IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

MONTGOMERY AREA SCHOOL DISTRICT, Appellant,	:	CV-23-01241
	:	CIVIL ACTION - LAW
vs.	:	
	:	
BOARD OF SUPERVISORS OF CLINTON TOWNSHIP,	:	
Appellee.	:	LAND USE APPEAL

OPINION AND ORDER

AND NOW, this 3rd day of June, 2024, upon consideration of the Appellant's Land Use Appeal (filed November 6, 2023), it is hereby ORDERED and DIRECTED that the Land Use Appeal is GRANTED for the reasons set forth below.

I. BACKGROUND

This matter came before the Court on the Land Use Appeal (filed on November 6, 2023) by Montgomery Area School District (hereinafter the "Appellant") regarding Appellant's application seeking approval to construct a Junior/Senior High School, its associated athletic field, parking lot, and stormwater management facilities (hereinafter the "Proposed Project") on a tract of parcel (hereinafter the "Property") situate in Clinton Township, Lycoming County, owned by the Appellant. Reproduced Record (hereinafter "RR") at 8. The Property bears a Tax Parcel Number 07-392-238 and an address of 537 Old Road, Montgomery, Pennsylvania 17752—this Court notes that the record evidence indicates, on page 9, that the Property is at 487 Old Road, while the Land Use Appeal filed by Appellant (and the Written Decision filed by Appellee) indicate the 537 Old Road address—and is located within an R1 Zone (Low Density Residential District) under the Clinton Township's zoning ordinance (hereinafter the "Ordinance"). RR at 6, 9.

The Appellant sought a Conditional Use of the Property as a public school under the Ordinance. On August 30, 2023, the Board of Supervisors of Clinton Township (hereinafter the "Appellee") held a Conditional Use Hearing (hereinafter the "Hearing") on the Appellant's application. RR at 1. Appellee Board members in attendance at the Hearing were Patrick Deitrick, Matthew Dodge, Kaydee K. Miller, Donald Wagner, and Lanny Wertz. At the start of the Hearing, counsel for the Appellee endeavored to explain to the audience how a governing body, such as the Appellee, determines the conditions it may impose on an

applicant, such as the Appellant, in the grant of a conditional use permit. RR at 5-6. Counsel for the Appellee then introduced eight (8) exhibits on behalf of the Appellee (hereinafter "Appellee's Exhibit")—e.g., conditional use application submitted by the Appellant (inclusive of a written statement, a site plan, and Ordinance criteria), a copy of Section 3.31 of the Ordinance, a definition of conditional use as defined in the Ordinance—and called witnesses, such as Appellee's secretary/treasurer and zoning officer. RR at 6-12. Appellee's secretary/treasurer testified to, among other things, that the conditional use application was sent to the township planning commission, and the commission responded with recommendations. RR at 11.

Counsel for the Appellant proceeded to briefly explain the Appellant's application for a conditional use under the Ordinance. For example, the Property is approximately 57 acres in size and has been owned by the Appellant since 1969. RR at 14. A facility known as Montgomery Athletic and Community Center is presently located on the Property. RR at 14-15. Having briefly explained the Appellant's application and confirmed the admission of exhibits on behalf of Appellant (hereinafter "Appellant's Exhibit"), counsel for the Appellant proceeded to introduce testimony from numerous witnesses, beginning with Andrew Keister, the Director of Civil Engineering (hereinafter "Keister") at Livic Civil. RR at 17. Keister, who is a civil engineer and a licensed surveyor, testified, among other things, that adjoining tracts to the Property include agricultural tracts to the north and west, and residential tracts to the south and east. RR at 21, 23. Keister further testified that the Property already contains the Appellant's athletic fields—e.g., football and baseball stadia—and facilities, has an estimate of one hundred and fifty (150) students visiting the Property per day, is compatible with the existing and potential land uses on adjacent land, and that the building of the Proposed Project comports with the Ordinance and will not have an adverse impact on the neighborhood. RR at 23-31.

Counsel for the Appellant also introduced several exhibits during the testimony of Keister—including Appellant's Exhibit 5, a magnified site plan depicting all the buildings, the pavement areas, sidewalks, curbing, lighting, utilities, etc., and Appellant's Exhibit 6, a concept site plan depicting current and proposed streets, easements, means of access, etc. RR at. 27-29. Counsel for the Appellant also illustrated—via Appellant's Exhibit 7, 8, and 9—that a bus turning template was used at the intersection of Old Road and S.R. 54, demonstrating that except the need for certain modifications to the shrubbery at the

intersection, all other PennDOT sight distance requirements were satisfied. RR at 32-36. Pertaining to the issue of sight distance, Keister testified that the proposed use will not create hazardous conditions to vehicles or pedestrians. RR at 36-37. Moreover, Keister noted that the proposed site plan provided adequate off-street parking and loading areas, among other things. RR at 38-39. Upon questioning by Board member Dodge on whether a study was conducted from Brouse Road and whether the study in Appellant's Exhibit 7 and 8 used an actual bus, Keister responded that no studies were conducted on the sight distance regarding Brouse Road, but on the question of whether an actual bus was used in the study that was conducted, Keister indicated that the study is based on templates, which is also typically how PennDOT conducts similar studies. RR at 42-43. Upon questioning by Board member Deitrick about parking on the Property (especially during special events) and by Board member Dodge on whether there were additional studies conducted regarding Old Road relative to the Proposed Project, Keister responded that parking at similar sporting events have always been problematic in Pennsylvania—and Keister's approach was to comport with the requirements of the Ordinance—and there were no additional studies conducted beyond Pinchtown Road. RR at 44-46.

Counsel for the Appellant then introduced testimony from Jesse Smith, Director of Transportation and Infrastructure at Livic Civil (hereinafter "Smith"), as well as Appellant's Exhibits 10 and 11 regarding Smith's *résumé* and the traffic signal warrant analysis. RR at 47. Smith testified that he conducted a traffic analysis study using standard industry practices (which comport with the standards set by PennDOT), and that he determined that no traffic signal was warranted/necessary for the Proposed Project (i.e., no hazard was created by the Proposed Project that would require such a traffic light). RR at 52. Upon questioning about how the study was conducted, Smith further elaborated about how traffic was measured—e.g., measured for one (1) day on August 16, 2023. RR at 54. Moreover, when asked whether there was a particular vehicle volume threshold at which PennDOT would mandate a traffic signal, Smith indicated in the affirmative and further elaborated that the aforementioned signal warrant analysis conducted here indicated a vehicle volume that was far below the threshold set by PennDOT. RR at 55. Smith responded to the Board members' questions by indicating that the study here only considered the vehicle volume (e.g., did not consider the acceleration of buses) and no pedestrian study for Old Road was conducted. RR at 55-56.

