



COMMONWEALTH OF PENNSYLVANIA  
ENVIRONMENTAL HEARING BOARD

<b>DAVID C. BERNSTEIN</b>	:	
	:	
v.	:	<b>EHB Docket No. 2023-090-BP</b>
	:	<b>(Consolidated with 2024-006-BP)</b>
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<b>COMMONWEALTH OF PENNSYLVANIA,</b>	:	
<b>DEPARTMENT OF ENVIRONMENTAL</b>	:	
<b>PROTECTION and MONTGOMERY</b>	:	<b>Issued: February 21, 2025</b>
<b>COUNTY CONSERVATION DISTRICT, and</b>	:	
<b>222 CHURCH ROAD LLC, Permittee</b>	:	

**OPINION AND ORDER ON  
THE DEPARTMENT OF ENVIRONMENTAL PROTECTION AND THE  
MONTGOMERY COUNTY CONSERVATION DISTRICT’S  
MOTION FOR PARTIAL SUMMARY JUDGMENT**

**By Paul J. Bruder, Jr. Judge**

**Synopsis**

The Environmental Hearing Board (“Board”) denies the Department of Environmental Protection and the Montgomery County Conservation District’s (collectively referred to as “the Agencies”) Motion for Partial Summary Judgment as genuine issues of material fact and law exist regarding the Agencies’ discretion in the consideration of Mr. Bernstein’s Montgomery County Court of Common Pleas land use appeals.

**OPINION**

**Introduction**

This third-party appeal centers around a National Pollutant Discharge Elimination System (“NPDES”) general permit, PAC460811 (“the permit”) issued to 222 Church Road, LLC. Appellant David C. Bernstein (“Mr. Bernstein”) filed two appeals with the Board regarding the subject permit. The first Board appeal occurred in November 2023 and challenged the

Montgomery County Conservation District’s (“MCCD”) issuance of the permit. The second appeal was filed in January 2024 and challenged the Department of Environmental Protection’s (“Department” or “DEP”) determination, after an informal hearing, that the MCCD’s issuance of the permit was valid. The Board consolidated the two appeals by Order dated January 22, 2024 at EHB Docket No. 2023-090-BP.

On December 16, 2024, Appellee Agencies filed a Motion for Partial Summary Judgment asking the Board to strike Mr. Bernstein’s Notice of Appeal paragraphs 12a,<sup>1</sup> 13a,<sup>2</sup> 17D,<sup>3</sup> 19,<sup>4</sup> and 22,<sup>5</sup> as they relate to the Agencies’ consideration of Mr. Bernstein’s two pending Montgomery County Court of Common Pleas appeals. Appellant filed his Response to said Motion on January 15, 2025. Appellee Agencies did not file a Reply Brief. This matter is ready for review and disposition.

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<sup>1</sup> “MCCD failed to adequately account for Mr. Bernstein’s appeals of the Township of Cheltenham Board of Commissioner’ preliminary and final land development approvals for the project. The Department should rescind the MCCD Approval and withhold further review until resolution of those appeals[.]” (See NOA e-filed on January 10, 2024 at ¶ 12(a)).

<sup>2</sup> “MCCD failed to adequately account for Mr. Bernstein’s appeals of the Township of Cheltenham Board of Commissioner’ preliminary and final land development approvals for the project. The Department should rescind MCCD’s approval and withhold further review until resolution of those appeals[.]” (See NOA on January 10, 2024 at ¶ 13(a)).

<sup>3</sup> “MCCD’s review and approval failed to properly account for Mr. Bernstein’s underlying appeals of two local subdivision and land development approvals to the Montgomery County Court of Common Pleas. Resolution of the underlying appeals may materially impact Permittee’s ability to develop the Permittee Property and materially impact Permittee’s ability to comply with PAG-02.” (See NOA e-filed on November 8, 2023 at ¶ 17(d)).

<sup>4</sup> “MCCD’s action violates Article 1, Section 27 of the Pennsylvania Constitution and Acts 67 and 68, 53 P.S. §§ 10619.2 and 11105, because MCCD did not account for the two pending appeals before the Montgomery County Court of Common Pleas.” (See NOA e-filed on November 8, 2023 at ¶ 19).

