

**IN THE CHANCERY COURT FOR BEDFORD COUNTY,
AT SHELBYVILLE**

TOMMY WRIGHT, NORMA WRIGHT)	
WRIGHT PAVING COMPANY, INC., and)	
CUSTOM STONE, LLC,)	
)	
Petitioners,)	
)	Docket No. 29858
vs.)	
)	
THE CITY OF SHELBYVILLE BOARD)	
OF ZONING APPEALS and THE CITY OF)	
SHELBYVILLE, TENNESSEE)	
)	
Respondents.)	

MEMORANDUM AND ORDER

I

Background

On February 12, 2004 the petitioners Tommy Wright, Norma Wright, Wright Paving Co., Inc., and Custom Stone, LLC first sought a permit to operate a stone quarry on their property in the City of Shelbyville. The property was zoned I-2 for industrial use, which allowed mining and quarrying as a special exception (conditional use). The City has steadfastly opposed the application, first by attempting to eliminate a quarry operation in an I-2 zone. After the Court of Appeals held that the change in the zoning ordinance was invalid¹, the City Board of Zoning Appeals subsequently denied the Wrights' request for a hearing on the ground that an earlier request for a delay was an actual withdrawal of the application. The Court of Appeals held that the Board's denial of a hearing on the original, amended application was arbitrary and

¹ *Wright v. City of Shelbyville*, M2009-00321-COA-R3 –CV, 2009 WL 3631019 (Tenn. Ct. App. Nov.3, 2009) (Rule 11 perm. app. denied April 14, 2010).

capricious. In an opinion filed on October 31, 2012² the Court remanded the case to the BZA for consideration of the 2004 application as updated.

The BZA considered the application on April 25, 2013 and again denied it. The petitioners seek a review under the writ of certiorari.

II

Standard of Review

The Court's review of an administrative decision by common law writ of certiorari is limited to a determination of whether the agency exceeded its jurisdiction, followed unlawful procedure, or acted arbitrarily or capriciously. *Hemontoler v. Wilson County Board of Zoning Appeals*, 883 S.W.2d 613 (Tenn. Ct. App. 1994). An agency's decision is arbitrary if it is not supported by material evidence. *Waste Collections of Tennessee v. Metro Government*, 2013 WL 1282011 at *4 (Tenn. Ct. App. 2013).

III

A Special Exception

A "Special Exception" is not an exception to the zoning ordinance at all. It is, instead, a use of property that is specifically allowed, subject to the satisfaction of certain conditions set out in the ordinance. Therefore, it is more commonly called a "conditional use." *Demonbreun v.*

Metropolitan Board of Zoning Appeals, 2011 WL 2416722 (Tenn. Ct. App. 2011).

The inclusion of the particular use in the ordinance as one that is permitted under certain conditions is equivalent to a legislative finding that the prescribed use is one which is in harmony with the other uses permitted in the district...the special exception permit must be granted to any and all property that meets the conditions specified.

Id., at *6 (quoting 3 Rathkopf's THE LAW OF ZONING AND PLANNING § 61:9 (4th ed.)).

²*Wright v. City of Shelbyville*, M2011-01446-COA-R3 –CV, 2012 WL 5378267 (Tenn. Ct. App. Jan.25, 2012) (Rule 11 perm. app. denied February 12, 2013).

The allowance of a conditional use constitutes a finding by the local legislative body that the use accords with the general zoning plan, is in harmony with, or will not adversely affect, the surrounding neighborhood, and meets a public need. *Id.*, at *7.

It logically follows that the board cannot deny a permit on grounds not expressly stated in the zoning ordinance and cannot deny a fully compliant request because other citizens are opposed to the use. *Youth Emergency Shelter v. Wilson County*, 13 S.W.3d 338 (Tenn. Ct. App. 1999).

IV

This Special Exception

The Shelbyville zoning ordinance during the pertinent time period dealt with special exceptions in Article 7. Section 7.060(B) and (C) contain the general requirements and the criteria for a review:

B. General Requirements. A conditional use permit (a special exception) shall be granted provided the Board finds that it:

1. Is so designed, located, and proposed to be operated so that the public health, safety, and welfare will be protected.
2. Will not adversely affect other property in the area in which it is located.
3. Is within the provision of "Special Exceptions" as set forth in this ordinance.
4. Conforms to all applicable provisions of this ordinance for the district in which it is to be located as well as the provisions cited in Section 7.060 and 7.061, and is necessary for public convenience in the location planned.

