BEFORE THE FAYETTE COUNTY ZOING HEARING BOARD

ZHB No. 10-20R

Reply Brief of Plaintiffs

Remand of No. 2089 of 2010 G.D.

This Reply Brief is in response to Laurel Mountain Midstream, LLC ("LMM") letter of Shawn Gallagher, Esq. dated June 29, 2016 ("LMM Brief") attached here to as Attachment A for convenience of reference. This brief will follow the format of the LMM Brief.

I. Relevant Legal Standards and Considerations

Under Sections 603(c)(1) and 912.1 of the Pennsylvania Municipalities Planning Code, 53 P.S. § 10101 et seq. ("MPC") the Fayette County Zoning Hearing Board ("Board") has the statutory authority as the tribunal of original jurisdiction to impose reasonable conditions when it approves a special exception. These conditions must be based upon evidence in the record before it. This case is unusual because LMM has been operating the Springhill Compressor Facility ("Facility") since 2009. When this proceeding is finally resolved it will be the first time the Facility is actually permitted under the Fayette County Zoning Ordinance ("Ordinance"). The evidence of the impact in the record submitted by Appellants ("Bezjaks") and the surrounding neighbors is real and current and not based upon speculation. The Bezjaks and the neighbors have lived these impacts. The Board does not have to guess how LMM will operate the Facility. It does not have to guess how it will be constructed or maintained. It knows. The conditions requested by the Bezjaks for the Board to adopt are based upon actual experience.

The status of this case is very similar to the situation in *Lecky v. Lower Southampton Twp. ZHB, 864 A.2d 593 (Pa. Cmwlth 2004).* There a local landscaping operation (not the industrial use we have here) had been operating for some time and the conditions imposed by that ZHB were related to actual experience.

The burden is upon LMM to show that these proposed conditions are unreasonable. As will be discussed in the analysis of all the proposed conditions which LMM opposes, each proposed condition relates to a specific chapter or section of the Ordinance or actual experience.

In Leckey the Commonwealth Court stated:

> "The Township contends that the trial court erred in striking the conditions imposed by the Board in granting the special exception regarding the amount and storage of equipment, hours of operation, number of employees and compliance with the Township's noise ordinance. [2] Section 912.1 of the Pennsylvania Municipalities Planning Code (MPC) [3] specifically authorizes the Board to "attach such reasonable conditions and safeguards, in addition to those expressed in the ordinance, as it may deem necessary to implement the purposes of this act and the zoning ordinance." Because, under the MPC, the Board, utilizing its grant of discretionary power to make a judgment, can impose conditions "it may deem" necessary, a court reviews a challenge to the reasonableness of those conditions; it does not determine whether there is substantial evidence, which is a "fact standard," but whether those conditions constitute an abuse of discretion. Like in any abuse of discretion review, the Board is

not required to support the imposition of conditions; rather, the opposite is true--property owners are required to show that the imposition of conditions was an abuse of discretion. *Pfile v. Zoning Bd. of Adjustment of Borough of Speers,* 7 Pa.Cmwlth. 226, 298 A.2d 598 (1972). [4]

In this case, nothing supports Property Owners' burden to establish that the Board's conditions were unreasonable. To the contrary, Property Owners' nursery and landscaping business was located in a residential district and the landscaping business was not even a permitted use in an R-1 zone. Conditioning the special exception by limiting the hours of operation and number of employees, requiring Property Owners to comply with the noise ordinance, the quantity of equipment used and the number of structures on the property, all made the operation of the business more compatible with an R-1 Residential zoning district. All of those conditions addressed the concerns expressed by Ms. Cofone, the Professional Planner, and those of both neighbors, Ms. Mehler and Ms. Quigley, who testified not only about concerns with the physical appearance of Property Owners' property but also regarding the noise from the equipment used, the time of day the equipment was used (10 p.m.), and a restriction on the number of employees at the nursery.

Accordingly, because it is within the Board's discretion to impose reasonable conditions on the grant of a special exception in a residential district that portion of the trial court's order striking the conditions is reversed.