<sup>5</sup> “The Department’s Determination violates Article 1, Section 27 of the Pennsylvania Constitution and Acts 67 and 68, 53 P.S. §§ 10619.2 and 11105, because the Department did not account for the two pending appeals before the Montgomery County Court of Common Pleas[.]” (See NOA e-filed on January 10, 2024 at ¶ 22).

## Background

In 2021, Appellant Mr. Bernstein sold 222 Church Road, Elkins Park, Cheltenham Township, Montgomery County, Pennsylvania 19027 (“Site”) to Permittee, 222 Church Road, LLC (“Permittee”). (See Appellant’s Resp. to DEP’s First Set of Req. for Admissions at ¶¶ 5 & 7). Mr. Bernstein currently owns 216 Church Road, Elkins Park which is directly adjacent to the Site. (See NOA, November 8, 2023 at ¶¶ 1 & 3).

After the purchase,<sup>6</sup> Permittee filed a subdivision and land development application to Cheltenham Township seeking approval to construct eight new single-family homes and a cul-de-sac on the Site. (See NOA, November 8, 2023 at ¶ 5). In 2022, Cheltenham Township granted Permittee’s preliminary subdivision and land development approvals, and in 2023, Cheltenham Township granted Permittee’s final subdivision and land development approvals. Mr. Bernstein filed appeals of those two actions in the Montgomery County Court of Common Pleas (“land use appeals”). (See NOA, November 8, 2023 at ¶ 6 & Appellees’ Summ. J. Brief at pg. 3 n.3).<sup>7</sup>

Separately, in November 2021, Permittee applied to the MCCD for a general permit for discharge of stormwater associated with construction activities for development associated at the Site. (See NOA, November 8, 2023 at ¶ 4). Between November 2021 and October 2023, MCCD rejected several applications for a general permit submitted by Permittee. (See NOA, November 8, 2023 at ¶ 7). The MCCD also received several sets of comments on the proposed project at the Site on May 26, 2023, June 7, 2023, and August 18, 2023. (Ex. DEP-6, Affidavit of Elise Eggert

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<sup>6</sup> An exact date has not been provided.

<sup>7</sup> The Montgomery County Court of Common Pleas dockets are *Bernstein v. Cheltenham Twp. Bd. Of Comm’rs*, 2022-07062 (Appeal of Cheltenham Twp. Bd. of Supervisors Resolution 08-22 granting preliminary land development approval for 222 Church Rd.) (filed May 17, 2022) and *Bernstein v. Cheltenham Twp. Bd. Of Comm’rs*, 2023-06556 (Appeal of Cheltenham Twp. Bd. of Supervisors Resolution 08-23 granting final land development approval for 222 Church Rd.) (filed April 14, 2023).

Crowe, P.E. at ¶ 29). On August 16, 2023, MCCD asked Permittee to provide a response to the comments on the project received. (*Id.*) On September 13, 2023, Robert E. Blue Consulting Engineers, P.C. prepared a response on behalf of Permittee and forwarded it to MCCD for review. (Ex. DEP-8).

On October 9, 2023, MCCD issued the subject NPDES Permit No. PAC460811 to conduct earth disturbance activities and discharge stormwater associated with construction activities into the Tookany Creek. (*See* NOA, November 8, 2023 at ¶ 8 & Appellees' SUMF at ¶ 1). The permit includes several conditions requiring that Permittee comply with all federal, state and local requirements, including local ordinances, when it undertakes earth disturbance activities and discharges stormwater associated with construction activities at the Site. (Ex. DEP-1, Condition III.D. and Part B.II.E, pgs. 9 & 16).

