

**DECISION OF THE ZONING HEARING BOARD OF
LONGSWAMP TOWNSHIP, BERKS COUNTY, PENNSYLVANIA**

In Re: Application of Kevin M. Flynn for a special exception pursuant to § 413(8) of the Longswamp Township Zoning Ordinance of 2015, as amended, for the property located at 212 Kennedy Avenue in Mertztown, Longswamp Township, Berks County, Pennsylvania, bearing Map Pin No. 548303323659.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The Zoning Hearing Board of the Township of Longswamp (hereinafter referred to as the “Board”) finds as follows:

FINDINGS OF FACT

1. The property, which is the subject of this land use application, is located at 212 Kennedy Avenue Mertztown, Longswamp Township, Berks County, Pennsylvania, and bearing Map Pin No. 548303323659, (hereinafter referred to as the “Subject Property”).

2. The Applicant is Kevin M. Flynn of 212 Kennedy Avenue in Mertztown, Longswamp Township, Berks County, Pennsylvania, 19539 (hereinafter referred to as the “Applicant”).

3. The owner of the Subject Property is Kevin M. Flynn of 212 Kennedy Avenue in Mertztown, Longswamp Township, Berks County, Pennsylvania, 19539.

4. The Subject Property is located in an area zoned “R” – Rural District pursuant to a Longswamp Township Zoning Ordinance of 2015, as amended (hereinafter referred to as the “Zoning Ordinance”) and the Longswamp Township Zoning Map.

5. Public notice of the hearing of April 18, 2018, was timely advertised in the Reading Eagle, a newspaper of general circulation within Longswamp Township, on April 4, 2018 and April 11, 2018; adjacent property owners were timely notified of the hearing by mail

on March 22, 2018; and the Subject Property was timely posted with notice of the hearing on March 23, 2018.

6. The Applicant obtained title to the Subject Property in or about February of 2017.

7. In April of 2017, the Applicant appeared before the Board seeking relief identical to that sought herein which was denied by the Board.

8. The Applicant seeks to lease a portion of the Subject Property and construct a 90' x 60' pole building for seasonal storage of equipment for a commercial business.

9. There is presently a two (2) story, 2800 square foot, single family home with a 40' x 72' detached garage on the Subject Property.

10. The Subject Property is approximately 13.73 acres in total size and is irregularly shaped. The Subject Property is adjacent to Kennedy Avenue to the east, a residential development to the south, and railroad tracks to the north.

11. The Subject Property is currently used for a single family dwelling residential use and an agriculture use.

12. The Applicant has an agreement with John Rohrbach to farm approximately ten (10) acres of the Subject Property. No credible evidence was presented as to the extent of Mr. Rohrbach's rights and interests in the Subject Property or the impact on those rights and interests by the Applicant's proposed additional use of a contractor's office and shop.

13. The Applicant is currently an employee of American Turf Installers, LLC ("ATI"). ATI is owned and operated by the Applicant's father, Richard Flynn.

14. The pole barn is intended to be used for storage of the following equipment owned and used by ATI: Four (4) John Deere Progrators; three (3) street sweepers; two (2)

compact utility tractors; one (1) tract loader; one (1) mini excavator; one (1) bulldozer; seven (7) trailers; and one (1) 450 dump truck.

15. Additionally, the pole barn will be used for storage of some materials associated with the business operations of ATI, as well as being used for minimal maintenance of equipment owned by ATI.

16. The pole barn will be used for storage primarily between November 30 and May 1 of each year. Generally, the equipment will be removed from the Subject Property in the early spring of each year and returned in the fall.

17. Over the course of approximately three (3) days in the spring, ATI will load its equipment on trailers and remove the equipment from the Subject Property in the early morning hours.

18. Over the course of approximately three (3) days in the fall, ATI will unload its equipment from trailers at the Subject Property in the evening hours.

19. An unsigned written lease agreement for real property between the Applicant and ATI was introduced into evidence. To the extent the lease agreement is executed, it would grant an interest in the Subject Property to ATI.

20. To the extent the Applicant's proposal is approved, three (3) different persons or entities will have enforceable interests in portions of the Subject Property.

21. No credible evidence was presented as to what will happen to the proposed use of the pole barn if the Applicant's employment with ATI is terminated, the Applicant sells the property, or ATI chooses to move its storage location elsewhere.

22. The Applicant's proposed use of the Subject Property as a contractor's offices and shop does not constitute expansion of residential, and related non-residential, development. To the contrary, it is a commercial use.

