

**BEFORE THE ZONING HEARING BOARD OF  
PENN TOWNSHIP**

IN RE: )  
 )  
Special Use Exception Applications of )  
Apex Energy, )  
Numis, Deutsch, Drakulic, and Backus )  
Well Pad Applications )

**MEMORANDUM OF LAW ON STANDING**

NOW COMES Protect PT, by and through its counsel, Fair Shake Environmental Legal Services, and submits this Memorandum of Law on Standing.

**I. Introduction**

Apex Energy, LLC (“Apex”) has submitted applications for special exception authorization to construct four well pads for the purposes of natural gas extraction to the Penn Township Zoning Hearing Board (“Board”). Protect PT is a citizens organization working to ensure the community’s safety, security, and quality of life from the effects of unconventional gas development. Protect PT has been an active participant in similar application proceedings before the Board, and now seeks to participate as a party before the Board in all four of Apex’s application proceedings.

**II. Argument**

Pursuant to the Municipalities Planning Code (MPC), a zoning board has broad authority to grant standing to various individuals and organizations, thereby allowing those individuals and organizations to testify, call witnesses, and cross examine the witnesses of other parties.

**a. Standing before a Zoning Hearing Board is Governed by Sections 9098(3) and 913.3 of the MPC**

The MPC contains two separate provisions regarding standing before a zoning hearing board. Section 908(3) provides:

The parties to the hearing shall be the municipality, any person affected by the application who has made timely appearance of record before the board, and any other person including civic or community organizations permitted to appear by the board. The board shall have power to require that all persons who wish to be considered parties enter appearances in writing on forms provided by the board for that purpose.

53 P.S. § 10908(3).

Under this section of the MPC, any person<sup>1</sup> may gain standing as a party before the zoning hearing board if they are “affected” by an application, or, if the board, in its discretion, decides to permit a party to appear and participate.

The other avenue to become a party before a zoning board is codified in § 913.3 of the MPC, titled “Parties appellant before the board,” and provides:

Appeals under section 909.1(a)(1), (2), (3), (4), (7), (8), and (9)<sup>2</sup> may be filed with the board in writing by the landowner affected, any officer or agency of the municipality, or any person aggrieved . . .

53 P.S. § 10913.3.

The subsections of § 909.1(a) identified in § 913.3 all concern appeals to the zoning board regarding various decisions made by a zoning officer or other local authority. *In re Broad Mountain Dev. Co., LLC* also noted that § 913.3 exclusively concerns who is entitled to initiate an appeal to a zoning hearing board. 17 A.3d 434, 440 (Pa. Commw. Ct. 2011) (“A person who wishes to contest a zoning approval can initiate an appeal or challenge if he is a ‘person aggrieved.’ Section 913.3 of the MPC.”). Considering both of these sections, the court in *Baker v. Zoning Hearing Bd. of West Goshen Twp., Chester Cty.* succinctly noted that:

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<sup>1</sup> In this memorandum, the term “person” or “persons” in the context of standing before a zoning hearing board is intended to include both individuals and civic or community organizations, pursuant to § 908(3) of the MPC.

<sup>2</sup> Section 909.1 of the MPC concerns the zoning board’s jurisdiction “to hear and render final adjudications” in particular matters.

Under Section 908 “any person affected by the application” has a right to appear as a party. Others not so affected have a right to appear as “persons aggrieved” under Section 1007 [now § 913.3] of the MPC,<sup>3</sup> if they meet the test enunciated by us in *Cablevision*. Those who qualify under neither Section 908 nor Section [913.3] of the MPC may be permitted to appear as parties in the discretion of the Board.

367 A.2d 819, 822 (Pa. Commw. Ct. 1976).

The *Baker* court noted that under *Cablevision-Division of Sammons Communications, Inc. v. Zoning Hearing Bd. of City of Easton*, 320 A.2d 388 (1974), to be a “person aggrieved,” that individual must suffer a “direct, immediate, pecuniary and substantial interest in the subject matter of the litigation.” *Id.*

Accordingly, when a zoning board considers whether an individual or organization has standing, the board must first determine whether the individual is seeking party standing pursuant to § 908(3) of the MPC or § 913.3. If a person is seeking standing under § 908, the person must establish that he or she is “affected” by the application. If the person is seeking standing under § 913.3, the person must establish that he or she is “aggrieved,” as defined in *Cablevision*. Even if the person is unable to meet either standard, the zoning board may still permit party status in the board’s discretion.

Although courts have recognized that standing under § 908(3) requires that a person be “affected,” while § 913.3 requires a person to be “aggrieved,” courts have not further opined upon the distinction. *Pennsylvania Zoning Law and Practice* equates the two and posits that “[a] township resident who has a direct and immediate substantial pecuniary interest in the subject matter of the zoning application is a person ‘affected by the application’ and must be accorded the status of a ‘party’ if he makes a timely appearance of record before the zoning board.” Ryan,

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<sup>3</sup> Section 1007 of the MPC was repealed in 1988 and recodified as § 913.3 in substantially the same form.

