

IN THE COURT OF COMMON PLEAS OF WESTMORELAND COUNTY,
PENNSYLVANIA
CIVIL ACTION - LAW

| | | |
|------------------------------|---|------------------|
| PROTECT PT, |) | |
| |) | |
| Plaintiff, |) | |
| |) | |
| v. |) | No. 1125 of 2017 |
| |) | No. 1790 of 2017 |
| PENN TOWNSHIP ZONING HEARING |) | No. 1791 of 2017 |
| BOARD, |) | No. 1792 of 2017 |
| |) | |
| Appellee, and |) | |
| |) | |
| APEX ENERGY (PA), LLC, |) | |
| |) | |
| Intervenor/Appellee |) | |
| |) | |

OPINION AND ORDER OF COURT

The matters before the Court are four separate Land Use Appeals as filed by the Appellant, Protect PT, from the decisions of the Appellee, Penn Township Zoning Hearing Board (hereinafter "Board"). Also before the Court are the Motions to Quash Appeal or in the Alternative to Post a Bond, filed by the Intervenor, Apex Energy (PA), LLC. For clarification purposes, Case No. 1125 of 2017 involves the Numis Well-Pad; Case No. 1790 of 2017 involves the Backus Well-Pad; Case No. 1791 of 2017 involves the Deutsch Well-Pad; and Case No. 1792 of 2017 involves the Drakulic Well-Pad.

While the cases have not been consolidated, Oral Argument was conducted on all of the appeals on October 23, 2017. At that time, the parties agreed that, while there may be some facts specific to each well pad, that there are four main issues relevant to all of

the cases. The specific defining facts of each well pad will be addressed in the legal arguments. Accordingly, this Court will issue one Opinion and Order of Court as to all four cases, noting the differences with regard to each case within.

The Court also notes that one of the afore-mentioned four main issues, an issue regarding Protect PT's standing in this case, is not applicable to Case No. 1790 of 2017 involving the Backus Well-Pad.

The four issues involved in the cases are, first, whether Protect PT has standing; second, Apex's compliance with Section 190-635 (D)(1) of the zoning ordinance (wastewater storage provision); third, Apex's compliance with 190-641 (D) (environmental rights provision/Article I, Section 27 provision) and, if such compliance has been made by Apex, then the fourth and final issue of whether Protect PT can establish that the proposed use will have a detrimental effect on the community.

BACKGROUND

All three parties are in basic agreement as to the procedural and factual background of the cases. While Protect PT and Apex provide an extensive detailed statement of those matters, a general overall view was provided by the Board. Thus, using the Board's summary, the Court notes that in the fall of 2015 Apex filed seven applications with the Zoning Office of Penn Township requesting that the Board grant special exceptions for unconventional natural gas well operations. These Well-Pads were to be developed on parcels that had been zoned Rural Resource by Penn Township, with said parcels being part of the Penn Township's Mineral Extraction Overlay District (MEO).

After hearings and decisions denying three of the applications in early 2016, Apex initiated a Federal civil action in the Western District of Pennsylvania against the Board, Penn Township and the Board of Commissioners. The Federal litigation was concluded through the entry of a Consent Judgment, which was approved by the Federal Court, and incorporated a Stipulation for Entry of Consent Judgment. While the parties may disagree on the interpretation of the Consent Judgment, it had the effect of Apex agreeing to implement a set of certain conditions on the Well-Pads in exchange for the Township, the Board, and the Commissioners agreeing to be bound by certain legal interpretations of the Penn Township Ordinance and the relevant section of the Pennsylvania Constitution regarding environmental rights.

Thereafter, the Board held a Public Hearing on January 21, 2017 as to the Numis Well-Pad (1125 of 2017), and issued its Decision on February 9, 2017. In the 108 paragraph decision, the Board granted the special exception subject to the terms of the relevant Ordinances and the incorporated various conditions that had been agreed upon as part of the Federal Court Consent Judgment.

Similarly, as to the Backus Well-Pad (1790 of 2017), the Board initially held Public Hearings pursuant to the request by Apex on September 8, 2016 and October 13, 2016. That matter was continued pending the result of the above-mentioned Federal civil action by Apex. After said Consent Judgment, the Board continued with public hearings on January 25, 2017 and January 28, 2017. The Board issued a 140 paragraph Decision on March 9, 2017, which granted the special exception subject to the terms of the

relevant Ordinances and the incorporated various conditions that have been agreed upon as part of the Federal Court Consent Judgment.

