm water plan worked in an office which worked for the Township Supervisors. N.T. 12-13. The minutes of the August 11, 1997, regular meeting of the supervisors indicate the land development plans submitted by the Clinton Township Volunteer Fire Company had been submitted, but after discussion it was decided an occupancy permit would not be issued until after all plans (specifically the storm water plan) had been approved by the Supervisors. Mr. Emert indicated he was willing to wait until the next meeting for the storm water review to be approved. Plaintiff's Exhibit No. 5. Note that up to this point, there is nothing in the record to indicate the delay was in any manner tied to the subject of rezoning. The Township Supervisors could not have foretold the rezoning issue would ultimately end up before the Hearing Board,

including Mr. Emert. There is simply nothing to indicate the firehouse permit at this point was being delayed to encourage Mr. Emert to later approve the zoning change.

In "late" 1997, an attorney was consulted by the fire company about the project because of what the fire company perceived were undue delays in getting the necessary approvals. N.T. 19. As noted, the Hearing Board decision to uphold the rezoning ordinance was rendered January 20, 1998; Mr. Emert voted in favor of the ordinance. The Township's approval for occupation occurred January 27, 1998. N.T. 14; *see also* Plaintiff's Exhibit Nos. 2 and 3.

To support their contention of bias, Appellants cite the cases of ***Baker v. Chartiers Township Zoning Hearing Board***, 677 A.2d 1274 (Pa.Cmwlth. 1996) and ***Pace Resources, Inc. v. Shrewsbury***, 492 A.2d 818 (Pa.Cmwlth. 1985). However, both are distinguishable. In ***Baker***, the zoning hearing board upheld an approval of a conditional use for expansion of a landfill. The trial court reversed the grant as illegal spot zoning and the Commonwealth Court affirmed. However, only one of the reasons for this finding was the "special relationship" of the applicant with the Board of Supervisors. The Courts also considered (1) the failure of the Board of Supervisors to provide a full and fair examination of the impact on adjoining properties; (2) the Township's knowing failure to comply with a statutory mandate requiring submission of the comprehensive plan to the County Planning Commission; and (3) the failure to consult a third-party expert, absolutely necessary in this case as it involved the use of land in an environmentally volatile fashion. It was these additional factors, coupled with the past and anticipated future financial benefits to the Township due to the landfill's operation, which led to the conclusion bias was involved. None of these factors are present in the instant case.

In ***Pace Resources, Inc***., the Commonwealth Court noted the rezoning occurred after prompting by a petition from area residents requesting the change, which petition was circulated by the wife of a planning commissioner. "In fact, the record indicates that this change was prompted by a petition from area residents requesting such a change, and that the circulator of the petition was the wife of one of the Planning Commissioners." *Id.* at 821. However, the rezoning was then accomplished in a total of one hour from introduction to passage. Here, the rezoning took over two months and included public notice and submission to the planning commissions. Moreover, the Court noted the rezoning was inconsistent with the comprehensive plan -- not proven here -- and the rezoning would cause tremendous detriment to the appellant (discussed *infra*).

We conclude that although Appellants once again may have raised the appearance of bias with respect to Mr. Emert, the evidence presented by Appellants in support of this claim does not constitute a showing of actual bias.

The Issue of Spot Zoning

"A request for rezoning calls upon a local governing body, acting in its legislative role, to consider whether or not rezoning is in the best interest of the community." ***Board of Commissioners, McCandless Township v. Beho Development Company, Inc***., 332 A.2d 848, 851 (Pa.Cmwlth. 1975), *allocatur denied.* Zoning ordinances shall be designed to, *inter alia*, promote, protect and facilitate safety and the general welfare, coordinate proper density of population, to prevent danger and congestion of travel and to prevent loss of health, life or property from flood or other dangers. 53 P.S. §10604 (1) and (2).