Pennsylvania Zoning Law and Practice, § 9.4.2 (1981). The treatise goes on to stress that, “[a] township resident who lacks that standing may nevertheless be permitted by the board to appear as a party in opposition to an application, as a matter of discretion, under the portion of § 908(3) which permits the Board to recognize as a party ‘any other party including civic or community organizations.’” *Id.*

**b. Definition of Direct and Immediate Substantial Pecuniary Interest**

In *William Penn Parking Garage, Inc. v. City of Pittsburgh*, the Pennsylvania Supreme Court considered, in depth, what is meant by “direct and immediate substantial pecuniary interest.” 346 A.2d 269 (Pa. 1975) (plurality opinion). Regarding the “pecuniary” requirement, the Court noted that “it is clear that some interests will suffice to confer standing even though they are neither pecuniary nor readily translatable into pecuniary terms,” *id.* at 281-82<sup>4</sup>, and that “even when the interest is ‘pecuniary’ there is no minimum threshold on its magnitude.” *Id.* at 282. In the zoning context, courts have held that no pecuniary interest need be shown when the individual’s property is in “close proximity” to the proposed development. *Whitehall Manor, Inc. v. Planning Comm’n of the City of Allentown*, 79 A.3d 720, 728 (Pa. Commw. Ct. 2013). Even if an individual’s property is not within “close proximity,” under *William Penn*, the pecuniary requirement is minimal. On the substantial requirement, *William Penn* found that “a ‘substantial’ interest simply means that the individual’s interest must have substance – there must be some discernible adverse effect to some interest other than the abstract interest of all citizens in having others comply with the law.” 346 A.2d at 282.

An interest is “direct” when the aggrieved person can make a showing of causation between the harm he or she has suffered and the complained of matter. *Id.* Finally, the

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<sup>4</sup> The Court listed numerous nonpecuniary interests that have satisfied standing, such as a plaintiff’s use of natural resources and dilution of the value of a vote.

immediacy of an individual's interest concerns "the nature of the causal connection between the action complained of and the injury to the person challenging it." *Id.* at 283. Subsequent cases have held that the causal connection is immediate "where the interest the party seeks to protect is within the zone of interests sought to be protected by the statute or constitutional guarantee in question." *South Whitehall Twp. Police Serv. V. South Whitehall Twp.*, 555 A.2d 793, 795 (Pa. 1989). Alternatively, an interest is "immediate" when it is "more than a 'remote consequence' and centers on the causal nexus and proximity between the action complained of and the injury to the party challenging it." *Pittsburgh Trust for Cultural Resources v. Zoning Bd. of Adjustment of City of Pittsburgh*, 604 A.2d 298, 303 (Pa. Commw. Ct. 1992).

**c. Who is "Affected" or "Aggrieved" to Satisfy Standing in a Zoning Proceeding**

Traditionally in a zoning proceeding, individuals and organizations have sufficiently shown that they are adversely affected by an application in one of two ways: (1) by residing in "close proximity" to a proposed development; or (2) by establishing a direct injury.

In *Laughman v. Zoning Hearing Bd. of Newberry Twp.*, the court noted that where an individual is in close proximity to a proposed development, it is presumed that the development will "have an effect on the property owner's property." 964 A.2d 19, 22 (Pa. Commw. Ct. 2008). As a result, "[a]n objector who is located in close proximity to the land involved in a zoning application normally has standing to contest the application." *In re Broad Mountain Dev. Co., LLC*, 17 A.3d 434, 440 (Pa. Commw. Ct. 2011). It has been held numerous times that abutting property owners have standing to contest zoning applications. *See Miravich v. Twp. of Exeter*, 6 A.3d 1076, 1079-80 (Pa. Commw. Ct. 2010) ("It is well-established that adjacent property owners have substantive standing to object to subdivision plans both before the governing body and in land use appeals to common pleas.").