As to the Deutsch Well-Pad (1791 of 2017), the Board held Public Hearings on January 21, 2017 and January 28, 2017. The Board then issued a 141 paragraph Decision on March 9, 2017, granting the special exceptions subject to the terms of the relevant Ordinances and the incorporated various conditions that were approved as part of the Federal Court Consent Judgment.

Finally, as to the Drakulic Well-Pad (1792 of 2017), the Board held the Public Hearing on January 28, 2017. At that time, by consent of the parties, testimony from prior Apex hearings on the previous Well-Pads was introduced and incorporated. The Board issued its 139 paragraph decision on March 9, 2017. Once again, the Board granted special exceptions subject to the terms of the relevant Ordinances and the incorporated various conditions that were approved as part of the Federal Court Consent Judgment.

As to all of the Public Hearings held regarding the four Well-Pads at issue, over the objections of Apex, Protect PT entered its appearance as an objector and fully participated by way of cross-examination of witnesses and the presentation of its own member lay witnesses and an expert witness in the Board hearings. Based upon the decisions as reached by the Board, Protect PT filed the above-captioned Land Use appeals, with Apex subsequently requesting and being permitted to intervene.

STANDARD OF REVIEW

All of the parties agree upon the applicable standard of review for this Court to apply in deciding the appeals by Protect PT. When additional testimony is not taken by

the Court, the standard of review is limited in scope to a determination of whether the local agency abused its discretion or committed an error of law. See *City of Hope v. Sadsbury Township Zoning Hearing*, 890 A.2d 1137(Pa.Cmwlth. 2006) and *Kassouf v. Twp. Of Scott*, 883 A.2d 463 (Pa. 2005). A conclusion that the Board abused its discretion may be reached 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. *Interstate Outdoor Advertising, LP v. Zoning Hearing Board of Warrington Township*, 39 A.3d 1019 (Pa.Cmwlth. 2012).

Further, as correctly stated on pages 16 and 17 of Apex's Brief at Case No. 1125 of 2017, the Commonwealth Court has held that when performing a substantial evidence analysis, courts must view the evidence in the light most favorable to the party who prevailed before the fact finder...; the critical inquiry is whether there is evidence to support findings actually made. Thereafter, if substantial evidence exists, the Courts are bound by the determinations, including resolution of credibility and conflicting evidence made by the Board.

In addition, a zoning board's interpretation of the applicable ordinance is to be granted significant deference and great weight as it has the primary responsibility and experience dealing with the language and contents of the ordinance. *City of Hope, supra*, p. 1144. The Court does not substitute its interpretation of the evidence for that of the Board[.] *Oxford Corp. vs. Zoning Hearing Bd. of Borough of Oxford*, 34 A.3d 286,(Pa.Cmwlth. Ct.2011). An error of law may exist if the zoning board fails to consider

each requirement of the zoning ordinance prior to their decision. See *In re Appeal of Chestnut Hill Cmty. Ass'n*, 155A.3d 658 (Pa. Cmwlth. 2017).

DISCUSSION AND ANALYSIS

I. Standing

As to the issue of Apex alleging that Protect PT does not have standing to pursue the appeals, in Paragraph 6 of the Notice of Land-Use Appeal as filed in each of the three cases regarding said issue, and as testified to at the Public Hearings, Protect PT indicates that it is a grassroots nonprofit corporation, incorporated in Pennsylvania and consisting of 133 members. It further alleges that its mission is to ensure the safety, security, and quality of life of the people in the Penn/Trafford and surrounding areas from unconventional gas development. As indicated above, in all of the cases, Protect PT participated as an objecting party by cross-examining witnesses, presenting lay witness testimony and expert testimony.

Protect PT provided testimony that it has 37 member households within a 2 mile radius of the proposed Numis Well-Pad, with several of those members who live closest to said pad testifying about their concerns and its impact on their community. In paragraph 84 of the Findings of Fact, Conclusions of Law Decision (hereinafter Decision) by the Board, it concluded that Protect PT does in fact have over 60 members, including several Township residents, in the immediate area of the proposed pad and therefore concluded that standing was appropriate.