864 A.2 at 596

The Board must also review the operation of LMM's Facility in light of *Robinson Township v. Commonwealth, 83 A.3d 901 (PA 2013).* There the Pennsylvania Supreme Court determined that:

Although the first clause of Section 27 does not impose express duties on the political branches to enact specific affirmative measures to promote clean air, pure water, and the preservation of the different values of our environment, the right articulated is neither meaningless nor merely aspirational. The corollary of the people's Section 27 reservation of right to an environment of quality is an obligation on the government's behalf to refrain from unduly infringing upon or violating the right, including by legislative enactment or executive action. Clause one of Section 27 requires each branch of government to consider in advance of proceeding the environmental effect of any proposed action on the constitutionally protected features. The failure to obtain information regarding environmental effects does not excuse the constitutional obligation because the obligation exists a *priori* to any statute purporting to create a cause of action.[40]

Moreover, as the citizens argue, the constitutional obligation binds all government, state or local, concurrently. Franklin Twp., 452 A.2d at 722 & n.8 (citing Section 27, Court stated that protection and enhancement of citizens' quality of life "is a constitutional charge which must be respected by all levels of government in the Commonwealth"); see Hartford, 482 A.2d at 549 (Declaration of Rights provision "circumscribes the conduct of state and local government entities and officials of all levels in their formulation, interpretation and enforcement of statutes, regulations, ordinances and other legislation as well as decisional law.").

83 A.3d at 952

LMM in its proposed findings attempt to use the plurality decision nature of Section III of the decision as making this review obligation of the Board non-binding. It cites *Pa. Environmental Defense Fund Foundation v. Commonwealth, 108 A.3d 140 (Pa. Cmwlth. 2015)* as authority. This case cannot help it. The Commonwealth Court correctly stated that *Robinson, supra* does not overturn *Payne v. Kassab 361 A.2d 263 (PA 1976).* However Payne recognized the mandatory Art I Section 27 review requirement and created a three part test for that review. Payne still require this Board to evaluate the operation of LMM Facility independently in regards to Art I Section 27. Not only that the

Commonwealth Court accepted in a footnote the Robinson court's analysis notwithstanding its reference to the "plurality" issue as follows:

> [37]Part III of the Pennsylvania Supreme Court's lead opinion in Robinson Township., authored by Chief Justice Castille, garnered the support of only two joining justices, Justices Todd and McCaffery. Part III, therefore, represents a plurality view of the Supreme Court. The legal reasoning and conclusions contained therein are thus not binding precedent on this Court. Kelly v. State Emps. Ret. Bd., 593 Pa. 487, 932 A.2d 61, 67-68 (Pa. 2007). Nonetheless, in reviewing the accompanying minority opinions, it does not appear that any of the concurring and dissenting justices disputed the plurality's construction of the Environmental Rights Amendment, **including the rights declared therein and attendant duties imposed thereby on the Commonwealth. (emphasis supplied)**

108 A.3d at 156

The MPC has as one of its purposes "to provide the preservation of this Commonwealth's natural and historic resources and prime agricultural land." 53 P.S. §10105. In it grant of zoning power at 53 P.S. § 10603(b)(5) it allows Protection and preservation of natural and historic and prime agricultural land and activities. This power and obligation is unfettered by Act 13 Chapter 33 regulations which are enjoined by the Pa Supreme Court in *Robinson, supra.*

Thus the Board had broad constitutional power and an obligation to review LMM's facility operations pursuant to Art I Section 27. Bezjaks' proposed conditions are reasonable and should be adopted by the Board and imposed.

II. Specific Objection by LMM

1. LMM shall install and maintain sound mitigation so that the measured sound level is 50 dBA during daytime hours (7 AM- 9 PM) and 35 dBA during nighttime hours (9 PM – 7 AM) as measured at any property line boundary or location on an adjacent property. The sound level should be measured using a 15 minute, A-weighted equivalent continuous sound level (LAeq) metric. Compliance shall be tested with all compression engines and other sources of noise running at full capacity.