On October 28, 2023, notice of MCCD's issuance of the permit was published in the *Pennsylvania Bulletin*. 53 Pa. Bull. 6716, 6755 (October 28, 2023). On November 8, 2023, Mr. Bernstein requested that the Department hold an informal hearing on the MCCD's issuance of the permit, pursuant to 25 Pa. Code § 102.32(c). (Appellees' SUMF at ¶ 4). On November 27, 2023, as part of the informal hearing process, Mr. Bernstein submitted 246 pages of comments and argument regarding the Project. (*See* Ex. DEP-9). On December 7, 2023, the Department held a virtual informal hearing where the Department accepted comments and documents from both Mr. Bernstein and Permittee's technical and legal representatives. (*See* December 11, 2023 Determination, Ex. DEP-2). After review, on December 11, 2023, the Department issued a determination affirming the MCCD's actions. (*Id.* & Appellees' SUMF at ¶ 5). The current appeal to the Board followed.

## Standard of Review

Summary judgment is appropriate when the record - including pleadings, depositions, answers to interrogatories, and other related documents - shows that there is no genuine issue of material fact in dispute and the moving party is, therefore, entitled to judgment as a matter of law. Pa.R.Civ.P. 1035.1-1035.2; *Beech Mountain Lakes Ass'n v. DEP*, 2023 EHB 221, 223. In evaluating whether summary judgment is appropriate, the Board views the record in the light most favorable to the non-moving party, and all doubts as to whether genuine issues of material fact remain must be resolved against the moving party. *Stedje v. DEP*, 2015 EHB 31, 33; *Eighty Four Mining Co. v. DEP*, 2019 EHB 585, 587 (citing *Clean Air Council v. DEP*, 2013 EHB 404, 406). Summary judgment is granted only in the clearest of cases, and usually only in cases where a limited set of material facts are truly undisputed and a clear and concise question of law is presented. *Liberty Twp. v. DEP*, 2022 EHB 324, 326; *Sludge Free UMBT v. DEP*, 2015 EHB 469, 471; *Citizens Advocates United to Safeguard the Environment v. DEP*, 2007 EHB 101, 106.

## Discussion

### *Act 67/68*

Acts 67 and 68 amended the Municipalities Planning Code to provide Commonwealth agencies, such as the Department, express authority to consider and rely on local land requirements when making permitting decisions. This authority was in doubt prior to their enactment. *Tri-County Landfill, Inc. v. DEP*, 2015 EHB 324, 329 (citing *New Hanover Twp. v. DEP*, 2011 EHB 645, 680).

Act 67, also known as the “Land Use Planning and Management Act” states: “[s]tate agencies shall consider and may rely upon comprehensive plans and zoning ordinances when reviewing applications for the funding or permitting of infrastructure or facilities.” 53 P.S. §

11105(a)(2). Act 68 compliments Act 67 by enhancing the planning capabilities of municipalities and states: “[w]hen a county adopts a comprehensive plan . . . Commonwealth agencies shall consider and may rely upon comprehensive plans and zoning ordinances when reviewing applications for the funding or permitting of infrastructure or facilities.” 53 P.S. § 10619.2(a). Additionally, Section 10619.2(c) of Act 68 states: “[w]hen municipalities adopt a joint municipal zoning ordinance: (1) Commonwealth agencies shall consider and may rely upon the joint municipal zoning ordinance for the funding or permitting of infrastructure or facilities.” In sum, Acts 67 and 68 provide agencies with an express statutory duty to consider certain local land use decisions and discretionary authority to rely upon these local decisions when reviewing applications for: (1) funding, (2) permitting of infrastructure, or (3) permitting of facilities. Act 67/68 does not prevent the issuance of permits before compliance with local ordinances is achieved but promotes acquiescence with and consideration of local regulations.