As to the Deutsch Well-Pad, paragraph 6 in that Land-Use Appeal alleges that several of the members of Protect PT provided testimony at the hearing, and in paragraph 114 of the Decision, the Board concluded that within the Protect PT group, several Township residents reside in the immediate area of said pad and granted standing.

As to the third and final case involving the standing issue, the Drakulic Well-Pad, once again in paragraph 6 of that Appeal, the parties stipulated as to various witnesses' testimony from the previous hearings including several witnesses who were members of Protect PT. As a result of that, in paragraph 112, the Board concluded that several Township residents who are members in the Protect PT organization reside in the area of said pad and granted standing.

Apex and the Board take several positions as to opposing standing by Protect PT. Those opposition positions are stated in their briefs and at Oral Argument and as contained in the Motions to Quash Appeal filed by Apex. Those legal arguments are that the individuals that testified as members of Protect PT do not live in the immediate vicinity of the three Well-Pads, that the organization itself does not own property in Penn Township and that witnesses' testimony expressed only general concerns of the community at large. Protect PT cites opposing cases and positions extensively in its Response to Intervenor's Motion to Quash Appeal and that Oral Argument.¹

Regarding the first two of those objections, case law has established that a citizen's group or a civic association may have standing if members of the organization

¹ The Court notes that at the Oral Argument, Apex indicated to the Court that the issue of posting a bond would not be addressed at that time.

possess property interests in the municipality, for example land ownership. *Clarksburg Coal Co. vs. Fayette County Zoning Hearing Board*, 35 D&C 3d. 211 (Fayette C.P., 1985). As stated above, the individuals belonging to Protect PT and who testified fall into that category.

As to the members being the aggrieved party in close proximity to the premises that is the subject of the appeal, there are numerous cases on the subject as cited by Apex and the Board.² However, none of those cases state a clear-cut distance requirement qualifying or disqualifying individual from obtaining standing. Obviously, the Board and its members are the individuals who have the overall experience and knowledge of the geographical areas involved in the “lay of the land” and the physical distances as it relates to each Well-Pad. For example, an individual member may live 2 miles from a specific Well-Pad, but perhaps the Board members know that there is only one main road to that area which is perhaps several miles long which could affect residents along that route with transportation and truck traffic. As required by the legal standard noted above reviewing Land-Use appeals, this Court will give deference to that type of possible practical knowledge and experience which led to the decision of the Board to grant standing.

As to the final component of legal standing by Protect PT, at least outwardly, the testimony of the members of Protect PT, as cited by all parties, established that it is an aggrieved party that has a substantial direct and immediate interest in the outcome of the

² See page 2 of the Brief of the board at Case No. 1125 of 2017.

Land-Use application, as opposed to merely stating a general concern.³ Said testimony may or may not be sufficient to establish a legal finding to uphold the appeal; however, it is persuasive enough to establish the right to standing by Protect PT.

Accordingly, this Court concludes that Protect PT was properly granted standing in order to pursue the present Land-Use appeals. Therefore, Apex's Motions to Quash Appeal are denied.

II and III. §190-635 (D) (1) and §190-641 (D) Compliance

The Court now addresses the second and third issues in a combined discussion. The first of the two issues is whether Apex demonstrated that the standards of §190-635 (D) (1) were met regarding storage of hazardous materials and/or wastewater storage provisions. The second issue is whether Apex established that the anticipated operations comply with the conditions of §190-641 (D) involving the environmental rights provision (Article I, Section 27).

As stated above, the applicable standard of review by this Court in determining whether the Board abused its discretion may be reached 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. The Board conducted five days of Public Hearings regarding the four Well-Pads at issue, namely September 8, 2016, October 13, of 2016, and January 21, 25 and 28 of 2017. After those hearings the Board issued four separate Findings of Fact, Conclusions of Law and Decisions.

³ See page 5 of the Brief cited by the Board at Case No. 1125 of 2017.

In the Numis case, it was a 108 paragraph decision. The Backus case was based on a 141 paragraph decision. The Deutsch case was a 140 paragraph decision. The Drakulic case concluded with a 139 page decision. This Court has reviewed each of those documents, and based upon a review of the pleadings, the extensive and detailed briefs submitted by all the parties and the Oral Argument conducted on October 23, 2017, and as limited by the standard of review in Land-Use appeals, has concluded that the decisions of the Board were supported by substantial evidence and were not arbitrary or capricious. Therefore, the Board did not commit an error of law or abuse its discretion.

