IN THE COURT OF COMMON PLEAS OF FAYETTE COUNTY, PENNSYLVANIA

CIVIL DIVISION

Joseph A. Beziak and Mildred P. Beziak, his wife,
And Carl F. Beziak and Lara Beziak, his wife,
Appellants,
Vs.
The Fayette County Zoning Hearing Board,
Respondent,
Laurel Mountain Midstream Operating LLC,
Intervenor

No. 2089 of 2010, G.D.

NOTICE OF ORDER

You are hereby notified that the following Order has been entered on July 24, 2014, in the above case.

☑ **Plaintiff** Douglas S. Sholtis
98 Main St., P.O. Box 656
Smithfield, PA 15478

☑ **Defendant** Wendy L. O'Brien
99 East Main Street
Uniontown, PA 15401

X Richard E. Bower, 615 West Crawford Avenue, Connellsville, PA 15425

X Shawn N. Gallagher, One Oxford Centre, 301 Grant St., 20th Floor, Pittsburgh, PA 15219-1410

X David F. Toal, 820 Evergreen Avenue, Pittsburgh, PA 15219

☑ **Order**

☐ **Amended Order**

☐ **Case Management Order**

☐ **Opinion and Order**

☐ **Pretrial Adjudication**

☐ **Decree in Divorce**

*****COPIES ATTACHED!*****

NINA CAPUZZI FRANKHOUSER, PROTHONOTARY

BY: Yolanda Cooper, Clerk

Mailed: July 24, 2014

IN THE COURT OF COMMON PLEAS OF FAYETTE COUNTY, PENNSYLVANIA

JOSEPH A. BEZJAK and MILDRED P. BEZJAK, his wife, and CARL F. BEZJAK and LARA BEZJAK, his wife,

Appellants,

v.

THE FAYETTE COUNTY ZONING HEARING BOARD,

Respondent.

v.

LAUREL MOUNTAIN MIDSTREAM OPERATING, LLC,

Intervenor.

CIVIL DIVISION

No. 2089 of 2010, G.D.

FILED
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FAYETTE COUNTY
PROTHONOTARY

OPINION

"Underlying this action is the state of law in the Commonwealth of Pennsylvania regarding the exploitation and recovery of natural gas in the geological formation known as the Marcellus Shale Formation relative to environmental and habitability concerns of those living in such areas. As [everyone] acknowledges, the state of the law is in flux." ION Geophysical v. Hempfield Tp. (USDC WD Pa/ 2014, slip opinion, Maurice Cohill, J.)

This case concerns the zoning approval granted July 2, 2010 by the Fayette County Zoning Hearing Board by Resolution 10-20 for a "special exception" use for a "public/private works facility"—specifically natural gas compressing and processing equipment—in an A-1 (agricultural) zone in Springhill Township. The named Appellants (hereinafter "Bezjaks") own

approximately 65 acres off Hope Hollow Road that is immediately adjacent to the "special exception" property now leased and controlled by Laurel Mountain Midstream Operating, LLC (hereinafter "Laurel"). The Appellant's principal complaint at this time is that Laurel's use is not properly classified as a "public/private works facility," but the Bezjaks also assert significant issues involving the procedures followed.

This matter has been pending for some time based on questions concerning the possible applicability of Act 13 of 2012 to the instant "natural gas compressor station." If that section applied, it would have rendered the within matter moot as a practical matter because that statute would have preempted local zoning authority over the future siting of gas compression and processing facilities in agricultural zones, and would have imposed a standard set of setbacks and decibel limits.

Notably, with respect to newly defined "natural gas compressor stations" and "natural gas processing plant" facilities, the statute would have required a setback of 750 feet "from the nearest existing building or 200 feet from the nearest lot line, whichever is greater, unless waived by the owner of the building or adjoining lot"; and imposed a decibel limit at the nearest property line of 60 decibels, 58 Pa.C.S. §3304(b)(7) & (8). The Zoning Hearing Board decision in this case did not anticipate or contain any of those conditions in any form—and the within permitted facility is well within 200 feet of the Appellant's property line, and emits noise well in excess of 60 decibels at their property line.