23. The Applicant's proposed use of the Subject Property as a contractor's office and shop does not constitute a development option to allow the continued existence of agricultural operations.

24. The Applicant's proposal would result in the inclusion rather than the exclusion of activities of an intensive commercial nature.

25. The Applicant's proposal is not compatible with residential development and existing agricultural operations.

26. Noise from the proposed use may be perceptible at the property line.

27. The proposed use of the Subject Property will adversely affect the character of the general neighborhood, the conservation of the property values, and the health and safety of residents on adjacent properties.

DISCUSSION

As described hereinafter in detail, the Board finds the Applicant's request for relief must be denied.

As the Board reviews this matter, it is mindful of the purposes set forth in the Zoning Ordinance for properties located in the R-Rural District, such as the Subject Property. Specifically, the Ordinance says:

It is the purpose of this District to provide for the orderly expansion of residential, and related nonresidential, development in areas which can feasibly be supplied with public facilities; to provide development options to allow the continued existence of existing agricultural operations; to provide standards which will provide for the installation of public facilities and the preservation of permanent open space; to exclude activities of an intensive commercial or industrial nature

and any activities not compatible with residential development and existing agricultural operations; and to otherwise create conditions conducive to carrying out the purposes of this Ordinance. Development activities in this District will be encouraged to utilize the Conservation Design (Growing Greener) options to further implement the protection and preservation goals of the District.

See Zoning Ordinance § 411. The Board was cognizant of this provision as it weighed the evidence in this case.

As this Board said previously with regard to this Applicant, the burden of proof is upon the Applicant to establish through clear, definitive, and credible evidence that it is entitled to the relief sought. The Zoning Hearing Board, as fact-finder, is the sole judge of the credibility of witnesses and conflicts in the testimony. The Zoning Hearing Board has the power to reject even uncontradicted testimony if the Board finds the testimony lacking in credibility. *See Constantino v. Zoning Hearing Board*, 152 Pa.Cmwlth. 258, 264 618 A.2d 1193, 1196 (1992). In this matter, the board finds that the evidence presented by the Applicant was at times vague, speculative, and even contradictory. As a result the Board was unable to attribute to it the level of credibility necessary to grant the Applicant relief.

As was the case with the Applicant's April, 2017 application, the analysis in this case centers upon the Applicant's request for a special exception pursuant to Section 413(8) to use the Subject Property as contractor's offices and shop. A "special exception" is not a true exception to a zoning ordinance. It is a use permitted, conditionally, one to which an applicant is entitled unless it is determined according to standards set forth in the zoning ordinance that the proposed use would adversely affect the community. *Awacs, Inc. v. Zoning Hearing Board*, 702 A.2d 604, 607 (Pa.Cmwlth. 1997). A special exception is a conditionally permitted use, allowed by the legislature if specifically listed standards are met. The application is to be granted or denied by the zoning hearing board pursuant to expressed standards and criteria contained within the

zoning ordinance. *In Re Appeal of Brickstone Realty Corp.*, 789 A.2d 333, 340 (Pa.Cmwlth. 2001).

The Zoning Ordinance sets forth the following general standards that must be met to grant a special exception.

- a. Such use shall be one which is specifically authorized as a Special Exception Use in the Zoning District wherein the applicant seeks a Special Exception.
- b. Such Special Exception shall only be granted subject to any applicable condition and safeguards as required by this Ordinance.
- c. Such use shall not adversely affect the character of the general neighborhood, nor the conservation of property values, nor the health and safety of residents or workers on adjacent properties and in the general neighborhood.
- d. Such use shall be of such size and so located and laid out in relation to its access streets that vehicular and pedestrian traffic to and from such use will not create undue congestion or hazards prejudicial to the general neighborhood.
- e. Services and utilities shall be made available to adequately service the proposed use.
- f. The granting of the Special Exception shall be consistent with the Township Comprehensive Plan.

See Zoning Ordinance § 1002. In addition to the general standards, § 413(8) of the Zoning Ordinance requires compliance with the following specific standards of § 724 for a contractor's office or shop:

Contractor's office or shop in the Conservation and Rural Zoning Districts are subject to the following criteria:

1. Construction vehicles and equipment shall be stored within enclosed structures.
2. A 10-foot buffer yard, shall be provided along side and rear lot lines unless a larger buffer yard is required under other provisions of this Ordinance.
3. Off-street parking shall be provided in accordance with the requirements of Article VI.
4. Hours of operation on site shall be limited to minimize impacts on adjacent residential uses.