The uncontroverted testimony of Bezjaks Sound Engineer, William Thornton and the testimony of Joseph Bezjak and the neighbors shows that tighter restrictions than those imposed by § 1000-503 Noise are required. Increasing the noise limits pursuant to the Board's authority at § 1000-858(C) and the required constitutional environmental remediation is reasonable and supported in the record. The standards are nationally recognized. There is no testimony from LMM to the contrary.

2. LMM shall implement blowdown injection technology, or equivalent means to prevent blowdowns from venting directly into the atmosphere.

There was discussion and testimony by LMM's facilities manager that LMM did not capture blow down gas. This released raw gas to the atmosphere which escapes the property. LMM raises in its objection the issue of preemption. No specific statutes were named. We must assume that they are the Commonwealth Air Pollution Control Act, 53 P.S. § 4001 et seq. ("APCA") and the federal Clean Air Act. There is expressly no preemption under the APCA. See: §4012(a). The Board has full authority to impose condition as strict as or stricter than the APCA. *Boro of Ridgway v. Buehler Lumber, 19 Pa. D&C 780 (Pa. Com. PL. 1981*

Even should preemption be a valid argument, the Pennsylvania Supreme Court has addressed this issue in *Hoffmann Mining Co v. ZHB of Adams Twp., 32 A.3d 587, (PA. 2011)*. The preemption involved in this case is conflict preemption. The Court's analysis is as follows:

> There are three generally recognized types of preemption: (1) express or explicit preemption, where the statute includes a preemption clause, the language of which specifically bars local authorities from acting on a particular subject matter;(2) conflict preemption, where the local enactment irreconcilably conflicts with or stands as an obstacle to the execution of the full purposes of the statute; and (3) field preemption, where analysis of the entire statute reveals the General Assembly's implicit intent to occupy the field completely and to permit no local enactments. Holt's Cigar, supra at 907; *Huntley*, 964 A.2d at 862-63 & n.6; *Cellucci v. General Motors Corporation,* 550 Pa. 407, 706 A.2d 806, 809 (Pa. 1998). Both field and conflict preemption require an analysis of whether preemption is implied in or implicit from the text of the whole statute, which may or may not include an express preemption clause. *Cellucci, supra* at 809.
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> Conflict preemption is a formalization of the self-evident principle that " a municipal ordinance cannot be sustained to the extent that it is contradictory to, or inconsistent with, a state statute." Mars Emergency, supra at 195 (quoting *Western Pennsylvania Restaurant Association v. City of Pittsburgh,* 366 Pa. 374, 77 A.2d 616, 620, 42 Mun. L Rep. 161 (Pa. 1951)). Conflict preemption is applicable when the conflict between a local ordinance and a state statute is irreconcilable, i.e., when simultaneous compliance with both the local ordinance and the state statute is impossible. See Council 13, *Am. Fed'n of State, County & Mun. Employees v. Rendell,* 604 Pa. 352, 986 A.2d 63, 81-82 (Pa. 2009) (holding that an irreconcilable conflict existed between a federal law and a section of the Pennsylvania Constitution because the former required the timely payment of wages to state employees, but the latter barred the expenditure of monies from the state treasury during a budget impasse when no appropriations bill had been passed); *City Council of the City of Bethlehem v. Marcincin,* 512 Pa. 1, 515 A.2d 1320, 1323, 1326 (Pa. 1986) (concluding that an ordinance limiting a mayor to two consecutive terms was not irreconcilable with a statute providing that a mayor shall be eligible for reelection); *Fross v. County of Allegheny,* 610 Pa. 421, 20 A.3d 1193, 1203 n.12 (Pa. 2011). In addition, under the doctrine of conflict preemption, a local ordinance will be invalidated if it stands " as an obstacle to the execution of the full purposes and objectives" of a statutory enactment of the General Assembly. *Id.* at 1203-1207 (concluding that a local ordinance severely restricting where convicted sex offenders could reside was an impediment to the objectives of the General Assembly as expressed in the Sentencing and Parole Codes, which set forth a policy of rehabilitation, reintegration, and diversion from prison of appropriate offenders, based on individually tailored assessments); Holt's Cigar, supra at 913 (concluding that a Philadelphia ordinance that banned the sale of certain items having both a legitimate use and a drug-related use interfered with an implied objective of the Controlled Substance, Drug, Device and Cosmetic Act to protect merchants who sell dual-use items for legitimate purposes).
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> Finally, with regard to conflict preemption, we reiterate this Court's prior statements as to the proper standard for invalidation of local ordinances, and also as to the potential coexistence of local enactments that supplement the statutory scheme or goals. " Where an ordinance conflicts with a statute, the will of the municipality as expressed through an ordinance will be respected unless the conflict between the statute and the ordinance is irreconcilable." *Marcincin*, 515 A.2d at 1326. We will refrain from holding that a local ordinance is invalid based on conflict preemption " unless there is such actual, material conflict between the state and local powers that only by striking down the local power can the power of the wider constituency be protected." *United Tavern Owners of Philadelphia v. School District of Philadelphia,* 441 Pa. 274, 272 A.2d 868, 871 (Pa. 1971). It is a long-established general rule that " in determining whether a conflict exists between a general and local law, [ ] where the legislature has assumed to regulate a given course of conduct by prohibitory enactments, a municipal corporation with subordinate power to act in the matter may make such additional regulations in aid and furtherance of the purpose of the general law as may seem appropriate to the necessities of the particular locality and which are not in themselves unreasonable." *MarsEmergency*, 740 A.2d at 195 (*quoting Western Pennsylvania Restaurant Association*, 77 A.2d at 620). For example, " municipalities in the exercise of the police power may regulate certain occupations by imposing restrictions which are in addition to, and not in conflict with, statutory regulations." Western Pennsylvania Restaurant Association, supra at 620. We have also observed that this Court has " traditionally given local zoning power great play[, and has] been reluctant to strike down a