Although Acts 67 and 68 provide Commonwealth Agencies authority to rely upon comprehensive plans and zoning ordinances when reviewing applications for permitting projects; however, they do not define the term “rely upon.” Therefore, the Department has discretion in applying this language. (Ex. DEP-3 at pg. 1). To aid in the Department’s discretion, it developed the “Policy for Consideration of Local Comprehensive Plans and Zoning Ordinances in DEP Review of Authorizations for Facilities and Infrastructure” – Document No. 012-0200-001 (“Land Use Policy”). (*Id.*) The purpose of this policy document is to provide guidance and direction to the Department’s staff on how to avoid or minimize conflicts with local land use decisions. (*Id.*) Specifically, the Land Use Policy states:

The term “rely upon” is not defined in Acts 67, 68 and 127 of 2000. DEP interprets the statutory language “may rely upon” to give DEP discretion as to how to rely upon planning and zoning in its authorizations. DEP has chosen to rely upon this information in several ways. DEP can deny an application, approve the application

or put a special condition on a permit when conflicts have been identified. DEP may also decide to suspend further review of an application until the conflict has been resolved. DEP does not interpret the law to authorize DEP “to rely” solely upon a comprehensive plan, because comprehensive plans do not have the same force of law as zoning ordinances. The PA MPC requires county comprehensive plans, municipal comprehensive plans and municipal ordinances to be generally consistent.

*Id.*<sup>8</sup>

In their Motion for Partial Summary Judgment, the Agencies argue that no genuine issue of fact or law exists regarding satisfaction of their duties under the Act 67/68 Amendments. Specifically, they state that they acted in accordance with the Department’s Land Use Policy by: (1) reviewing Cheltenham Township and Montgomery County Planning Commission determinations that the Project was consistent with local zoning and the Montgomery County Comprehensive Plan; (2) using permit conditions to ensure compliance with local zoning and county planning; and (3) reviewing and considering voluminous public comments prior to issuing the Permit.

In response, Appellant argues genuine issues of material fact exist as to *how* the Agencies complied with Act 67/68 in making their final decision to approve the permit. Such issues include, but are not limited to, questions regarding MCCD’s follow up with Cheltenham Township and Montgomery County Planning Commission after learning of Mr. Bernstein’s land use appeals, how the Agencies applied the Department’s Land Use Policy to guide their review, and how the Agencies took into consideration the stormwater concerns made by Appellant.

The Board finds that this motion for summary judgment revolves around the issue of what

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<sup>8</sup> This Board has held on previous occasions that Department guidance documents do not have the weight of properly promulgated regulations, and the Board is under no duty to follow them. *PQ Corp. v DEP*, 2016 EHB 826, 837; *Winner v. DEP*, 2014 EHB 1023, 1035. *United Refining Co. v. DEP*, 2006 EHB 846. We do however recognize such documents as a tool used by the Department for the purpose of trying to establish consistent application of existing regulations.

level of effort is necessary on the part of the Agencies to prove that they had considered all local land use regulations and conflicts in efforts to protect the Commonwealth's natural resources in accordance with Act 67/68 and the Department's Land Use Policy. We find the 2015 case of *Tri-County Landfill, Inc. v. DEP*, to be particularly helpful to this analysis. *Tri-County Landfill, Inc. v. DEP*, 2015 EHB 324. In *Tri-County*, this Board stated:

Actually, we find that level of effort to be rather limited due, in large part, to the need on the part of the agency to defer to local authorities when it comes to local matters such as zoning. We have frequently held that neither the Department nor this Board has the duty or even the authority to act as a statewide zoning hearing board. To the contrary, local zoning issues must be decided at the local level. *Casey v. DEP*, 2014 EHB 439; *Lyons v. DEP*, 2011 EHB 169; *Cnty. of Berks v. DEP*, 2005 EHB 233. The Department has no role in actually enforcing local land use and zoning requirements. *New Hanover Twp.*, 2011 EHB at 680. Indeed, the Department is not required to conduct an independent investigation whether a project complies with local zoning requirements before permitting the project. *Heasley v. DER*, 1991 EHB 1758. It is only where a potential conflict between the project and local laws is brought to its attention in the course of its permit review that the Department must take the local issue into account. The Department is not required to decide the local zoning issue; it is only required to decide what to do about the permit application in light of the zoning issue. In this respect, the Department's role is analogous to its role when a legitimate dispute regarding a permittee's legal right to enter land is identified; the Department must account for the dispute, not decide it. *Empire Coal Mining & Dev. v. DER*, 678 A.2d 1218, 1222-23 (Pa. Cmwlth. 1996); *Rausch Creek Land, LP v. DEP*, 2013 EHB 587, 599-606, 613; *Chestnut Ridge Conservancy v. DEP*, 1998 EHB 217, 229.