Counsel for the Appellant then introduced testimony from Scott Cousin, a registered architect for Crabtree Rohrbaugh & Associates Architects (hereinafter "Cousin"). RR at 57. Cousin testified that he utilized standard industry practices (i.e., scientific or technical principles or methods widely used in the field, as well as estimates developed by general engineers, civil engineers, mechanical engineers, and plumbing engineers) in reaching his professional conclusion regarding the Proposed Project and its total cost of thirty-five million (35,000,000) dollars, that the Property is suitable for use according to Pennsylvania Department of Education standards, and that the Proposed Project will not adversely affect the neighborhood. RR at 60-64. In conjunction with Cousin's testimony, counsel for the Appellant introduced exhibits on the floor plan design (Appellant's Exhibit 13) and a construction rendering of the exterior of the Proposed Project (Appellant's Exhibit 14). RR at 62-63, 65. Cousin further testified that the overall height of the Proposed Project is thirty-four (34) feet, which is under the maximum limit of an R-1 zone. RR at 65-66. Counsel for the Appellant subsequently introduced a rendering of the proposed lighting design pertaining to the parking lot and surrounding roadways as Appellant's Exhibit 15. RR at 66. Upon questions regarding the brightness of the lights, the timing of the lights, and the impact of the lights on the surrounding areas, Cousin responded that there is no indication that the aforementioned lights would have an adverse impact on the neighborhood, and that there were no plans for automatic shutoffs for those lights at this time. RR at 67-70. Cousin also opined that the placement of the Proposed Project would have a positive impact on the neighborhood. RR at 70, 73,

After introducing a bus diagram (outlining the proposed bus routes) as Appellant's Exhibit 16, counsel for the Appellant introduced testimony from Grant Evangelist (hereinafter "Evangelist"), the business manager and head of transportation for the Appellant. RR at 74-75. Evangelist testified, among other things, that the Proposed Project would not have any adverse effect or safety effect on pedestrians or vehicular traffic, and that the Proposed Project would not have an adverse impact on the neighborhood. RR at 78-79 (in fact, Evangelist testified that the Proposed Project will likely decrease pedestrian traffic). Board members Dodge and Dietrick questioned Evangelist on whether any pedestrian studies were completed, whether a Brouse Road study was needed, and whether Evangelist was aware of any accidents at the intersection of Old Road and Pinchtown Road, to which Evangelist answered—for all three questions—in the negative. RR at 80-84.

Counsel for the Appellant then introduced testimony of Michael C. Snyder (hereinafter "Snyder"), the athletic director for the Appellant. RR at 85. Snyder testified that the current facilities on the Property are used by the community everyday and that he was not aware of any safety concerns. RR at 85-86. Snyder further noted that, during the Fall and Spring seasons, approximately 150 to 200 students use the aforementioned facilities per day and that buses transport many of these students to and from the Property. RR at 87-88. Moreover, he testified that the community would continue to have access to and use of the facilities on the Property after the construction of the Proposed Project, and that the Proposed Project would have no adverse impact. RR at 88-89. Upon questioning by Board member Deitrick regarding the foot traffic of pedestrians and students and its potential impact on vehicular traffic on Old Road, Snyder responded that if pedestrians are walking along the side of the ride, then there is enough room for both pedestrians and vehicles. RR at 89-90. Finally, Board member Dodge asked Snyder about parking during sporting events and whether there would be overflow onto neighboring properties, to which Snyder responded that approximately two (2) or three (3) football games annually have a need for additional, overflow parking, but that Snyder was unaware of parking issues related to visitors. RR at 90-91.

Upon the conclusion of the Appellant's presentation, counsel for the Appellee invited members of the public to provide testimony. RR at 93-94. Several members of the public expressed their interest in testifying. RR at 94. Those testimonies included, e.g., concerns about the Proposed Project regarding the width of Old Road, the cost of the Proposed Project, the need for sidewalks, the impact on the water supply for local residents, the accuracy of the traffic studies, stormwater runoff, pedestrian safety, and the increase of traffic. RR at 94-137. On the question of the stormwater runoff, for example, Keister was asked where the Appellant planned to direct the runoff, to which Keister responded that the runoff would be directed to the small basin at the rear of the Property and the small basin at the front of the Property would be eliminated. RR at 103-111. Board member Deitrick, however, indicated that Keister's testimony contradicted Appellant's submitted plans, to which Keister responded that the plans were still being updated. RR at 112.

Upon the conclusion of the testimony and after recess, the Board members voted on a series of questions presented by counsel for the Appellee. RR at 138-143. Counsel for the Appellee then proceeded to read thirteen (13) conditions into the record, and, upon motion

to approve the conditional use with the aforementioned conditions, Board members Miller, Dodge, and Wagner voted yes, and Board members Wertz and Deitrick voted no. RR at 144-146. No Board members elected to explain his or her vote. *Id*.

On October 9, 2023, Appellee entered a written decision (hereinafter the "Written Decision"), granting Appellant's application and imposing thirteen (13) conditions, six (6) of which are at issue in the Appellant's Land Use Appeal before this Court: Condition (i) – "Pursuant to Section 11.1.C.4. and Section 11.1.C.7.a. of the Township Zoning Ordinance, the Applicant must widen Old Road to twenty feet (20') from SR 54 to the black hole creek bridge at the south-eastern end of Old Road"; Condition (ii) – "Pursuant to Section 11.1.C.4., Section 11.1.C.7.a., and Section 11.1.C.7.f. of the Township Zoning Ordinance, the Applicant must install streetlights on one (1) side of the widened Old Road to Township specifications"; Condition (iii) – "Pursuant to Section 11.1.C.4. and Section 11.1.C.7.a. of the Township Zoning Ordinance, the Applicant must install a sidewalk on one (1) side of the widened Old Road to Township specifications"; Condition (v) – "Pursuant to Section 11.1.C.4., Section 11.1.C.7.a., and Section 11.1.C.7.f. of the Township Zoning Ordinance, the Applicant must install a traffic light at the intersection of SR 54 and Old Road"; Condition (ix) – "Pursuant to Section 11.1.C.3., Section 11.1.C.5., Section 11.1.C.6., and Section 11.1.C.7.d. of the Township Zoning Ordinance, the Applicant must indemnify the [Montgomery Water Authority] for any fines or sanctions imposed on the [Montgomery Water Authority] by the Susquehanna River Basin Commission due to the Project's impact on surrounding wells"; and Condition (xii) - Pursuant to Section 11.1.C.6. and Section 11.1.C.7.f. of the Township Zoning Ordinance, the Applicant must ensure that all non-essential lighting on the Property is off by 11:00 P.M."

On March 1, 2024, both parties filed a "Joint Statement of Uncontested Facts," which indicates, e.g., that "Condition (v) which requires Appellant to install a traffic light at the intersection of SR 54 and Old Road would require Appellant to complete construction within the right of way of a State Route and Township Road"; "The Property does not directly abut the intersection of Route 54 and Old Road. The intersection is an access point to the Property"; "A traffic light cannot be built at the intersection of SR 54 and Old Road without permission and approval from the Pennsylvania Department of Transportation."