C. Criteria for Review:

Prior to the issuance of a special exception; the Board shall certify (compliance with the specific rules governing individual special exceptions (Section 7.061)), and that satisfactory provisions and arrangements have been made concerning all the following where applicable:

1. Ingress and egress to property and proposed structures thereon with particular reference to automotive and pedestrian safety and convenience, traffic flow and

control, and access in case of fire or catastrophe.

2. Off-street parking and loading areas where required, with particular attention to the items in item 1 above, and the economic, noise, vibrations, glare, or odor effects of the special exception on or by adjoining properties and properties generally in or near the district.
3. Refuse and service areas, with particular reference to the items in 1 and 2 above.
4. Utilities, with references to locations, availability, and compatibility.
5. Screening and buffering with reference to type, dimensions and character.
6. Signs, if any, and proposed exterior lighting with reference to glare, traffic, safety, economic effect, and compatibility and harmony with properties in the district.
7. Required yard and other open space.
8. General compatibility with adjacent properties and other property in the district.

Special Conditions for mining and quarrying activities are set out in §7.061.11(A) and (B):

A. Condition

The location of such an activity shall be in an area sparsely developed during the length of time the mining or quarrying activity is anticipated.

B. Condition

Any permit issued hereunder shall be based on a site plan or other documents submitted with an application which shall provide for the following:

1. Existing contours of the site and up to one hundred (100) feet beyond the site boundary. Contour intervals shall be at 2 foot intervals.
2. Location of the area in which the proposed quarrying activity is to be conducted.
3. Location of all proposed buildings, crusher and screening equipment, roadways and other facilities proposed on the site.
4. Proposed method of drainage of the quarry area.
5. Proposed fencing of the quarry area. Fencing shall be provided around all open excavations.
6. Methods proposed for blasting. Open blasting commonly referred to as “pop shots”

shall be prohibited.

7. Methods proposed to control noise, vibration and other particulate matter in order to meet the performance standards as set out in this ordinance.

8. Finished contours of the site after the quarrying operation has been terminated. The site shall be graded and/or filled so as to be in substantial conformity with the topography of the surrounding lands. All fill material shall be non-toxic, non-flammable, and non-combustible solids. All areas that are back-filled shall be left so that adequate drainage is provided.

9. A comprehensive traffic impact study of both volume and vehicle weight impacts as they relate to the existing and proposed street system.

As noted in Section B-7, the site plan was required to contain the methods to control noise, vibration and particulate matter to meet the performance standards set out in this ordinance [emphasis added]. Section 4.070 of the ordinance sets out the performance standard regulations. The specific performance standards will be discussed later in this Order.

The petitioners argue that the performance standards are irrelevant to the consideration of their application for a conditional use. It appears to the Court, however, that the ordinance specifically mandates that the Board of Zoning Appeals certify compliance with the standards when issuing a permit.

V

Analysis

The Shelbyville zoning ordinance approaches the consideration of a mining and quarrying operation in a disjointed fashion. The starting point does not appear until Section 7.0611.11(B) which provides that a permit shall be based on a site plan providing for nine specific things. Included in the nine are the methods proposed for blasting (Section 6) and the methods proposed to meet the performance standards found elsewhere in the ordinance (Section 7). The site plan is required to be approved by the Planning Commission “taking into account

the above conditions as well as any other factors related to the use and operation of such facilities.” Section 7.061.11(F).

Then the application can be filed with the BZA for review. Section 7.060(A). The BZA is required to consider the General Requirements, Section 7.060(B) and the Criteria for Review, Section 7.060(C).

The record shows that the usual practice of the Shelbyville Planning Commission / BZA required an applicant to submit the site plan to the Planning Commission for review. After the staff comments, the applicant would then amend the site plan to remove any concerns the Planning Commission had raised. This procedure was followed in this case up to a point. Under the guidelines established by the parties, the applicant was to respond to the comments by April 15, 2013. The applicant met that deadline. The Planning Commission did not notify the applicant of any further comments until the afternoon of April 19 when the respondents filed multiple reports from experts hired to review the application and to express opinions about how the application failed to show compliance with some of the criteria in the zoning ordinance. With the BZA hearing set for April 25, this deviation from the agreed guidelines prevented the applicant from having a meaningful chance to respond before the hearing.