Once a potential conflict between the project and local zoning is identified, the Department must decide what to do about it. . . . It may be appropriate in some cases to deny the permit, but it might be appropriate in other cases to suspend review of the permit, as was previously done with respect to this project. *See Tri-County Landfill v. DEP*, 2010 EHB 747. . . . It may be appropriate under other circumstances to issue the permit with conditions. *See New Hanover, supra; Lyons, supra*. Choosing among these options may depend on any number of factors, one of which might involve the degree of the perceived conflict between the project and local requirements.

*Id.* at 330-31.

Relying on the above quoted language, we look to the Agencies' arguments on what actions they took to consider whether any local land use conflicts existed and how they addressed said



conflict. The Agencies state that they: (1) obtained certification from the Municipality and County that the Project was consistent with the Township’s zoning ordinance and its stormwater management ordinance,<sup>9</sup> the Montgomery County Comprehensive Plan,<sup>10</sup> and all other county land use plans that impact the area;<sup>11</sup> and (2) took into account public comments related to land use and zoning issues in affirming the validity of the permit. Further, the Agencies argue that the permit itself includes several conditions<sup>12</sup> requiring that Permittee comply with federal, state, and local requirements, including local ordinances, when it undertakes earth disturbance activities. The Agencies provided Affidavits from Elise Eggert-Crowe, District Engineer for the MCCD, and Domenic Rocco, Director of the Bureau of Waterways Engineering and Wetlands, as well as written documentation to support their position.

Although the Board finds that the Agencies facially showed that they complied with Act 67/68, there are still outstanding questions surrounding whether Mr. Bernstein’s land use appeals constitute a zoning conflict, and if so, whether the Agencies properly evaluated how the appeals would affect the permit. The Department acknowledges that it received notice of Mr. Bernstein’s

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<sup>9</sup> On March 8, 2023, the Cheltenham Township Director of Planning and Zoning, Mr. Henry Sekawangu, acknowledged receipt of the permit application, and responded to the form by indicating, *inter alia*, that the proposed project is consistent with the Township’s zoning ordinance and its stormwater management ordinance. (See Municipal Notification Form, DEP-4 at pg. 4).

<sup>10</sup> On March 8, 2023, Jon A. Leshner, LEED, Environmental Planning Assistant Manager, MCPC, responded to the form and indicated that “your project is consistent with the Montgomery County Comprehensive Plan (adopted January 15, 2015) and all other county land use plans that impact this area...” (See County Notification Form, DEP-5 at pg. 4).

<sup>11</sup> See DEP-6 at ¶ 22-26 & DEP-7 at ¶ 20-21, 24.

<sup>12</sup> Condition III.D states: “No condition of this General Permit shall release any person from any responsibility or requirements under relevant federal or Pennsylvania environmental statutes or regulations, or under relevant local ordinances.” Part B, Standard Conditions, II. Compliance Requirements, E. Property Right states: “This General Permit does not convey any property rights of any sort, nor does this General Permit convey any exclusive privileges, and this General Permit does not authorize any injury to private property invasion of personal rights, or infringement of federal, state, or local laws or regulations.” (Ex. DEP-1, Condition III.D. and Part B.II.E, pgs. 9 & 16).

land use appeals on May 26, 2023, four months before the permit was issued. (*See* Appellees’ Summ. J. Brief at pg. 12). Additionally, the pleadings themselves were included in Bernstein’s November 27, 2023 comments (Ex. DEP-9). However, there is no evidence that the Department reviewed or considered the pleadings in the county actions, or that anyone from the Department reached out to anyone from the Township or the County to discuss the claims made, or the issues raised in the county actions. *Snyder v. DEP*, 2015 EHB 857, 876-80 (Under certain circumstances, where a potential zoning conflict is brought to the Department’s attention during the permit review process, the Department must decide how to proceed in light of that information, which is then, of course, reviewable by this Board.). Indeed, when a local land use decision is being challenged in court, the Department will have to make a permitting decision based upon the existing circumstances and status of that appeal.<sup>13</sup>