Generally,

> …a collection of *private* interests does not add up to a "public" interest cognizable by zoning, in the absence of some recognized legitimate zoning purpose. Conversely, an owner's assertion of the constitutional right to deal with land as he pleases so long as he does not violate a valid zoning restriction or other provision of law is protection of a public interest of the highest order…the mere popularity or desirability of a result does not necessarily create a permissible zoning objective.

Berman, *supra* at 590 (emphasis in original).

Here, the Hearing Board found the rezoning did not constitute spot zoning, as alleged by Appellants. Spot zoning is defined as "[a] singling out of one lot or a small area for different treatment from that accorded to similar surrounding land indistinguishable from it in character, for the economic benefit of the owner or to his economic detriment." ***Bishop Nursing Home v. Zoning Hearing Board***, 638 A.2d 383, 386 (Pa.Cmwlth. 1994). The topography, location and characteristics of the land may be considered in determining whether an area has been spot zoned but each case must be decided on its own facts. *Ibid.*

"In order to be considered special legislation, or spot zoning, a zoning ordinance must be unjustly discriminatory, arbitrary, unreasonable and confiscatory in its application, in that it is directly aimed at a particular piece of property." ***Shohola*** at 1341. "The singling out of one lot or a small area for different treatment from that accorded to similar surrounding land which is indistinguishable in character is invalid 'spot' zoning. *Ibid.*

A peninsula surrounded on all but one side by inconsistently zoned land can be a spot zone. ***Baker***, *supra*. In ***Baker***, the Commonwealth Court found spot zoning had occurred where the record showed procedural irregularities had been ignored by the hearing board. The trial and appellate courts found this indicated the board had failed to make a full and fair examination of the impact of the rezoning in its attempt to accommodate an individual who

benefited from their decision. In that case, the board of supervisors rezoned a farm adjacent to a landfill from an agricultural to an industrial district as a result of a request from the landfill owner. The action was upheld by the zoning hearing board. The procedural irregularities set forth by the trial court were: (1) the failure of the Board of Supervisors to provide a full and fair examination of the impact which the rezoning would have on adjacent properties; (2) the special relationship between the landfill owner and the board, which led to an expedited deliberation process to the detriment of the public interest; (3) the township's knowing failure to comply with the statutory mandate to submit the comprehensive plan to the county planning commission for comparison with the rezoning request (53 P.S. §10303(b)); and (4) the failure to consult a third-party expert, which, although not required by law, was absolutely necessary to protect the interests of all parties when land was to be used in such an environmentally volatile fashion. ***Baker***, *supra*, at 1276. The ***Baker*** Court cited ***Pace Resources v. Shrewsbury Township Planning Commission***, *supra*, in stating that irregularity in zoning procedures, which showed the governing body had not thoroughly reviewed the proposed rezoning, was a significant factor, *along with other factors*, including inconsistency with the comprehensive plan, to indicate to the Court the proposed rezoning constituted arbitrary and unjustifiably discriminatory spot zoning. ***Baker*** at 1278 (emphasis supplied). The appellate Court determined the failure to submit the plan to the county planning commission indicated the deliberation process was expedited to the detriment of the public interest.

In ***Pace Resources***, *supra,* Pace Resources, Inc. owned a parcel of land which it intended to subdivide and create an industrial park. The land was zoned industrial subsequent to Pace Resources' purchase, but a portion was later rezoned as agricultural before the corporation

could obtain approval of its plans. The Court found the township had failed to show any substantial relationship between the rezoning and the public health, safety morals or welfare and was prompted by a petition. The Court went on to point out the result of this rezoning, along with other changes made, went against the stated intent of the Planning Commissioners and Board of Supervisors, was inconsistent with the comprehensive plan and would cause "tremendous economic detriment" to Pace Resources, who was prohibited by ordinance from subdividing the acreage into residential lots. *Id.* at 822.