In reviewing the four Decisions, it would be an understatement merely to say that the findings and conclusions of law are detailed, specific, itemized, definite and evaluated numerous factors presented to the Board. To establish this determination, the Court will use the Numis Well-Pad Decision at case No. 1125 of 2017 as an illustration. That Decision contains some of the following Board Findings:

- a. The parcels are zoned Rural Resource (RR) as is defined in §190 – 402 of the Ordinance and are also part of the Township’s Mineral Extraction Overlay (MEO) district as more particularly defined in §190 – 407. See Board finding 3.
- b. Apex is in the business of drilling Marcellus Shale gas wells, operates wells in Westmoreland and Armstrong Counties, including the Quest Pad in Penn Township, which was previously granted a special exception, and has obtained the current leases which cover oil, gas and other mineral rights. See Board findings 4, 5, and 6
- c. Apex’s request is for a Special Exception for drilling unconventional wells and subsequent operation of the wells as is permitted by Article VI, Section 190 – 641 as amended, of the Zoning Ordinance of Penn Township and has obtained approval for an ESCGP-2 permit from the Pennsylvania Department of Environmental Protection development of the site. See Board findings 7 and 8.
- d. Pursuant to the Stipulation and Consent Order dated December 16, 2016 in the Federal Court case, Apex agreed to several conditions concerning sound wall containment, noise monitoring, air quality monitoring, permit submission, traffic

coordination and control and other matters, with said conditions to be included in the Decision of the Board. See Board finding 12.

- e. There are no protective structures within the 600 foot setback required by the Ordinance, no drilling will occur within 200 feet of property lines of parcels adjacent to the subject parcel, and that the project is designed to meet dimensional setbacks of the Ordinance as would apply to oil and gas development. See Board findings 16, 17 and 18.
- f. The post-construction stormwater maintenance plan provides for three infiltration basins located along the proposed access road together with infiltration berms and an underground detention pond adjacent to the well pad. See Board finding 21
- g. Board findings 24 through 27 show more examples of detailed findings, in that they state there will be a maximum of two truck trips per hour for approximately 10 days, the construction phase will be a daylight operation, truck operations will be handled during the various phases with a traffic coordinator traffic, and Apex has agreed to coordinate tracking schedules with the local school districts and their school bus contractors will avoid conflicts.
- h. Board finding 31 indicates that the pad area will be protected by three barriers of various materials and coatings to handle potential spills of liquids during the operations.
- i. Board findings 36 and 37 state that Apex outlined a casing and cementing regimen that must be PaDEP approved and that pursuant to the Stipulation and Consent Order Apex will erect sound walls surrounding the perimeter of the pad area that remain in place during the various phases of development until production.
- j. Refracting process will require the introduction of the least 7 million gallons of water and chemical drilling compounds per well, wastewater recovered from the fracking operation will be temporarily stored as recovered in mobile tanks on-site removed from the site on a regular basis, waste water recovered from the fracking operation will be approximately 15 – 20% of the freshwater amounts injected into wells at the site, adequate containment is to be provided to protect from accidental waste fluid release and no waste fluid treatment will occur on-site. See Board findings 61 through 65
- k. Apex will be required to monitor air quality and noise production through independent third party contractors during the construction, drilling and completion phases of the development. See Board finding 73. And,
- l. Board findings 74 through 82 detail the specific findings of the Air and Hydrogeologic Assessment reports prepared by Environmental Resources Management which reviewed and analyzed industry risk assessment standards as applicable to the Well-Pad.

The Conclusions of Law as stated in paragraphs 83 through 108, excluding 84, 85, 91, 93, 94, 95, and 108, all illustrate that the Board carefully evaluated all of the evidence

and testimony presented, applied the legally acceptable requirements of the existing Ordinances, including Sections 190- 635 (D) (1) and 190-641 (D) and complied with all of the terms and conditions of the Stipulation and Consent Order entered in Federal Court. The Findings of Facts, Conclusions of Law and Decisions of the other three cases are just as detailed and specific and also carefully evaluate the evidence and testimony presented to the Board. This Court feels it would be redundant to similarly illustrate examples of those evaluations and determinations by the Board, as those Decisions are all of record.