Those questions about Act 13 were answered in part by the long-anticipated Pennsylvania Supreme Court decision issued December 19, 2013 (argued October 17, 2012) which finally held the relevant portions of that statute (specifically including 58 Pa.C.S. §3304(b)(7) & (8)) to be unconstitutional insofar as they improperly preempt local zoning as a method of environmental protection. As a result, this Court must decide whether or not the Zoning Hearing Board's decision was valid or not based only on the law in existence at that time.

BACKGROUND

There are a variety of procedural questions regarding the timeliness of action by both sides, and whether or not various actions were inadequate to preserve issues for review by the court. Both sides have followed procedures that fall far short of ideal, with Laurel Mountain Midstream building two-thirds of the within facility first, without any zoning approvals, and applying for approval five years later only because they wanted to add a third compressor and its accompanying processing equipment; and with the appellants accused of filing an appeal without reciting sufficiently specific grounds. In addition, it is alleged that the principal substantive ground now argued by the Appellants was finally waived because it was not first argued before the Zoning Hearing Board. The court must first determine if any of those procedural flaws are dispositive.

If not resolved on procedural default grounds, the major issue recited by the appellants is whether the facility that was built was correctly categorized by the zoning hearing board as a "public/private works facility," or whether it is incorrectly categorized and/or a facility that fits none of the definitions currently in the zoning ordinance. If incorrectly categorized and/or a use that fits none of the ordinance definitions, then the court will have to determine what remedy would apply.

It is indisputable that the primary purpose of the facility is to compress locally produced natural gas (that is piped in at a relatively low pressure) to a significantly higher pressure that will allow it to be sold, injected into interstate pipelines and transmitted for use in other areas. Counsel for the Bezjaks asserts that the facility should be considered to be a "petroleum, tar and bitumen processing, storage and sales" use, based on the fact that the facility removes sand, water and liquid petroleum byproducts as part of the compression process. The Fayette County Zoning Ordinance defines that use as "A facility that serves to refine extracted oil into products for use in the market or serves to temporarily hold for storage for the purpose of selling the product." §1000-108.

The Court specifically asked the parties to cite any case or other authority to indicate whether a particular "use" can qualify under two different ordinance definitions in the Fayette County Zoning Ordinance, or whether the ordinance must be interpreted as creating mutually exclusive use categories. This question turns out to be irrelevant, since the use

clearly does not fit the definition of "petroleum, tar and bitumen processing, storage and sales." Although both products are "fugacious" unlike solid minerals, and although both are produced from drilled wells, there is a well-recognized dichotomy between gas and oil in Pennsylvania law based on the basic fact that "oil" is normally a liquid and "natural gas" is normally a gas. It is indisputable that the facility at issue compresses gas, and only generates a small amount of liquid hydrocarbons as a byproduct of that principal process. So the only remaining substantive issue is whether or not the facility qualifies under the Fayette County Zoning Ordinance as a "public/private works facility."

The question of potentially equal consequence is whether or not the procedural issues allow this court to even consider that substantive issue.

PROCEDURAL ISSUES

Errors in procedure asserted against the grant of Laurel's Zoning Approval (Resolution 10-20) include the following:

1. Failure to obtain permits between the lease signed in January of 2005 and the installation of the first two compressors with accompanying equipment.

2. Listing the zoning of the property as "Commercial" on the original typed permit application, an error that was corrected with a felt tip pen by adding "A-1"—without any explanation on record—at some point before notices were sent out for the Zoning Hearing Board's hearing of May 26, 2010. "Commercial" was

never crossed out, so the purpose of having both entries was potentially confusing. Moreover, the application lists "public/private works facility" twice in parentheses as one of several uses desired, and as one of the reasons for granting a Special Exception, but it is never identified as the particular defined Special Exception that is being applied for. No ordinance sections or definitions are set forth or referenced.

3. Failure of the Zoning Hearing Board to properly notify Bezjaks of the decision, with Bezjaks learning of Resolution 10-20 (due to the diligence of their counsel) only two days before the appeal period expired.

4. Laurel continues to operate the facility despite enforcement notices issued and outstanding, and has operated it to its economic benefit since an unknown date after the lease was signed in January of 2005.

Errors in procedure asserted against the Bezjaks and in support of affirming Resolution 10-20:

1. Failure to assert the claim that the use is not a "public/private works facility" before the Zoning Hearing Board.

2. Failure to present expert testimony before the Zoning Hearing Board to establish that the use would cause specific harm to the public's health, safety and general welfare.