APPLICABLE ZONING ORDINANCE SECTIONS AT ISSUE

53 P.S. § 10603—"Ordinance provisions"—subsection (c)(2) states that zoning ordinances may contain "provisions for conditional uses to be allowed or denied by the governing body after recommendations by the planning agency and hearing, pursuant to express standards and criteria set forth in the zoning ordinance…In allowing a conditional use, the governing body may attach such reasonable conditions and safeguards, other than those related to off-site transportation or road improvements, in addition to those expressed in the ordinance, as it may deem necessary to implement the purposes of this act and the zoning ordinance[.]"

53 P.S. § 10502-A—"Definitions"—defines "Offsite improvements" as "those public capital improvements which are not onsite improvements and that serve the needs of more than one development." Immediately below the definition for "Offsite improvements," § 10502-A defines "Onsite improvements" as "all improvements constructed on the applicant's property, or the improvements constructed on the property abutting the applicant's property necessary for the ingress or egress to the applicant's property, and required to be constructed by the applicant pursuant to any municipal ordinance, including, but not limited to, the municipal building code, subdivision and land development ordinance, PRD regulations and zoning ordinance."

53 P.S. § 65107 states that "all townships of the second class as now exist and those created, established or reestablished after this act takes effect" are governed by the Second Class Township Code under Title 53, Part X, Chapter 141 of the Pennsylvania Statutes on Municipal and Quasi-Municipal Corporations. Clinton Township is a township of the second class, therefore Clinton Township is governed by the aforementioned Second Class Township Code.

53 P.S. § 10913.2—"Governing body's functions; conditional uses"—subsection a states that "[w]here the governing body, in the zoning ordinances, has stated conditional uses to be granted or denied by the governing body pursuant to express standards and criteria, the governing body shall hold hearings on and decide requests for such conditional uses in accordance with such standards and criteria. The hearing shall be conducted by the board or the board may appoint any member or an independent attorney as a hearing officer. The decision or, where no decision is called for, the findings shall be made by the board. However, the appellant or the applicant, as the case may be, in addition to the municipality

may, prior to the decision of the hearing, waive decision or findings by the board and accept the decision or findings of the hearing officer as final. In granting a conditional use, the governing body may attach such reasonable conditions and safeguards, in addition to those expressed in the ordinance, as it may deem necessary to implement the purposes of this act in the zoning ordinance."

JURISDICTION

Pursuant to 53 P.S. § 11002-A—"Jurisdiction and venue on appeal; time for appeal—subsection a, "[a]ll appeals from all land use decisions rendered pursuant to Article IX[] shall be taken to the court of common pleas of the judicial district wherein the land is located…." Appellant's Property bears a Tax Parcel Number 07-392-238 and an address of 537 Old Road, Montgomery, Pennsylvania 17752, therefore the Property is land located in Clinton Township, Lycoming County; therefore, this Court has jurisdiction.

STANDARD AND SCOPE OF REVIEW

This Court has taken no additional evidence on appeal. When the trial court takes no additional evidence, the scope of review in an appeal is limited to a determination of whether the governing body "abused its discretion or committed an error of law." *Warwick Land Development, Inc. v. Board of Sup'rs of Warwick Tp., Chester County*, 695 A.2d 914, 917 n. 6 (Pa. Commw. Ct. 1997) (citing *Rouse/Chamberlin, Inc. v. Board of Supervisors of Charlestown Township*, 504 A.2d 375 (Pa. Commw. Ct. 1986)); *see, generally, Appeal of M.A. Kravitz Co., Inc.*, 460 A.2d 1075, 1081 (Pa. 1983)("In considering a zoning appeal, where the court of common pleas takes no additional evidence, the appellate courts are limited to a determination of whether the board committed an abuse of discretion or error of law.").

Moreover, "[a]n abuse of discretion exists if the Board of Supervisors' findings are not supported by substantial competent evidence." 695 A.2d at 917 n. 5; *see In re Richboro CD Partners, L.P.*, 89 A.3d 742, 754-755 (Pa. Commw. Ct. 2014)("In conditional use proceedings where the trial court has taken no additional evidence, the Board is the finder of fact, empowered to judge the credibility of witnesses and the weight afforded to their testimony; a court may not substitute its interpretation of the evidence for that of the Board.")(citing *Tennyson v. Zoning Hearing Board of West Bradford Township*, 952 A.2d 739, 743 n. 5 (Pa. Commw. Ct. 2008); *In re Cutler Group, Inc.*, 880 A.2d 39, 46 (Pa.

Commw. Ct. 2005)); *see, generally, Valley View Civic Association v. Zoning Board of Adjustment*, 462 A.2d 637, 639-640 (Pa. 1983)("the Board abused its discretion only if its findings are not supported by substantial evidence.").

"Substantial evidence" is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. 462 A.2d at 640 (citing *Consolidated Edison Co. v. NLRB*, 305 U.S. 197 (1938); *Republic Steel Corp. v. Workmen's Compensation Appeal Board*, 421 A.2d 1060 (Pa. 1980); *Norfolk and Western Railway Co. v. Pennsylvania Public Utility Commission*, 413 A.2d 1037 (Pa. 1980); *Pennsylvania State Board of Medical Education and Licensure v. Schireson*, 61 A.2d 343 (Pa. 1948); *Pennsylvania Labor Relations Board v. Kaufmann Department Stores, Inc.*, 29 A.2d 90 (Pa. 1942)).

Citing *Smith v. Zoning Hearing Bd.*, 734 A.2d 55, 57 (Pa. Commw. Ct. 1999), our Commonwealth Court noted the "common rule that appellate courts reviewing a governing body's adjudication of a conditional use application generally should defer to the interpretation rendered by the governing body[]"; however, our Commonwealth Court also noted that "[t]his rule must sometimes bend to the second rule, found in [53 P.S. § 10603.1], which provides: '[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 enacted by the governing body, in favor of the property owner and against any implied extension of the restriction.'" *Williams Holding Group, LLC v. Board of Sup'rs of West Hanover Tp.*, 101 A.3d 1202, 1213 (Pa. Commw. Ct. 2014). Our Commonwealth Court therefore concluded that "ambiguous language in an ordinance" must be interpreted "in favor of the property owner and against any implied extension of the restriction." *Id.* (citing *Isaacs v. Wilkes–Barre City Zoning Hearing Bd.*, 612 A.2d 559, 561 (Pa. Commw. Ct. 1992)); *see, generally, Kleinman v. Lower Merion Tp. Zoning Hearing Bd.*, 916 A.2d 726, 728 (Pa. Commw. Ct. 2006)(opining that a provision is ambiguous when "it is open to more than one interpretation" and "[b]ecause the language is ambiguous…the trial court correctly construed the language in favor of the landowner.").