Here, the rezoned area could be classified as a peninsula of residential land surrounded on its three remaining sides by commercial or industrial property (either continguously or across a roadway, as noted, *supra*). This one factor, however, does not compel a finding the ordinance is invalid. The fact that property on the opposite side of Route 405 is zoned industrial, or commercial on the other side of Brouse Road, is of no particular consequence because "[t]he line of demarcation must be fixed somewhere. Simply because a piece of property borders property zoned industrial does not mean it automatically can be rezoned industrial." ***In re Fayette County Ordinance*** at 1346 (citations omitted). Accordingly, the fact that commercial and industrial zones exist nearby does not dictate a finding the area in question should remain commercial. Conversely, the fact that the area bordering the northern portion of the area is residential does not necessarily invite a finding that the area should be rezoned, notwithstanding the Hearing Board's (Township's) argument to the contrary.

In ***Schubach v. Silver***, 336 A.2d 328 (Pa. 1975), the Pennsylvania Supreme Court was asked to consider whether rezoning constituted impermissible spot zoning where a tract of land was rezoned at the request of a land owner from a residential to a commercial area.

Neighborhood residents objected to the rezoning. In finding the ordinance was valid, the Supreme Court noted that the rezoned land was distinctly different from surrounding residential land in that it fronted on two heavily traveled traffic arteries, was located in an area such that development as detached residential property was not economically feasible and, possibly most importantly, the property was directly across the road from commercial land. The Court concluded it was "only realistic to say that this piece of land, by its very location, is useable only as a 'natural extension' of the already existing commercial use." ***Schubach*** at 337. The Court continued that, "because of the location of this land, it is by nature unsuited for detached dwelling use and, therefore, different from the surrounding residential land. Yet, it is well situated for commercial use; in fact it is no more than the natural extension of a previously existing commercial use." *Ibid.* Moreover, the rezoning was in accord with the comprehensive plan. The ***Schubach*** Court recognized the merit of the "transition zone" theory, in which pieces of property located between two different uses should be put to the best use possible, that which best blends in with surrounding different uses. However, the Court stated it was in no way retreating from the view that, simply because property is bordered by a commercial zone, it cannot automatically be rezoned as commercial. ***Schubach*** at 338.

In ***Baker***, *supra*, it was the combination of factors, including irregularity in the zoning procedures, which led the Court to conclude the rezoning was invalid. Similarly, multiple factors were noted in ***Pace Resources***, *supra*, including severe economic detriment to the adversely affected property owner.

Economic hardship to a property owner was also a factor in the case of ***McIlhinney v. Zoning Hearing Board***, 455 A.3d 1284 (Pa.Cmwlth. 1983). In that case, the

property in question had been previously zoned commercial and was located in an area that was primarily and almost exclusively commercial. The only residential use in the area prior to its rezoning to "R-A Rural," the most restricted zoning classification, was a tract of residential housing immediately opposite to the subject property. The board contended the change was necessary, as commercial development would be detrimental to the adjacent uses and the public welfare. The zoning board upheld the rezoning, but the Court of Common Pleas reversed the decision. In affirming the trial Court's decision, the Commonwealth Court noted the physical attributes of the property involved, including the proximity to a major traffic interchange and surrounding commercial uses. The Court failed to see how rezoning to the most restrictive zoning classification fit any logical planning scheme, nor was it justifiable as a reasonable use "by any stretch of the imagination." *Id.* at 1286. The Court noted further the change would create severe economic hardship for appellant, as the record established his property under commercial zoning was worth approximately $60,000.00 per acre (for a total of $560,000.00) while under the R-A zoning it was worth $9,000.00 per acre (for a total of $85,000.00). The Court noted prospective homebuyers would obviously be reluctant to buy homes in this area with surrounding commercial uses and noise from the interchange (I-95). The Court upheld the trial court's conclusion that it was "clear that the property here involved is best suited for a commercial use and that the rezoning of the property constituted illegal spot zoning with no legitimate or rational basis therefor." *Id.* at 1287.