IV. Detriment on the Community

Finally, regarding the last issue of the burden shifting to Protect PT to establish the proposed use as detrimental on the community, the Board, over the objection of Apex, permitted Protect PT and its members to fully and completely participate in all of the Public Hearings. Protect PT's participation included cross-examination of witnesses of Apex, providing testimony of lay witnesses through members of the organization, and presenting its expert witness, Dr. Ron Sahu, an expert on the issue of air modeling, who holds Bachelors, Masters, and Doctoral degrees in mechanical engineering and currently operates his own consulting business that serves governmental, private and nonprofit clients.⁴

As indicated above, paragraph numbers 91, 93, 94, 95, and 108 in the Numis case illustrate that the Board evaluated all of the testimony by the lay witnesses and the expert

⁴ See Board finding 107 in the Backus case as to Dr. Sahu's qualifications.

on behalf of Protect PT as against the testimony of witnesses on behalf of Apex and its expert, Michael Sterner, the ERM project manager, an expert with a degree in Biology, certified as a professional wetland scientist by the Army Corps of Engineers and by Chevron as a qualified environmental ESHA facilitator for the preparation of the environmental health and safety impact statements.⁵

Based on that evaluation, the Board, in all of the present cases, concluded that the objecting parties failed to establish sufficient, credible evidence that if the applicant is found to have met the Ordinance requirements and the proposed use is granted, that said use would create a high probability of an adverse, abnormal or detrimental effect that will occur to public health, safety and welfare.

Using the Backus Well-Pad (Case No. 1790 of 2017) as an example, the Board findings 91 through 106 evaluated in detail the Air and Hydrogeologic Assessment Reports prepared by said ERM and as testified to by Mr. Sterner. Importantly, in Board findings 107 through 111, the Board evaluated and commented on the testimony by Dr. Sahu, the expert witness for Protect PT, and clearly accepted the expert testimony of Mr. Sterner and the detailed report prepared by ERM. Board finding 92 found that the report was multidisciplinary and prepared in response to the provisions of Section 190-641 (D) regarding the requirements that Apex demonstrate oil and gas drilling operations will not violate citizens' right to clean air and water as guaranteed by Article I, §27 of the Pennsylvania Constitution. Further, Board finding 118 illustrates that the Board found that the testimony of the lay witnesses did not show that the impact from the permitted

⁵ See pleadings and also Board finding 91 in the Backus Well-Pad case as to Mr. Steiner's general certifications.

special exception use would support denial of the request because the impact would be greater than normally associated with said use.⁶

Accordingly, given the prevailing case law and the applicable standard of review, the Court must conclude that Protect PT did not meet its burden as to establishing the proposed use as detrimental on the community.

Therefore, the Court enters the following Order of Court:

⁶ For example, see pages 24, 25, and 26 of the Brief for Protect PT and pages 4 and 5 of the Brief for the Board in the Numis case summarizing the testimony of the lay witnesses.

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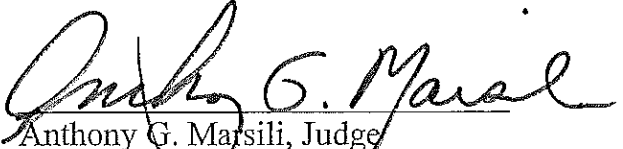
ORDER OF COURT

AND NOW, to wit, this 6th day of December, 2017, consistent with the foregoing Opinion; and, after careful consideration, it is hereby ORDERED, ADJUDGED AND DECREED as follows:

1. The Motions to Quash filed by Apex regarding the alleged lack of standing of Protect PT at the above captioned numbers are hereby DENIED.
2. The Land Use Appeals as filed by Protect PT at the above captioned numbers are hereby DENIED.
3. Accordingly, the Decisions of the Penn Township Zoning Hearing Board at the above captioned numbers are hereby UPHELD.

4. In accord with Pa.R.C.P. 236(a)(2)(b), the Prothonotary is DIRECTED to note in the docket that the individuals listed below have been given notice of this Order.

BY THE COURT:


Anthony G. Marsili, Judge

ATTEST:

Prothonotary

cc: Ryan E. Hamilton, Esq.
John K. Sweeney, Esq.
Jeffrey G. Wilhelm, Esq.