Additionally, "[w]hen interpreting zoning ordinances, this Court relies on the common usage of words and phrases and construes language in a sensible manner." *City of Hope v. Sadsbury Tp. Zoning Hearing Bd.*, 890 A.2d 1137, 1143-1144 (Pa. Commw. Ct.

2006)(citing *Steeley v. Richland Twp.*, 875 A.2d 409, 414 (Pa. Commw. Ct. 2005)). As noted by our Commonwealth Court:

> The question of whether a proposed use falls within a given category specified in an ordinance is a question of law. *Danwell Corp. v. Zoning Hearing Board of Plymouth Township*, 115 Pa. Commonwealth Ct. 174, 540 A.2d 588, *petition for allowance of appeal denied*, 520 Pa. 620, 554 A.2d 511 (1988). This issue is one of statutory construction in which the function of this court is to determine the intent of the legislative body which enacted the ordinance. Accordingly, the court is bound by the definition of the terms in question as the ordinance itself defines them. However, where the "ordinance does not specifically define the term sought to be construed, and the words are ones in common usage, they are to be given their common usage meaning." *Id*. at 184, 540 A.2d at 593.

Sabatine v. Zoning Hearing Bd. of Washington Tp., 651 A.2d 649, 653 (Pa. Commw. Ct. 1994).

III. QUESTIONS PRESENTED

A. Whether Appellee committed an error of law by imposing conditions (i), (ii), (iii), and (v).

B. Whether Appellee abused its discretion by imposing conditions (i), (ii), (iii), (v), (ix), and (xii).

IV. ANSWERS TO QUESTIONS PRESENTED

A. Appellee committed an error of law by imposing conditions (i), (ii), (iii), and (v), because conditions (i), (ii), (iii), and (v) violate 53 P.S. § 10603.

B. Appellee abused its discretion by imposing conditions (i), (ii), (iii), (v), (ix), and (xii), because the Appellee's findings of fact related to conditions (i), (ii), (iii), (v), (ix), and (xii) are not supported by substantial evidence.

V. ANALYSIS

This Court has reviewed the fifteen (15) Findings of Fact entered by the Appellee in the Written Decision of October 9, 2023, the six (6) conditions at issue listed in that Written Decision, and the Reproduced Record. This Court notes that not every Finding of Fact in that Written Decision is a true Finding of Fact—in other words, some are actually

conclusions and/or restatements of law. This Court will proceed, below, to first restate the law on conditional use under 53 P.S. § 10603. This Court will then proceed to analyze each enumerated Finding of Fact and each enumerated condition at issue.

The law on conditional use under 53 P.S. § 10603

In *Clinton County Solid Waste Authority v. Wayne Township*, 643 A.2d 1162 (Pa. Commw. Ct. 1994), our Commonwealth Court restated that, under 53 P.S. § 10603(c)(2), "it is clear that the Supervisors, as the governing body of the township,[] have the authority to grant conditional uses pursuant to the express standards and criteria set forth in the zoning ordinances enacted by the Supervisors to regulate land use pursuant to the police power." 643 A.2d at 1168 (citing 53 P.S. § 10603(c)(2); 53 P.S. § 10601; *Hill v. Zoning Hearing Board of Maxatawny Township*, 597 A.2d 1245 (Pa. Commw. Ct. 1991)). What is equally clear and "well-settled" is the law on conditional uses:

> A conditional use is one that has been legislatively approved for a particular zoning district, so long as the proposed use satisfies the standards for such a use set forth in the zoning ordinance. *Ligo v. Slippery Rock Township*, 936 A.2d 1236, 1242 (Pa.Cmwlth.2007). Once that burden is satisfied, the applicant is entitled to the conditional use, and the burden shifts to the objectors. The objectors must prove, to a high degree of probability, that aspects of the proposed use will adversely impact the health, safety and welfare of the community in ways not expected by the legislative body when it established its list of approved, conditional uses. *East Manchester Zoning Hearing Board v. Dallmeyer*, 147 Pa.Cmwlth. 671, 609 A.2d 604, 610 (1992). Speculation of possible harms is not sufficient to satisfy this burden. *Id*.
> ….
> Reasonable conditions are those that advance a valid zoning interest and are supported by the evidence of record. *See* ROBERT S. RYAN, PENNSYLVANIA ZONING LAW AND PRACTICE § 9.4.19 (1981).

HHI Trucking & Supply, Inc. v. Borough Council of Borough of Oakmont, 990 A.2d 152, 159 (Pa. Commw. Ct. 2010); *City of Hope v. Sadsbury Tp. Zoning Hearing Bd.*, 890 A.2d 1137, 1147-1148 (Pa. Commw. Ct. 2006); *see, e.g., In re Richboro CD Partners, L.P.*, 89 A.3d 742, 754 (Pa. Commw. Ct. 2014)("In order to deny a conditional use based upon the high degree of probability that the traffic impact will pose a substantial threat to the community, objectors have a high burden. Objectors must demonstrate that the conditional use will generate traffic patterns not normally generated by other permitted uses and that this abnormal traffic pattern will pose a substantial threat to the health, safety, and welfare of the community.")(citing *Joseph v. North Whitehall Township Board of Supervisors*, 16 A.3d

1209, 1217 (Pa. Commw. Ct. 2011); *Borough of Perkasie v. Moulton Builders, Inc.*, 850 A.2d 778, 782 (Pa. Commw. Ct. 2004); *Appeal of Brickstone Realty*, 789 A.2d 333, 341–342 (Pa. Commw. Ct. 2001)).

In *HHI Trucking and Supply, Inc.*, the property owner requested approval to build a concrete plant in a zoning district where a concrete plant was permitted as a conditional use. 990 A.2d at 155. Access to the proposed concrete plant was provided by a road which lacked shoulders, had deteriorating pavement, and experienced significant truck traffic. *Id*. During the hearings on the property owner's conditional use application, objectors to the application argued that the proposed concrete plant was located near residential neighborhood homes. *Id*. The property owner presented expert witnesses who addressed, among various issues, the trucking traffic on the access road, construction and operation of the concrete plant, storm water management, noise, etc. *Id*. Objectors to the application also presented expert witnesses to refute the expert testimony presented by the property owner. *Id*. Residents of that borough also testified of their concerns regarding the adverse impact of the propose concrete plant to their community. *Id*. At the conclusion of those hearings, the borough council granted the property owner's application, but imposed thirty-three (33) conditions, many of which addressed the plant operations, stormwater management, lighting, traffic, etc. *Id*. The property owner appealed fourteen (14) of those thirty-three (33) conditions, contending that those conditions were "unreasonable and effectively prevent it from either building or operating its proposed plant." *Id*. A challenged condition, for example, was with regard to "Transportation and Traffic Improvements," which stated that the property owner "shall facilitate and pay for the engineering and construction of roadway improvements to widen" the access road in question "to alleviate existing structural and safety problems that exist due to the current narrowness" of that access road. *Id*. The trial court, which did not take any additional evidence, reasoned that those fourteen (14) conditions were unsupported by the record evidence; therefore, the trial court affirmed the approval of the property owner's application but voided the fourteen (14) conditions imposed by the borough council. *Id*. The borough council, relying on *Leckey v. Lower Southampton Township Zoning Hearing Boa*rd, 864 A.2d 593, 596 (Pa. Commw. Ct. 2004), appealed to the Commonwealth Court, arguing that the trial court erred in voiding those fourteen (14) conditions because the trial court's order did not specifically address each of those conditions, and therefore erroneously "placed the burden on [the borough council] to justify each condition." *Id*.