We acknowledge that the Hearing Board heard expert testimony presented by Ms. Bonnie M. Tompkins that Mr. Overdorf's property could be worth $200,000.00 (under a marketing analysis approach) with a commercial classification, but substantially less as a

residential property. Ms. Tompkins stated the area was an ideal commercial location because it was situated along Route 405, which had experienced industrial growth; commercial growth logically follows. December 16, 1997, N.T. 134.[12]

The Hearing Board also considered the testimony of Lora Morningstar, a realtor/broker with Business Ventures, whose expert testimony agreed with that of Ms. Tompkins, that the "highest and best use" for the area in question was commercial. December 17, 1997, N.T. 17. Ms. Morningstar testified that where property owners of undeveloped land suitable for commercial use have that land rezoned as residential, some dollar value is taken away from those owners. December 17, 1997, N.T. 25.

Appellants' witness Mr. Harris, of the Lycoming County Planning Commission, testified that, due to the available sanitary sewer line and the current traffic flow along Route 405, in his opinion a classification other than R-1 might make more sense (to allow for the possibility of concentrated residential and some commercial uses). December 17, 1997, N.T. 53, 57, 74. Mr. Harris stated in his (personal) opinion planning or studies would be necessary prior to making a change such as was done by the supervisors. *Id.* at 75. However, as noted *supra*, in conclusion he could not state the change violated the existing planning criteria. *Ibid*. at 52.

Conversely, the Hearing Board heard Ms. Tompkins admit the Overdorfs purchased the three-quarters of an acre parcel from her approximately five or six years earlier (in 1991) for only $45,000.00, at which time the property was in fact zoned as commercial.

[12] Appellants also elicited testimony from Ms. Tompkins (and others) that commercial land generally has a higher value than residential and that this could increase tax revenues. *See, e.g.,* December 17, 1997, N.T. 26 (testimony of Lora Morningstar). We note, however, that tax base concerns cannot be decisive in a zoning case. ***Baker***, *supra* at 1279.

December 16, 1997, N.T. 138-144.[13] In determining the credibility of an expert's testimony, "the critical factors are logic, unequivocality, reasonableness of the conclusion, and the degree that the witness's view deviates from the general opinion of other experts." ***Cavanaugh v. Fayette County Zoning Board***, 700 A.2d 1353, 1357 fn. 7 (Pa.Cmwlth. 1997). Moreover, we must keep in mind the Hearing Board was evaluating the opinion testimony of these witnesses. The weight to be afforded Ms. Tompkins testimony, as well as Ms. Morningstar's and Mr. Harris', was for the Hearing Board to determine. Despite their claims commercial growth was necessary in the area at issue, given that commercial growth had not in fact occurred since 1987, it is not unreasonable that the Hearing Board determined what was actually necessary in that area was the residential development, which did occur. This is particularly true where Appellants did not present any testimony to support a contention that there was a demand for commercial parcels in the locality of the rezoned area.

"[A] zoning classification which seems at first glance to reflect discriminatory treatment of a tract of land may be 'justified' by a showing that the different treatment merely recognizes special circumstances affecting the tract. Stated differently, zoning which merely accords special recognition to special circumstances is not improperly discriminatory." §3.4.11, Ryan, Robert S., Pennsylvania Zoning Law and Practice, (George T. Bisel Company, Philadelphia 1992).

Here, the special circumstances presented to the Hearing Board included the likelihood that resurfacing as a result of commercial development might result in flooding problems, the potential dangers and costs associated with increased traffic from commercial

[13] No evidence was given with respect to any specific differentiation in value concerning Mr. Pfeiffer's property.

development, as well as the fact that the area as it had actually developed was primarily residential. Concerning this last circumstance, Appellants cite the case ***Appeal of Mulac***, 210 A.2d 275 (Pa. 1965), for the proposition that "attributes and potential development, not current development, must control zoning decisions…" (Appellants' Brief p. 6). Actually, in that case the facts before the Pennsylvania Supreme Court concerned a "large" residential zone in which "certain" commercial uses existed. *Id.* at 277. The Supreme Court found unpersuasive the argument that, because the area contained a mix of commercial and residential uses, rezoning on that basis alone to a general business classification was proper. Rather, because the amendatory ordinance created a commercially zoned island in a "residentially zoned sea," this constituted invalid spot zoning *unless* a proper basis for such special treatment could be demonstrated. *Ibid.* Therefore, the holding of that case did not include a finding that we must ignore the existing manner in which the area has been developed and allow the zoning classification to control. Further, it has been said that "[w]hile the existence of a nonconforming use will not justify zoning of itself, the present use of a property is a fact of obvious relevance and may be considered in determining whether a zoning classification is valid." Pennsylvania Zoning Law and Practice, *supra* at §3.4.12.