5. No outdoor storage of supplies inventory, or materials, used in the contractor's operation shall be permitted.

6. Any activities that produce noxious dust, odor, light, or noise, perceptible at the property line are prohibited.

See Zoning Ordinance §724. In this case, the Applicant did not credibly establish that he will be in compliance with these provisions.

Overall, the Board concludes the Applicant's proposal is not consistent with the specific intent of the Rural Zoning District as set forth in § 411 of the Ordinance. Specifically, (1) the Applicant's proposal is not residential, and related non-residential, development; (2) it does not provide development options to allow the continued existence of agricultural operations; (3) it does not exclude activities of an intensive commercial nature, and (4) it includes activities that are not compatible with residential development and existing agricultural activities. As a result, the Board finds the Applicant's proposed commercialization of what is an otherwise residential and agricultural property would have an adverse impact in violation of § 1002(c) of the Zoning Ordinance.

The Board also finds a lack of any detailed, credible evidence relating to the agricultural uses at the Subject Property. The Board rejects the Applicant's contention that the addition of the proposed commercial use adds a second use to the Subject Property. To the contrary, the Board finds it adds a third use. Specifically, the Applicant's residence is a use permitted by right pursuant to § 412(2) of the Zoning Ordinance. The existing farming use may be a use permitted by right pursuant to § 412(4), however, intensive agriculture is not. Finally, contractor's offices or shops are a third use permitted by special exception. In this case, as was the situation at the prior hearing, the Applicant's evidence regarding the existing agricultural use was so vague the Board could not credit the balance of the testimony presented to determine the impact of the proposal on the Subject Property as a whole and surrounding properties.

The Board is also troubled by inconsistencies in the testimony of Kevin Flynn such that it cannot give his testimony weight to meet the burden of persuasion put on the Applicant. Specifically, the Board noted several inconsistencies between the 2017 evidence presented by Mr. Flynn and the current evidence, all of which was presented without explanation. Among other things, these inconsistencies included issues relating to hours of operation, amount of property being farmed, and use of parking and non-parking areas.

Although the Applicant indicated the equipment would be removed in the morning in the Spring and returned in the evening in the Fall, the evidence did not credibly establish efforts to establish hours of operation designed to minimize impact on adjacent residential uses. As a result, the Board cannot find credible testimony exists to establish compliance with § 724(4).

The Board also found the testimony of a neighboring property owner credible regarding his concern that noise will be perceptible at the property line. The Board rejected the Applicant's testimony regarding noise. As a result, the Applicant has not established compliance with § 724(6).

For the foregoing reasons the Applicant's request for a special exception is denied.

CONCLUSIONS OF LAW

1. The Zoning Hearing Board of Longswamp Township has jurisdiction to decide this land use application pursuant to the Longswamp Township Zoning Ordinance of 2015, as amended, and the Pennsylvania Municipalities Planning Code of 1968, P.L. 805, No. 246 as reenacted and amended, 53 Pa.C.S.A. §10901.1, *et seq.*

2. Pursuant to the Zoning Ordinance, the Board shall hear and decide requests for special exceptions filed with the Board in writing, as provided for in the Zoning Ordinance and in accordance with all standards and criteria contained in the Zoning Ordinance.

3. The Applicant has not met all of the requirements of § 413(8), § 724 and § 1002 of the Zoning Ordinance to obtain a special exception.

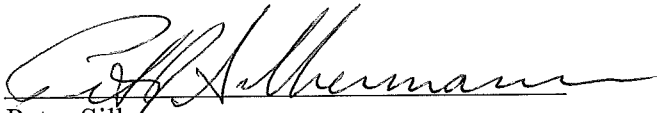
ORDER

AND NOW, the Longswamp Township Zoning Hearing Board, by a unanimous vote, hereby rules as follows:

The Applicant's request for a special exception from § 413(8) of the Zoning Ordinance is DENIED.

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Longswamp Township Zoning Hearing Board:

By: 
Peter Silberman

By: ABSENT
Steven Russo

By: 
Mark Story

Date of Issuance of Written Decision: 4/23/18

ANY AGGRIEVED PERSON MAY APPEAL THIS DECISION TO THE COURT OF COMMON PLEAS OF BERKS COUNTY, PENNSYLVANIA, WITHIN THIRTY (30) DAYS FROM THE DATE OF THE ISSUANCE OF THIS WRITTEN DECISION.