Our Commonwealth Court rejected the borough council's argument:

> First, the trial court did not place the burden upon Borough Council. Rather, the trial court held that HHI met its burden on appeal by showing that the 14 conditions were unreasonable.
>
> Second, *Leckey* does not mean, as suggested by Borough Council, that a municipality can devise conditions out of thin air and without any reference to the record evidence. The trial court held, although not expressed in precisely this way, that where a municipality imposes a condition to prevent "harm" for which there is no evidence in the record, that condition is not reasonable. Stated otherwise, the municipality abuses its discretion when it imposes a condition without supporting evidence in the record. This logic is consistent with our holding in *Coal Gas Recovery, L.P. v. Franklin Township Zoning Hearing Board*, 944 A.2d 832 (Pa.Cmwlth.2008), where we stated that when findings of a zoning hearing board are not supported by record evidence, the board has abused its discretion.
>
> Third, a reasonable condition is one that relates to a standard adopted in the applicable zoning ordinance. This is necessary because a zoning hearing board's jurisdiction is limited to enforcement of the zoning ordinance. A zoning hearing board does not enjoy broad, inchoate powers to advance its members' vision of what constitutes the public welfare or even the public welfare as defined in a variety of environmental protection statutes, be they state or federal. Other governmental agencies bear that enforcement authority.[] A zoning hearing board's authority is defined by the MPC and the zoning ordinance.
>
> In sum, to be reasonable, a condition must relate to a zoning ordinance standard or be authorized by the MPC. Factual findings on which the condition is premised must be supported by record evidence. If not, a zoning hearing board, or municipality, abuses its discretion when it imposes such a condition. In *Commonwealth ex rel. Corbett v. Snyder*, 977 A.2d 28 (Pa.Cmwlth.2009), this Court defined an abuse of discretion as "a judgment that is plainly unreasonable, arbitrary or capricious, fails to apply the law, or was motivated by partiality, prejudice, bias or ill will." *Id*. at 41 (quoting *Ambrogi v. Reber*, 932 A.2d 969, 974 (Pa.Super.2007)).

HHI Trucking & Supply, Inc. v. Borough Council of Borough of Oakmont, 990 A.2d 152, 160 (Pa. Commw. Ct. 2010).

Our Commonwealth Court, in *HHI Trucking & Supply, Inc.*, concluded, for example, that the conditions regarding "Transportation and Traffic Improvements"—which required

the property owner to widen the access road, were "unreasonable *per se*"—and therefore unlawful—because those conditions were "relate[d] 'to off-site transportation or road improvements'" and therefore violated 53 P.S. § 10603(c)(2). *Id*. at 163 (quoting 53 P.S. § 10603(c)(2)). The Commonwealth Court, in affirming the trial court's order, further explained that "[i]n the absence of evidence in the record explaining their need, these conditions appear to have been drawn from thin air, which is arbitrary and capricious. Further, without evidence, it is impossible to determine whether the municipality has acted reasonably in its imposition of a condition." *Id*.

The fifteen (15) Findings of Fact from the Appellee's Written Decision

1. *Notice of the Hearing was advertised, posted, and mailed in accordance with Section 908(1) of the Pennsylvania Municipalities Planning Code ("MPC").*

   This Appellee Finding is a true Finding of Fact and is supported by the record.

2. *The Applicant is the owner of the Property where the conditional use is requested.*

   This Appellee Finding is a true Finding of Fact and is supported by the record.

3. *The Property is located at 537 Old Road, Montgomery, Clinton Township, Pennsylvania 17752, Parcel No.: 07-392-238, which is situated in the low-Density Residential (R-1) Zoning District of the Township.*

   This Appellee Finding is a true Finding of Fact and is supported by the record.

4. *Section 2.1A of the Township Zoning Ordinance defines the purpose of the R-1 Zoning District.*

   This Appellee Finding is not a true Finding of Fact, but a restatement of the Township Ordinance.

5. *Section 3.31 of the Township Zoning Ordinance identifies "Public and quasi-public structures and uses" as a conditional use in the R-1 Zoning District.*

   This Appellee Finding is not a true Finding of Fact, but a restatement of the Township Ordinance.

6. *Section 4.809 of the Township Zoning Ordinance defines "public and quasi-public structures and uses" to include schools and similar public or semi-public community facilities, which definition includes the proposed Project.*

   This Appellee Finding is not a true Finding of Fact, but a restatement of the Township Ordinance.

7. *The Property is currently used as the Montgomery Area Athletic and Community Center, which includes a community building, football and track stadium, baseball and softball fields, tennis courts, and a soccer field utilized by the Montgomery Area School District and partially open to the general public.*

   This Appellee Finding is a true Finding of Fact and is supported by the record.

8. *Section 14.1 of the Township Zoning Ordinance defines a "conditional use" as "a use permitted in a certain zoning district as provided for in Article 3, which must be approved by the Board of Supervisors."*

   This Appellee Finding is not a true Finding of Fact, but a restatement of the Township Ordinance.

9. *Section 11.1 of the Township Zoning Ordinance expands on the definition of a conditional use by stating, "the Supervisors…may also attach other reasonable conditions and safeguards as deemed appropriate to protect the public welfare and to implement the purposes of this Ordinance."*

   This Appellee Finding is not a true Finding of Fact, but a restatement of the Township Ordinance.

10. *Section 11.1 of the Township Zoning Ordinance sets forth the requirements that must be met for a conditional use application.*

    This Appellee Finding is not a true Finding of Fact, but a restatement of the Township Ordinance.

11. *The Applicant submitted an acceptable written statement in accordance with Section 11.1.A. of the Township Zoning Ordinance.*

    This Appellee Finding is a true Finding of Fact and is supported by the record.

12. *At the conditional use stage of the process, the Applicant submitted an acceptable site plan in accordance with Section 11.1.B. of the Township Zoning Ordinance.*

    This Appellee Finding is a true Finding of Fact and is supported by the record.

13. *Section 11.1.C[.] of the Township Zoning Ordinance specifies certain standards and criteria (in addition to those outlined in Article IV) the Board must consider when deciding on a conditional use application.*

    This Appellee Finding is not a true Finding of Fact, but a restatement of the Township Ordinance.