Nevertheless, the record reveals that the site plan was unanimously approved by the Planning Commission just prior to the BZA meeting. Ordinarily, under this particular zoning ordinance, the Planning Commission’s approval would certify compliance with the Special Conditions in Section 7.061.11 and the Performance Standards in Section 4.070. That is what the zoning ordinance requires: a site plan approved by the Planning Commission showing compliance with the factors in those sections. In this case, however, the Director of Planning did

not state any non-compliance until the BZA convened. The city's experts, all offering opinions on those same factors, were all present at the BZA hearing.

VI

The Board's Action

As the Court has noted, the application came on to be heard on April 25, 2013. First, the Planning Commission unanimously approved the site plan.

Then, most of the same individuals who comprised the Planning Commission convened as the Board of Zoning Appeals. At the beginning of the meeting, the chairman announced that he had a conflict of interest and would not take part in any discussion or any vote. He would, however, conduct the meeting. Another member announced that his wife owned property in the vicinity.

After hearing from both sides and some public comments, the BZA voted on each requirement by a show of hands. They then voted the application down by a roll-call vote of six to one with one abstention. The chairman announced that "the motion failed," although the record reflects that no actual motion was on the floor.

On the specific requirements in the zoning ordinance the Board certified that all of them had been met except the following:

Section	7.061.11(A)
Section	7.061.11(B)(6)
Section	7.061.11(B)(7)
Section	4.070.1
Section	4.070.2
Section	4.070.3
Section	7.060(B)(1)
Section	7.060(B)(2)
Section	7.060(B)(3)
Section	7.060(B)(4)
Section	7.060(C)(8)

A vote on Section 7.061.11(E) was deferred.

The Court will address the specific votes taken by the BZA.

1.

Section 7.061.11A of the ordinance reads:

7.061.11 Special Conditions for Mining and Quarrying Activity

- A. The location of such activity shall be in an area sparsely developed during the length of time the mining or quarrying activity is anticipated.

There is no definition in the ordinance of the word “sparsely.” The site plan shows that the adjoining properties are mostly vacant lands. There are some residences within the general area but the proof shows that the nearest one to the site is 2,000 feet away. The high school is 2,250 feet away. The City’s experts testified that “in their opinion” it was densely populated, but even they did not furnish a definite standard to be met.

The Court concludes that there is no proof supporting the BZA’s holding.

2.

The next section that the BZA held was not satisfied was Section 7.061.11(B)(6). That Section reads:

- B. Any permit issued hereunder shall be based on a site plan or other documents submitted with an application which shall provide for the following:

* * *

- 6. Methods proposed for blasting. Open blasting commonly referred to as "pop shots" shall be prohibited.

The only specific requirement in this Section is a prohibition of “pop shots.” There are no other blasting standards in the ordinance. There are, however, state blasting standards that apply to any blasting activities, not only to the operation of a quarry. The application contains a

detailed report of the effect on any structures or people in the area caused by the proposed quarry operation. The closest residence is 2,000 feet from the quarry site. The closest property line is more than 500 feet from the site. All the ground vibration results and the air blast results are within the state standards. There is no effect from the proposed operation shown that would cause any damage to the nearby structures or that would be much above the barely perceptible range to humans.

The City's experts quarrel mostly with the lack of a blasting plan in the application. But that is not a requirement in the ordinance. The application reflects that the applicant will closely monitor the effect of its blasting program and warn the population when blasting is scheduled.

The City's proof about the perils of fly rock is mostly anecdotal. Anyone can find rare examples of rock being blown through the air a long distance from the blast site. But, on any construction site in a Middle Tennessee town, blasting takes place on a regular basis where the property is surrounded by tall buildings, churches and schools. If an applicant had to show prior to any operation that fly rock would never be a problem, no construction would take place in large areas of Middle Tennessee.

The high school principal testified that he had not ever noticed any damage to the school from vibration or flying rock even though a quarry had operated in the same general vicinity for many years.

The Court concludes that the BZA's finding is not supported by any material evidence.