3. Failure to specifically list the claim that the use is not a "public/private works facility" in the appeal filed at the last second due to the lack of statutorily required notice of the entry of the decision.

The Court has reviewed all of the facts and circumstances of record,

and has concluded that justice requires that all of the procedural defects be set aside and disregarded as a basis for deciding the issues in this case.

§908 of the Municipalities Planning Code (53 P.S. §10908) governs the procedure for hearings by the Zoning Hearing Board. It provides, inter alia, that the Zoning Hearing Board must hold a first hearing on an application within 60 days of the application's filing. Subsequent hearings must take place within 45 days of the preceding hearing, and the applicant is entitled to no less than seven hours of hearing time within 100 days of the first hearing, and must complete its presentation within that time. Parties opposed to the application must complete their presentation within 100 days of the first hearing held after completion of the applicant's case. The Zoning Hearing Board must render a decision within 45 days of the last hearing. The Board is required to send notice of the entry of the decision to all persons who have "filed their name and address" with the Board, which notice is to be sent not later than "the day following its date."

In this case, the application is dated April 12, 2010. The only documented notice of the hearing was sent to the applicant on May 13, 2010, and there is a list of neighbor's addresses with check marks—which list includes the Bezjaks. The single hearing was held on May 26, 2010, 44 days after the application, and less than two weeks after notice was sent to the neighbors. The decision is dated July 2, 2010, although there was no Zoning Hearing Board meeting or hearing noticed or advertised in the interim. Notice of the decision was never mailed to Bezjaks or their counsel, both of whom signed the attendance sheet circulated at the hearing. There was no column on the sheet for

addresses, but Bezjak's address was already in the file from the hearing notice, and counsel's address is readily ascertainable from local directories. As noted above, Bezjaks' counsel learned of the decision by inquiring about it at the Zoning office and was informed of its entry just two days before the appeal period was scheduled to expire.

During the hearing, the Bezjak witness made numerous remarks relevant to the timing of the hearing and decision:

1. questioning whether the hearing was for a rezoning (Tr. 73)

2. "I'd like to know the distance between the two, if I'm not jumping the gun. What's the distance between the two properties? (Tr. 75) (in fact the distance is only few feet);

3. "I'm concerned about all the environmental aspects of it. . . . And I'm concerned about all the environmental: the noise, vegetation, contamination of the water." (Tr. 76);

4. "Yes, I'm sure there could be some danger, whether it's fire or explosion or whatever it may be. I don't know what all the aspects that come with this. I don't know the size of it, the magnitude of it. . . . You know, I thought it was going to be the way it was and left alone; but if you're going to expand it, I think I should know what's going to come down the pike, if it's coming to me." (Tr. 77);

5. "I'd like to see them reject this until we do a further study to see what we can do about this. . . . I think you should put this on hold until we figure this thing out totally. And I mean all aspects, environmentally, my financial

position, and what I'm going to do with my property, how is it going to affect me down the road 20 years from now, how it's going to affect the community, how it's going to affect the County. It's going to affect all of us. That's my point of view. I'm asking you to put it on hold." (emphasis supplied) (Tr. 78).

To be sure, counsel did not request an additional hearing or a continuance—but neither did the Board deliberate and decide, simply moving to "take our 45 days." No additional hearings or meetings were officially held.

So from the Bezjak perspective, they had less than two weeks to prepare for a hearing against the company that had been operating a facility within mere feet of the Bezjak property for more than five years, and they are faulted for not having arranged for expert testimony to contradict testimony and exhibits that they had no prior knowledge of within minutes after they were presented. Further, despite appearing and entering their appearances, they obtained through their own efforts only two days notice before the appeal period was to expire within which to set forth their specific objections, and they are faulted for not being sufficiently specific in the grounds for appeal they then presented. Meantime, Laurel has continued to take economic advantage of the facility.

For all of the above reasons, the Court concludes that procedural defaults have occurred, but it would be unjust to decide this matter based on procedural default where the applicant has benefitted without cost and the appellants have suffered loss without sufficient time or any fair opportunity to present their objections. There is plenty of fault to go around—it is only fair to

address the merits of the issue raised.