14. *The Applicant did demonstrate to the Board that the proposed Project satisfies the requirements under Section 11.1.C. of the Township Zoning Ordinance, provided that the conditions and safeguards established by the Board (as hereinafter described) are met.*

    This Appellee Finding is not a true Finding of Fact, but simply a Conclusion of Law, and—as this Court more fully reasoned hereinbefore and hereinafter—is not supported by substantial evidence in the record with regard to conditions (i), (ii), (iii), (v), (ix), and (xii).

15. *Pursuant to Section 11.1 of the Township Zoning Ordinance, the Board has attached the conditions and safeguards listed in its Decision below in order to protect the public welfare and to implement the purposes of the Zoning Ordinances.*

    This Appellee Finding is not a true Finding of Fact, but simply a Conclusion of Law, and—as this Court more fully reasoned hereinbefore and hereinafter—is not supported by substantial evidence in the record with regard to conditions (i), (ii), (iii), (v), (ix), and (xii).

The six (6) conditions at issue from the Appellee's Written Decision

1. *Condition (i) – "Pursuant to Section 11.1.C.4. and Section 11.1.C.7.a. of the Township Zoning Ordinance, the Applicant must widen Old Road to twenty feet (20') from SR 54 to the black hole creek bridge at the south-eastern end of Old Road"*

    This Appellee condition, listed in Section IV, "DECISION," from the Appellee's Written Decision is not supported by substantial evidence in the record—

therefore is an abuse of discretion—and also violates 53 P.S. § 10603(c)(2)—therefore is an error of law.

Contrary to the mandates of condition (i) here, the record shows that Appellant introduced exhibits and expert testimony that demonstrated, among other things, that a bus turning template (which, according to Appellant's expert, is how PennDOT conducts similar studies) showed that—except for modifications to shrubbery at the intersection of Old Road and S.R. 54—all other PennDOT sight distance requirements were satisfied. RR at 32-36. Furthermore, on the issue of sight distance, a civil engineer testified that the Proposed Project will not create hazardous conditions to vehicles or pedestrians, and that the proposed site plan provided adequate off-street parking and loading areas. RR at 36-39. Exhibits regarding bus routes and expert testimony were also introduced by Appellant to demonstrate that the Proposed Project would not have any adverse effect on pedestrians or vehicular traffic, or adversely impact the neighborhood—in fact, Appellant's head of transportation testified that the Proposed Project will likely decrease pedestrian traffic. RR at 74-79. Additional expert testimony from the Appellant's athletic director further revealed that there is enough room for both pedestrians and vehicles on Old Road and that he was unaware of parking issues related to visitors. RR at 88-91. Appellee presented no expert testimony to either contradict the testimony and exhibits introduced by Appellant or show alternative reasons on why/how developing the Proposed Project would have an adverse impact in this regard. *See, e.g., HHI Trucking & Supply, Inc. v. Borough Council of Borough of Oakmont*, 990 A.2d 152, 159 (Pa. Commw. Ct. 2010) (opining that "[t]he objectors must prove, to a high degree of probability, that aspects of the proposed use will adversely impact the health, safety and welfare of the community in ways not expected by the legislative body when it established its list of approved, conditional uses" and "[s]peculation of possible harms is not sufficient to satisfy [objector's] burden.")(citing *East Manchester Zoning Hearing Board v. Dallmeyer*, 609 A.2d 604, 610 (Pa. Commw. Ct. 1992)). Moreover, although residents testified to concerns about the width of the road in question, Appellant's expert addressed those concerns. RR at 94-96.

Because the Appellee ignored the aforementioned evidence in reaching this condition, the Appellee's condition here is not supported by substantial evidence and

therefore constitutes an abuse of discretion. *Id*. at 160 (opining that the law on conditional use in Pennsylvania does not suggest that a governing body may "devise conditions out of thin air and without any reference to the record evidence" and "Factual findings on which the condition is premised must be supported by record evidence. If not, a zoning hearing board, or municipality, abuses its discretion when it imposes such a condition.").

Moreover, condition (i) here violates 53 P.S. § 10603(c)(2)—and therefore the Appellee committed an error of law—because condition (i) relates to "off-site transportation or road improvements" that are not permitted by § 10603(c)(2). 53 P.S. § 10502-A defines "Offsite improvements" as "those public capital improvements which are not onsite improvements…." § 10502-A defines "Onsite improvements" as "all improvements constructed on the applicant's property, or the improvements constructed on the property abutting the applicant's property necessary for the ingress or egress to the applicant's property…."

In *HHI Trucking & Supply, Inc.*, our Commonwealth Court made it clear that requiring a conditional use applicant to widen roads that relate to "off-site transportation or road improvements" violates 53 P.S. § 10603(c)(2). 990 A.2d at 163; *cf. Hydropress Environmental Services, Inc. v. Township of Upper Mount Bethel, County of Northampton*, 836 A.2d 912, 920 (Pa. 2003)("[n]o legislative delegation of power to townships of the second class includes the express power to charge to road users generally or any particular subset thereof the cost of improving the roads on which they travel or to require such payers to post financial security.").

Here, parties have stipulated in a "Joint Statement of Uncontested Facts" that "[t]he Property does not directly abut the intersection of Route 54 and Old Road." In fact, the Property neither extends to, nor abuts, Old Road entirely from the intersection of Route 54 and Old Road to the Black Hole Creek bridge. Furthermore, because "this Court relies on the common usage of words and phrases and construes language in a sensible manner," this Court cannot sensibly construe "Onsite improvements" in § 10502-A to mean that Appellant—the landowner here—can be required to improve a road that runs beyond the property in question. *City of Hope v. Sadsbury Tp. Zoning Hearing Bd.*, 890 A.2d 1137, 1143-1144 (Pa. Commw. Ct. 2006)(citing *Steeley v. Richland Twp.*, 875 A.2d 409, 414 (Pa. Commw. Ct. 2005));

see, generally, Kleinman v. Lower Merion Tp. Zoning Hearing Bd., 916 A.2d 726, 728 (Pa. Commw. Ct. 2006)(opining that a provision is ambiguous when "it is open to more than one interpretation" and "[b]ecause the language is ambiguous…the trial court correctly construed the language in favor of the landowner."). Thus, condition (i) violates 53 P.S. § 10603(c)(2), and therefore the Appellee committed an error of law.

2. *Condition (ii) – "Pursuant to Section 11.1.C.4., Section 11.1.C.7.a., and Section 11.1.C.7.f. of the Township Zoning Ordinance, the Applicant must install streetlights on one (1) side of the widened Old Road to Township specifications"*

This Appellee condition, listed in Section IV, "DECISION," from the Appellee's Written Decision is not supported by substantial evidence in the record—therefore is an abuse of discretion—and also violates 53 P.S. § 10603(c)(2)—therefore is an error of law.