3. A.

The next requirement the BZA held had not been met was Section 7.061.11(B)(7). It reads:

7. Methods proposed to control noise, vibration and other particulate matter in order to meet the performance standards as set out in this ordinance;

This Section obviously refers to the performance standards found in Section 4.070.

Although the Court has found that the performance standards are part of the certification process, how they should be used in the process requires an interpretation of the ordinance itself.

First, the Court notes that these standards are not specific to quarries. According to section 4.070 of the ordinance, the performance standards apply to “all types and classes of industrial, commercial, community facility’s uses...” In the following paragraphs, these additional provisions are found:

In all applicable districts, as indicated above in any permitted use or any conditional use and every building or structure or tract of land that is established, developed, or constructed shall comply with each and every performance standard contained herein.

* * *

Performance standards are not applicable to the temporary construction, excavation, grading and demolition activities which are necessary and incidental to the development of facilities on them same zone lot, on another of several zone lots being developed at the time, or on the public right- of-way or easement for a community facility activity.

* * *

The following performance standards regulations shall apply to all uses or property in the C-1, C-2, C-3, I-I, and 1-2 Districts, as well as any commercial, industrial, or community facility use type activity located in any other district. If in the opinion of the Planning Commission there is question as to whether an existing or proposed land use is in violation of the following performance standards, it shall be the responsibility of the property owner and/or person (as defined herein) in question to prove beyond a doubt that such usage is in compliance with the applicable performance standard(s).

The Court interprets these provisions to mean that the standards to be met apply only to the continuous, ordinary operations conducted in the districts designated in the ordinance. For

instance, an infrequent or sporadic event that causes a loud noise or vibrations that can be felt across lot lines should not be considered violations of the performance standards. A blaring automobile horn in the parking lot of a commercial establishment is going to happen periodically, and might exceed the noise levels established in the ordinance, but even with that certain knowledge, the City would not deny the applicant a permit.

Probably a better example is the vibration caused by blasting operations. The Court has already discussed the impossibility of complying with the ordinance if the vibration standards applied to the infrequent blasting operations as well as to the continuous operations.

3. B.

Turning to the special performance standards, the BZA held that the applicant had not met the requirements of Section 4.070(1) which reads:

4.070.1 Prohibition of Dangerous or Objectionable Elements

No land or building in any district shall be used or occupied in any manner so as to create any dangerous, injurious, noxious; or otherwise objectionable fire, explosive, or other hazard; noise or vibration, smoke, dust, odor, or other form of air pollution; heat, cold, dampness, electrical, or other disturbance; glare; liquid or solid refuse or wastes; or other substance, condition, or element in such a manner or in such amount as to adversely effect the surrounding area.

The Court interprets this section to contain the general prohibition of the use of any property that will “adversely effect [sic] the surrounding area.” The specific requirements to be met appear in the following ten paragraphs. The BZA held that all of the requirements in the following paragraphs had been met except for Sections 4.070.2 (noise) and 4.070.3 (vibration).

Section 4.070.2 contains the allowable decibel limits at the project lot line for various frequencies in cycles per second.

The application addresses the noise level requirements and contains a commitment to abide by the standards noting that it is impossible to show “beyond doubt” what the noise level will be at any particular property line and that the most obvious source of noise would be the rock crusher. The application gives examples of how the standards will be met, depending on the type of equipment used and the noise-reducing controls employed.

An expert witness testifying on behalf of the applicant expressed some doubt that the noise level requirement could be met by any quarry in the state – if the standard applied to blasting. He did not express any other reservations about the applicant’s ability to operate the quarry within the guidelines set out in the ordinance. Blasting, however, is not a continuous operation. It will occur and will probably be felt across lot lines, and may exceed the allowable decibel limit for continuous operations. But these sporadic events would not cause a violation of the ordinance.

The City’s proof contains an elaborate analysis of the applicant’s proof and comments on the methodology used and the lack of consideration of other sources of noise. But the bottom line conclusion is that the quarry can be operated in a manner that satisfies the requirements. That conclusion seems to be “beyond doubt.” And the applicant has committed to taking whatever steps are necessary to comply with the standards if a violation should occur.

The Court concludes that the BZA’s holding on this issue is not supported by material evidence.