“If the Department considered an issue in its evaluation of a permit then it is likewise appropriate for us to review the same issue.” *Borough of Jessup v. DEP*, 2024 EHB 174, 176 (*quoting Marshall v. DEP*, 2020 EHB 60, 71). “Although we are not necessarily limited to what the Department considered, we clearly can and should at a minimum review what the Department did consider when we evaluate whether it made the correct decision.” *Friends of Lackawanna v.*

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<sup>13</sup> Former Board Judge Richard P. Mather, Sr., during his tenure with the Department as Director of the Bureau of Regulatory Counsel, wrote:

While local land use issues can be resolved during the Department’s review of a permit application in most situations, there may be situations where challenges to local land use decisions extend beyond the time periods, established by law or policy, for timely Department permit action. In these rare cases, the Department will be asked to consider and may rely upon a local land use decision which is being challenged in court, and it will have to make a permitting decision based upon the existing circumstances and the status of the local land use decision.

Richard P. Mather, Sr., *DEP Implementation of Acts 67 and 68*, 3 Lawyers J. 8 (2001).

*DEP*, 2017 EHB 1123, 1165. “The Board’s review considers more than whether the Department followed the laws and regulations in taking an action, but also considers whether the action was a reasonable exercise of the Department’s discretion and in accordance with the Department’s obligations under the Pennsylvania Constitution.” *Snyder*, 2015 EHB at 857. “[O]nce we enter the world of reviewing the Department’s discretion, we tend to exit the world where summary judgment is appropriate.” *Tri-County Landfill*, 2015 EHB at 333. Thus, if the Department considered Mr. Bernstein’s land use appeal, the Department’s Land Use Policy, and/or public comments and then used its discretion on these matters in making its permitting decision, the Board must decide whether it did so correctly. *See Jessup*, 2024 EHB at 176.

As such, considerations on how the Agencies used their discretion in considering local land use conflicts in their permitting decision, and whether Mr. Bernstein’s appeals constitute a zoning conflict are inappropriate for resolution on summary judgment. A hearing with the opportunity for live testimony and cross-examination on the matter is essential when dealing with matters involving discretionary actions such as these.

***Article 1, Section 27***

The Agencies further argue they are entitled to summary judgment on the Article 1, Section 27<sup>14</sup> claim made by Appellant because (1) Mr. Bernstein provides no specificity to this claim; (2)

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<sup>14</sup> Article 1, Section 27 of the Pennsylvania Constitution, also known as the Environmental Rights Amendment (“ERA”), states:

The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania’s public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

PA. CONST. art. I, § 27.

the Agencies did consider and take into account Mr. Bernstein’s Montgomery Court of Common Pleas appeals, and (3) Article 1, Section 27 does not require the Agencies to stay their permit review pending a final outcome of local litigation related to land use decisions. (Appellant’s Law Summ. J. Brief at pg. 15-17). Mr. Bernstein responds to these arguments by re-stating that there are genuine issues of material fact on *how* the Agencies addressed Mr. Bernstein’s appeals and *how* they took the appeals into consideration against the “further degradation of the environment that will result from the improperly designed and planned stormwater management facility.” (Appellants’ Resp. Brief at pg. 15). For the same reasons as stated above, the question of the Departments’ discretion and evaluation of these matters involve disputed issues of fact and law. Clearly, such matters are inappropriate for disposition in the context of a motion for summary judgment.

### **Conclusion**

Therefore, we must deny Appellees’ Motion for Partial Summary Judgment. Accordingly, we issue the Order that follows.





**For Appellant:**

Aaron S. Mapes, Esquire  
Robert J. Schena, Jr., Esquire  
(via *electronic filing system*)

**For Permittee**

Steven Hannn, Esquire  
(via *electronic filing system*)