Contrary to the mandates of condition (ii) here—and as noted in the Court's review of condition (i)—the record shows that Appellant introduced various exhibits and expert testimony that demonstrated, among other things, the Proposed Project would not have any adverse effect on pedestrians or vehicular traffic, or adversely impact the neighborhood. *See, generally,* RR (indicating that the studies conducted here have shown, e.g., that the Proposed Project will not create hazardous conditions to vehicles or pedestrians). Again, similar to the problems noted by this Court, while some residents testified to concerns about streetlights, Appellee presented no expert testimony to either contradict the testimony and exhibits introduced by Appellant or show alternative reasons on why/how developing the Proposed Project would have an adverse impact in this regard. *See, e.g., HHI Trucking & Supply, Inc. v. Borough Council of Borough of Oakmont*, 990 A.2d 152, 159 (Pa. Commw. Ct. 2010) (opining that "[t]he objectors must prove, to a high degree of probability, that aspects of the proposed use will adversely impact the health, safety and welfare of the community in ways not expected by the legislative body when it established its list of approved, conditional uses" and "[s]peculation of possible harms is not sufficient to satisfy [objector's] burden.")(citing *East Manchester Zoning Hearing Board v. Dallmeyer*, 609 A.2d 604, 610 (Pa. Commw. Ct. 1992)).

Because the Appellee ignored the aforementioned evidence in reaching this condition, the Appellee's condition here is not supported by substantial evidence and therefore constitutes an abuse of discretion. *Id*. at 160 (opining that the law on conditional use in Pennsylvania does not suggest that a governing body may "devise conditions out of thin air and without any reference to the record evidence" and "Factual findings on which the condition is premised must be supported by record evidence. If not, a zoning hearing board, or municipality, abuses its discretion when it imposes such a condition.").

Likewise, condition (ii) here violates 53 P.S. § 10603(c)(2)—and therefore the Appellee committed an error of law—for the reasons this Court stated in its review of condition (i).

3. *Condition (iii) – "Pursuant to Section 11.1.C.4. and Section 11.1.C.7.a. of the Township Zoning Ordinance, the Applicant must install a sidewalk on one (1) side of the widened Old Road to Township specifications"*

This Appellee condition, listed in Section IV, "DECISION," from the Appellee's Written Decision is not supported by substantial evidence in the record—therefore is an abuse of discretion—and also violates 53 P.S. § 10603(c)(2)—therefore is an error of law.

Contrary to the mandates of condition (iii) here—and as noted in the Court's review of conditions (i) and (ii)—the record shows that Appellant introduced various exhibits and expert testimony that demonstrated, among other things, the Proposed Project would not have any adverse effect on pedestrians or vehicular traffic, or adversely impact the neighborhood. *See, generally,* RR (indicating that the studies conducted here have shown, e.g., that the Proposed Project will not create hazardous conditions to vehicles or pedestrians). Again, similar to the problems noted by this Court, while some residents testified to concerns about sidewalks, Appellee presented no expert testimony to either contradict the testimony and exhibits introduced by Appellant or show alternative reasons on why/how developing the Proposed Project would have an adverse impact in this regard. *See, e.g., HHI Trucking & Supply, Inc. v. Borough Council of Borough of Oakmont*, 990 A.2d 152, 159 (Pa. Commw. Ct. 2010) (opining that "[t]he objectors must prove, to a high degree of probability, that aspects of the proposed use will adversely impact the

health, safety and welfare of the community in ways not expected by the legislative body when it established its list of approved, conditional uses" and "[s]peculation of possible harms is not sufficient to satisfy [objector's] burden.")(citing *East Manchester Zoning Hearing Board v. Dallmeyer*, 609 A.2d 604, 610 (Pa. Commw. Ct. 1992)).

Because the Appellee ignored the aforementioned evidence in reaching this condition, the Appellee's condition here is not supported by substantial evidence and therefore constitutes an abuse of discretion. *Id*. at 160 (opining that the law on conditional use in Pennsylvania does not suggest that a governing body may "devise conditions out of thin air and without any reference to the record evidence" and "Factual findings on which the condition is premised must be supported by record evidence. If not, a zoning hearing board, or municipality, abuses its discretion when it imposes such a condition.").

Likewise, condition (iii) here violates 53 P.S. § 10603(c)(2)—and therefore the Appellee committed an error of law—for the reasons this Court stated in its review of condition (i).

4. *Condition (v) – "Pursuant to Section 11.1.C.4., Section 11.1.C.7.a., and Section 11.1.C.7.f. of the Township Zoning Ordinance, the Applicant must install a traffic light at the intersection of SR 54 and Old Road"*

This Appellee condition, listed in Section IV, "DECISION," from the Appellee's Written Decision is not supported by substantial evidence in the record—therefore is an abuse of discretion—and also violates 53 P.S. § 10603(c)(2)—therefore is an error of law.

Contrary to the mandates of condition (v) here, the record shows that Appellant introduced exhibits and expert testimony demonstrating—based on a traffic analysis study comporting with standards established by PennDOT—that no traffic signal was warranted/necessary for the Proposed Project; in other words, no hazard was created by the Proposed Project that would require a traffic light. RR at 47-52. Furthermore, Appellant's expert elaborated on how the traffic signal warrant analysis was conducted, opining that—relative to the particular vehicle volume at which PennDOT would mandate a traffic signal—the analysis conducted demonstrated that the vehicle volume here would be far below the threshold set by

PennDOT. RR at 54-55. Again, similar to the problems noted by this Court, while some residents testified about concerns regarding traffic lights, Appellee presented no expert testimony to either contradict the testimony and exhibits introduced by Appellant or show alternative reasons on why/how developing the Proposed Project would have an adverse impact in this regard. *See, e.g., HHI Trucking & Supply, Inc. v. Borough Council of Borough of Oakmont*, 990 A.2d 152, 159 (Pa. Commw. Ct. 2010) (opining that "[t]he objectors must prove, to a high degree of probability, that aspects of the proposed use will adversely impact the health, safety and welfare of the community in ways not expected by the legislative body when it established its list of approved, conditional uses" and "[s]peculation of possible harms is not sufficient to satisfy [objector's] burden.")(citing *East Manchester Zoning Hearing Board v. Dallmeyer*, 609 A.2d 604, 610 (Pa. Commw. Ct. 1992)).

Because the Appellee ignored the aforementioned evidence in reaching this condition, the Appellee's condition here is not supported by substantial evidence and therefore constitutes an abuse of discretion. *Id*. at 160 (opining that the law on conditional use in Pennsylvania does not suggest that a governing body may "devise conditions out of thin air and without any reference to the record evidence" and "Factual findings on which the condition is premised must be supported by record evidence. If not, a zoning hearing board, or municipality, abuses its discretion when it imposes such a condition.").

Likewise, condition (v) here also violates 53 P.S. § 10603(c)(2)—and therefore the Appellee committed an error of law—for the reasons this Court stated in its review of condition (i).