3. C.

Section 4.070.3 provides as follows:

4.070.3 Performance Standards Regarding Vibration

No vibration other than from a temporary construction operation or a transportation facility shall be permitted which is discernible

without instruments at the zone lot line of the zone lot on which the vibration source is situated. For purposes of this section, vibration shall include the type of vibration which is a reciprocating movement transmitted through the earth and impact vibration which is an earthborne vibration produced by two or more objects (or parts of a machine) striking each other.

The same analysis applies to this section. The application contains a commitment to meet the standards in the ordinance. The measures used depend on the type of equipment employed and the layout of the site. Naturally, those details would not be available until the equipment is purchased and set in place.

The Court holds that the application meets this requirement.

4.

The BZA also held that the applicant had not satisfied Section 7.060(C)(8), the requirement that the use be compatible with adjacent properties and other properties in the district.

The proof shows that the quarry will be located in the back of the industrial park. The closest property where daily activities are conducted is the other quarry. Most of the surrounding properties are all zoned for heavy industry.

There are some residential properties in the general area, but the closest appears to be more than 2000 feet away. Some of the home owners testified at the hearing. Also some people expressed their concern for the special needs children at the school.

Their concerns were based on what is already happening at the existing quarry. What they described can only be caused by violations of the zoning ordinance. Yet, the record does not contain any proof of complaints to the authorities charged with enforcing the ordinance or any action by the City to address any of the concerns expressed.

The Court finds that the BZA's finding is not supported by substantial and material evidence.

5.

The Board held that the general requirements in Section 7.060(B)(1 – 4) were not satisfied by the applicant. They are as follows:

- B. General Requirements. A conditional use permit (special exception) shall be granted provided the Board finds that it:
1. Is so designed, located, and proposed to be operated so that the public health, safety, and welfare will be protected.
 2. Will not adversely affect other property in the-area in which it is located.
 3. Is within the provision of "Special Exceptions" as set forth in this ordinance.
 4. Conforms to all applicable provisions of this ordinance for the district in which it is to be located as well as the provisions cited-in Section 7.060 and 7.061, and is necessary for public convenience in the location planned.

As the foregoing analysis has demonstrated, any alleged finding that the project is so designed, located, and proposed to be operated in a way that is inimical to the public health, safety and welfare is not supported by any material evidence. The same is true of it not being within the "Special Exceptions" as set forth in the ordinance or of it not conforming to the applicable provisions of the ordinance or the special provisions in Section 7.060 and 7.061.

Also, there is no proof that the use will adversely affect other property in the area. The Court is aware that an adverse effect might be caused by an interference with the use and enjoyment of other property or by depressing property values. It is difficult for the Court to see how this quarry will do either, when another quarry is already operating in the area and causing multiple problems. By observing the noise and vibration performance standards in the ordinance

plus the state blasting standards, this quarry will not contribute to any of the problems that the neighbors / school officials have tolerated for so long.

VII

CONCLUSION

Based on all of the foregoing, the Court finds that the BZA acted arbitrarily and capriciously by:

1. Denying the application on grounds that are not supported by any material evidence;
2. Denying the application on grounds that contradict the site plan, which had been unanimously approved, and
3. Adopting a procedure that denied the applicants a meaningful opportunity to respond to the city's expert evidence.

It is therefore, **ORDERED, ADJUDGED** and **DECREED** by the Court as follows:

1. That the Board of Zoning Appeals issue a permit to the petitioners to allow the operation of a quarry on the subject property for a period of five years from the date the permit is issued.
2. That the Board of Zoning Appeals set a bond to be furnished by the petitioners as contemplated by the zoning ordinance.
3. That the petitioners are allowed to recover their attorneys' fees under the "Equal Access to Justice Act," Tenn. Code Ann. § 29-37-101, et. seq. The petitioners shall submit proof of the amount of their reasonable and proper fees.
4. Tax the costs to the City.

ENTERED this _____ day of July, 2014.

Ben H. Cantrell, Senior Judge

Certificate of Service

The undersigned hereby certifies that a true and exact copy of the foregoing has been served via U.S. Mail, postage prepaid, upon:

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This the _____ day of July 2014.

Everett Scott Neely, Law Clerk for
Senior Judge Ben H. Cantrell