"Legislative history also may serve to rebut the inference that special treatment of land results from impermissible discrimination. Where the rezoning ordinance which is under attack merely returns the property to the classification which it had for years before, the Pennsylvania Supreme Court has indicated that a spot zoning attack is weakened: ***Schmidt v. Zoning Board of Adjustment***, 382 Pa. 521, 114 A.2d 902 (1955)." Pennsylvania Zoning Law and Practice, *supra* at §3.4.11. Here, the record reflects the area was zoned as R-2 until

approximately 1986-1987, at which time it was rezoned as a commercial district. December 16, 1997, N.T. 40-43; December 17, 1997, N.T. 20. Granted the newly created R-1 classification is more restrictive; moreover, this Court might have found (had we the authority) an R-2 classification was more in keeping with the characteristics of the area, including the diverse development in the area, the proximity to Route 405 and the previous installation of a sewer line. However, we remain mindful that the task before us is not a *de novo* review. Consequently, we cannot substitute our judgment for that of the Hearing Board (and by extension, the Township Supervisors and Township Planning Commission).

When considering the question of spot zoning,

> [t]he key point is when a municipal governing body puts on blinders and confines its vision to just one isolated place or problem within the community, disregarding a community wide perspective, that body is not engaged in lawful zoning, which necessarily requires that the picture of the whole community be kept in mind while dividing it into compatibly related zones by ordinance enactments. In other words, legislating as to a spot is the antithesis of zoning…

Baker, *supra* at 1277, *citing* ***Township of Plymouth v. County of Montgomery***, 531 A.2d 49, 57 (Pa.Cmwlth. 1987). Here, the record contains considerable testimony that the concerns for the community in general were taken into consideration, in terms of traffic dangers (both with respect to vehicular traffic and the safety of pedestrians without sufficient walkways), the threat of flooding and the possible imposition upon the Township for the installation of traffic control devices. We cannot say the municipal governing body "put on blinders" and disregarded a community wide perspective.

Conclusion

There is no question Appellants presented evidence in support of their various contentions. Overall, however, we cannot say, given our standard of review and Appellants' burden, that Appellants have successfully demonstrated the commission of an error of law or abuse of discretion. As discussed throughout this Opinion, the findings of the Hearing Board can be supported by substantial evidence in the record.

In sum, given the concerns for traffic safety and the other potential adverse effects further commercial development may have had in the area, it was not unreasonable for the Township Supervisors to rezone the area, nor for the Hearing Board to determine the change should be upheld.

Whether this Court may have reached a different conclusion as to the appropriate zoning classification cannot control the outcome of this appeal.[14] Appellants have not met their heavy burden of overcoming the presumptive validity of the ordinance. Neither have they demonstrated the findings of the Hearing Board were unsupported by substantial evidence, such that an error of law or abuse of discretion has been committed whereby this Court should interfere with the legislative decisions of the Township Supervisors and the Hearing Board. Accordingly, the Appeal must be dismissed.

[14] The Court notes that 37 families/residents chose to invest in single family residential homes within this area, demonstrating their judgment that the location is suitable for residential use.

O R D E R

AND NOW, this 30th day of June 1999, upon consideration of the foregoing Opinion, the appeal of Scott Overdorf, *et al.* of Ordinance Amendment 97-10 is **HEREBY DISMISSED**.

BY THE COURT:

William S. Kieser, Judge

cc: Court Administrator
Marc S. Drier, Esquire
Scott T. Williams, Esquire
Judges
Nancy M. Snyder, Esquire
Gary L. Weber, Esquire (Lycoming Reporter)