5. *Condition (ix) – "Pursuant to Section 11.1.C.3., Section 11.1.C.5., Section 11.1.C.6., and Section 11.1.C.7.d. of the Township Zoning Ordinance, the Applicant must indemnify the [Montgomery Water Authority] for any fines or sanctions imposed on the [Montgomery Water Authority] by the Susquehanna River Basin Commission due to the Project's impact on surrounding wells"*

This Appellee condition, listed in Section IV, "DECISION," from the Appellee's Written Decision is not supported by substantial evidence in the record and therefore is an abuse of discretion.

Contrary to the mandates of condition (ix) here, the record does not show that the Proposed Project would adversely impact surrounding wells. The record suggests that the Appellant owns the property on which the well is located, and that there is an agreement between the Appellant and the Montgomery Water Authority on the provision of water. RR at 98-99. While some residents testified to concerns regarding the Proposed Project's impact on the water supply, Appellee presented no expert testimony to either contradict the testimony and exhibits introduced by Appellant or show alternative reasons on why/how developing the Proposed Project would have an adverse impact in this regard. *See, e.g., HHI Trucking & Supply, Inc. v. Borough Council of Borough of Oakmont*, 990 A.2d 152, 159 (Pa. Commw. Ct. 2010) (opining that "[t]he objectors must prove, to a high degree of probability, that aspects of the proposed use will adversely impact the health, safety and welfare of the community in ways not expected by the legislative body when it established its list of approved, conditional uses" and "[s]peculation of possible harms is not sufficient to satisfy [objector's] burden.")(citing *East Manchester Zoning Hearing Board v. Dallmeyer*, 609 A.2d 604, 610 (Pa. Commw. Ct. 1992)).

Furthermore, this Court notes that, as opined by our Commonwealth Court in *State College Borough Water Authority*:

> Congress and our state legislature created the [Susquehanna River Basin Commission] in no small part to combat chaos and fragmentation in the management of the basin's water resources. As the [State College Borough Water Authority] also asserts, the Commission, as the single administrative agency empowered to oversee these resources, must approve of all the projects affecting them, subject to certain exceptions not relevant here. Article 3 of the Compact, § 3.10. Such a grant of authority vests the Commission with control over all the water resources within its jurisdiction, and defeats any notion that local governing bodies, such as the [Board of Supervisors of Halfmoon Township] in this case, may attach conditions to a project it has approved.
>
> ….
>
> Our reading of the Compact as a whole satisfies us the state legislature indicated an intention that local governing bodies should not supplement the Commission's decisions with respect to its authority to

> manage the basin's water resources. No other conclusion is logical where the Compact evinces a frustration with splintered governmental authority and responsibility, and where the Commission has been given the power to regulate water withdrawals and diversions and to determine what areas should be designated as protected or involved in an emergency situation. *See* Article 11 of the Compact.
>
> ….
>
> We hold today, however, that conditions placed on the grant of a conditional use application by a local governing body *subject to the Commission's authority*, which conditions interfere with the Commission's power to regulate area water resources, are preempted. A review of the conditions imposed by the Board and stricken by the common pleas court reveals that they were all commendable efforts to protect against *future* interference with wells in Halfmoon Township or with certain public water systems. The conditions were to provide that protection by, *inter alia*, instituting an "agreement" that the Authority pay to repair, deepen or replace any well in the township going dry after the Authority began to pump from its well; moreover, before the Authority pumped more than 1.75 mgd, it was to provide interconnects to a main line of various systems. The conditions therefore placed mandatory duties on the Authority which, in the instance of the interconnects, were to be accomplished before the Authority pumped nearly half of the maximum amount the Commission allowed it to pump per day.
>
> If this Court were to allow the imposition of these or any similar conditions by local governing bodies in their desire to protect their residents, we are certain the very mischief the Commission was designed to remedy would yet remain—that is, "a splintering of authority and responsibility." While we hold that the common pleas court properly struck down the Board's conditions, we hasten to add that this opinion in no way serves as insulation for the Authority from liability for problems it may cause by the pumping of its well.

State College Borough Water Authority v. Board of Sup'rs of Halfmoon Tp., Centre County, 659 A.2d 640, 644, 645 (Pa. Commw. Ct. 1995), *appeal denied* 670 A.2d 145, 543 Pa. 700.

As such, although *State College Borough Water Authority* does not insulate those who extract subsurface water "from liability for problems it may cause by the pumping of its wells," the Appellee *qua* Board of Supervisors plainly does not have the authority to compel the Appellant here to enter into indemnification agreements *vis-à-vis* the Montgomery Water Authority and the Susquehanna River Basin Commission. 659 A.2d at 645.

6. *Condition (xii) - Pursuant to Section 11.1.C.6. and Section 11.1.C.7.f. of the Township Zoning Ordinance, the Applicant must ensure that all non-essential lighting on the Property is off by 11:00 P.M."*

This Appellee condition, listed in Section IV, "DECISION," from the Appellee's Written Decision is not supported by substantial evidence in the record—therefore is an abuse of discretion.

Contrary to the mandates of condition (xii) here, the record shows that Appellant introduced exhibits and expert testimony demonstrating that—upon question regarding the brightness, timing, and impact of the lighting design for the Proposed Project—there is little indication that the proposed lighting design would have an adverse impact on the neighborhood. RR at 66-70. Again, similar to the problems noted by this Court, Appellee presented no expert testimony to either contradict the testimony and exhibits introduced by Appellant or show alternative reasons on why/how developing the Proposed Project would have an adverse impact in this regard. *See, e.g., HHI Trucking & Supply, Inc. v. Borough Council of Borough of Oakmont*, 990 A.2d 152, 159 (Pa. Commw. Ct. 2010) (opining that "[t]he objectors must prove, to a high degree of probability, that aspects of the proposed use will adversely impact the health, safety and welfare of the community in ways not expected by the legislative body when it established its list of approved, conditional uses" and "[s]peculation of possible harms is not sufficient to satisfy [objector's] burden.")(citing *East Manchester Zoning Hearing Board v. Dallmeyer*, 609 A.2d 604, 610 (Pa. Commw. Ct. 1992)).

Because the Appellee ignored the aforementioned evidence in reaching this condition, the Appellee's condition here is not supported by substantial evidence and therefore constitutes an abuse of discretion. *Id*. at 160 (opining that the law on conditional use in Pennsylvania does not suggest that a governing body may "devise

conditions out of thin air and without any reference to the record evidence" and "Factual findings on which the condition is premised must be supported by record evidence. If not, a zoning hearing board, or municipality, abuses its discretion when it imposes such a condition.").

VI. ORDER

Accordingly, it is hereby ORDERED and DIRECTED as follows:

1. The Appellant's Land Use Appeal (filed November 6, 2023) is hereby GRANTED;
2. Conditions (i), (ii), (iii), (v), (ix), and (xii) in Appellee's Written Decision of October 9, 2023 are STRICKEN for the reasons set forth above.

IT IS SO ORDERED.

BY THE COURT,

_____
William P. Carlucci, Judge

WPC/aml

cc: Thomas C. Marshall, Esquire
Scott T. Williams, Esquire