While owning property within close proximity to a proposed development supports an individual's standing, it is not *necessary* for an individual to live within a set distance in order to obtain standing before a zoning hearing board, because individuals may also establish "some sort of direct injury" to satisfy the standing requirement. *Laughman*, 964 A.2d at 23. *See, e.g., In re Broad Mountain Dev. Co., LLC*, 17 A.3d at 440-41 (finding that intervenors who lived within a half mile of a proposed wind farm satisfied standing by testifying to potential impacts upon the use and enjoyment of their property such as "continual noise issues, incidents of flickering, throwing and shedding of ice in freezing conditions, possible fires, and potential health problems," in addition to "decline in property values"); *Grant v. Zoning Hearing Bd. of Twp. of Penn*, 776 A.2d 356 (Pa. Commw. Ct. 2001) (holding, in part, that landowners who lived within 6,660 feet of a proposed electric generation facility and alleged that "wind and sound from the proposed site" would flow to their property were aggrieved and thus had standing); *Callowhill Neighborhood Ass'n v. City of Philadelphia Zoning Bd. of Adjustment*, 118 A.3d 1214 (Pa. Commw. Ct. 2015) (finding that a church was aggrieved when light from a proposed sign would shine directly onto the church building and into the church's skylight); *D.E. Street, Inc. v. Zoning Hearing Bd. of Borough of West York*, 519 A.2d 1093, 1095 (Pa. Commw. Ct. 1987) (objector showed adverse impact by asserting that the proposed use of a public parking lot would cause parking problems). As recognized in *Matter of Larsen*, "[t]he burden to establish an adverse impact sufficient to establish standing is not an onerous one; one need only show a perceivable adverse impact on the interest other than the common interest of all citizens in having others comply with the law." 616 A.2d 529, 591 (Pa. 1992) (internal citations omitted).

#### **d. Discretion of the Board**

Importantly, even where an individual or community organization has not established standing as a “person aggrieved” or a “person affected by the application,” the zoning hearing board has the discretion to permit any interested individual or organization to participate as a party. The Commonwealth Courts have consistently recognized that when an individual or organization has been allowed to offer testimony, present evidence, and cross examine other witnesses, the zoning hearing board has implicitly granted the individual or organization party status. *See Naimoli v. Zoning Hearing Bd. of Chester Twp.*, 56 Pa. Commw. Ct. 337, 340 (1981) (acknowledging that the objectors were granted party status because “the objector was allowed to cross-examine witnesses and to call witnesses without objection *by the board.*”) (emphasis added); *Hager v. Manheim Township Zoning Hearing Board*, 352 A.2d 248 (Pa. Commw. Ct. 1976) (finding that the objectors were parties before the zoning hearing board because they were represented by counsel and their names and addresses appeared in the hearing minutes, although no written appearance had been filed).

When an applicant opposes the standing of one or more objectors, the zoning hearing board still retains its authority to grant party status to individuals and civic and community organizations in its discretion. As recognized in *Society Created to Reduce Urban Blight v. Zoning Hearing Bd. of Adjustment of City of Philadelphia*, when an applicant is granted an “ongoing objection to the standing of non-aggrieved persons participating before the ZBA,” the individual or organization must establish standing as an aggrieved person *on appeal* from an adverse decision. 951 A.2d 398, 403 (Pa. Commw. Ct. 2008); *affirmed Spahn v. Zoning Bd. of*

*Adjustment of the City of Philadelphia, et al.*, 977 A.2d 1132 (Pa. 2009).<sup>5</sup> An ongoing standing objection in no way impacts the § 908(3) clause granting standing to “any other person including civic or community organizations *permitted to appear by the board.*”

#### **e. Organizational Standing**

Section 908(3) of the MPC, specifically permits community and civic organizations to appear as parties before the Board. Accordingly, organizations like Protect PT may participate as a party without establishing individual standing. However, civic and community organizations may also establish standing based upon their members’ standing, *see Armstead v. Zoning Bd. of Adjustment of City of Philadelphia*, 115 A.3d 390, 400 (Pa. Commw. Ct. 2015) (“organizations such as Scenic Philadelphia can establish standing based on their members’ own standing.”), provided that individual members establish that they are aggrieved. *Id.* “An association, even without sustaining injury itself, may nevertheless have standing to commence litigation as the representative of its members who are suffering immediate or immediate injury because of the disputed action.” *Pittsburgh Trust for Cultural Resources v. Zoning Bd. of Adjustment of City of Pittsburgh*, 604 A.2d 298, 304 (Pa. Commw. Ct. 1992). An organization or association must allege that “at least one” of its members “has or will suffer a direct, immediate and substantial injury.” *Id.*

### **III. Conclusion**

In conclusion, this Board may grant standing to individuals and community organizations either within its sole discretion or after a showing that individuals will be adversely affected or

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<sup>5</sup> Importantly, *Society Created to Reduce Urban Blight* did not involve the MPC, but was governed by a statutory provision regarding standing only applicable in Philadelphia. The case determined that where an individual’s standing has been opposed before the zoning hearing board, the individual is not granted an automatic right to appeal an adverse decision, as was held in *Baker*. Rather, the individual must establish standing on appeal.



aggrieved by the application. In order to be adversely affected or aggrieved, an individual merely must show a perceivable adverse impact beyond an interest common to the community at large.

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Rose K. Monahan, Esq.  
Ryan Hamilton, Esq.  
Fair Shake Environmental Legal Services  
3495 Butler Street, Suite 102  
Pittsburgh, Pennsylvania 15201  
(412) 742-4615 (office)  
(412) 291-1917 (fax)  
rmonahan@fairshake-els.org  
rhamilton@fairshake-els.org