SUBSTANTIVE ISSUE

As noted above, the main substantive issue is whether or not the compressor station meets the Fayette County Zoning Ordinance's 2010 definition of "public/private works facility." That use definition was modified by the Fayette County Commissioners in Resolution 09-04-23-16 on April 23, 2009. Up until that time, virtually the same defined use was captioned "Public Service Facility." (The definition was changed only by changing the word "governmental" to "government," a change that may have been inadvertent.) With but one exception, both definitions read as follows:

> "The erection, construction, alteration, operation or maintenance of buildings, power plants or substations, water treatment plants or pumping stations; sewage disposal or pumping plants and other similar public service structures by a utility, whether publicly or privately owned, or by a municipal or other government[al] agency, including the furnishing of electrical, gas, communication, water supply and sewage disposal uses."

Bezjaks' counsel argues that this implies directly that the facility operator "furnishing" gas must necessarily be furnishing gas in the immediate neighborhood of the facility, and that can be the only reason that such "public/private works facilities" Special Exception is permitted in all zones. No authority for that inference is cited.

Bezjaks also argue that Laurel does not qualify as a "public utility" under the PUC laws, but cite no authority that incorporates that definition into the

Fayette County Zoning Ordinance.

On the contrary, there are several possible reasons for permitting "public/private works facilities" in all zones—such as the instant compressor station having to be located somewhere between the wells it services and the pipeline it supplies. In addition, the Fayette County definition expressly provides that it applies to "private" utilities, not just "public" utilities, clearly demonstrating that the PUC definition has no application.

The Laurel facility clearly is similar to an electrical substation or water or sewage pumping station. The definition clearly includes "gas" as one of the products covered. And that "gas" is "furnished" to some members of the "public" albeit members of the public at some significant distance away. The Laurel facility clearly fits the literal definition in the Ordinance. There is no reason to stretch to other laws to define the term when it contains no relevant ambiguity.

So, on the primary substantive issue, it is clear that the applied for use does fit the ordinance definition.

FURTHER PROCEEDINGS

Since the Laurel facility complies with the literal terms of the Zoning Ordinance, the burden shifts to any party opposing the use to show a specific threat to the public health, safety and general welfare as a result of the use. In that event, the Zoning Hearing Board has discretion to attach conditions to the approval, if such conditions can remedy such threats. At the May 26, 2010 Zoning Hearing Board hearing, Bezjaks did not present any such showing.

However, for the reasons recited above, the Court finds that Bezjaks

did not have a fair and reasonable opportunity to respond to the presentation made by Laurel on May 26, 2010. Less than two weeks-notice of the hearing, only minutes to respond to expert testimony and exhibits, justified confusion about whether the hearing concerned a rezoning, justified confusion about what "special exception" was being sought, a decision without any additional scheduled meeting or hearing of the Zoning Hearing Board, and improper late "last minute" notice of the decision all combined to prevent Bezjaks from presenting a reasoned opposition to the application.

By contrast, this Court was recently reversed by the Commonwealth Court in the case of PPM Atlantic Renewable v. Fayette County Zoning Hearing Board (1431 C.D. 2010) where this court merely reduced setbacks and noise limitations from those imposed by this same Zoning Hearing Board for a use (wind power) that is arguably considerably safer and quieter than that at issue here—but the instant use has no imposed setback requirements or specific noise limitations at all. The hearings in that matter went on for quite a long time—nothing was ramrodded through in a single meeting with less than two weeks-notice. It is impossible to reconcile the disparate treatment of these two special exception uses.

For all of the above reasons, the Court concludes that the only just and appropriate result is to remand the within matter to the Zoning Hearing Board to allow Bezjaks to resume the hearing that terminated on May 26,2010, and to allow them time to present any evidence in favor of conditions that should be attached to any approval of the applied for Special Exception. The Pennsylvania

Legislature and Governor evidently felt that a 200 foot setback from the nearest property line was generally appropriate, and that a noise limitation of 60 decibels at the nearest property line was also appropriate—unless waived in writing by the adjacent landowner. The fact that that statute unconstitutionally infringes on the local government's ability to protect the environment for its citizens doesn't mean that there is no logical basis for such conditions. But conditions can only be imposed based on evidence in this case, and there may or may not be any such evidence after the remanded hearing or hearings conclude.

WHEREFORE, the within matter is hereby REMANDED TO THE ZONING HEARING BOARD for further proceedings not inconsistent with this Opinion.

BY THE COURT:

STEVE P. LESKINEN, JUDGE

ATTEST:

PROTHONOTARY