local ordinance in cases where a state statute does not directly and inherently conflict with the zoning power." *Benham*, 523 A.2d at 315.

32 A.3d 593 – 595

All of LMM permits from PaDEP are in the record. None of them regulate LMM's choice of blowdown management. This condition is based upon FLIR films of escaping gas and the neighborhood testimony on odors and health effects. It does not affect the operation of the Facility other than to contain gas. It is a proper local air pollution condition authorized by § 1000-507 of the Ordinance. It is reasonable and backed by substantial evidence in the record.

3. LMM shall file quarterly with Fayette County a report providing the following information:

A. All data appropriate to the facility as described in the DEP publication "Spreadsheet Reporting Guide for Conventional and Unconventional Midstream Natural Gas Compressor Station Emissions Reporting System" [1] (or its successor document) for the quarter ending no greater than 60 days prior to the date on which the report is filed.

B. Total amount of gas input into the compressor station for the same reporting period as item A above.

C. Total amount of gas output from the compressor station to transmission for the same reporting period as item A above.

D. Copies of any and all LDAR "FLIR" (or equivalent technology) imaging taken pursuant to the BAQ-GPA/GP-5 section "REQUIREMENTS FOR EQUIPMENT LEAKS" for the same reporting period as item A above.

E. Copies of any and all EPA Air Compliance Inspection Reports immediately upon receipt and copies of its response immediately and all other responses no less than its quarterly filing.

It shall be understood that Fayette County's copy of this report is a Public Record under the terms of the Right To Know Law.

7. LMM shall at the same time it notifies PaDEP of any incidents, including without limitation Springhill Compressor Station Malfunctions, email a copy of the incident notification to the Fayette County Office of Planning, Zoning and Community Development.

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1 http://files.dep.state.pa.us/Air/AirQuality/AQPortalFiles/Business%20Topics/Emission%20Inventory/marcellus/2015_Midstream_Air_Emissions_Spreadsheet_Guide.pdf

LMM is being asked to file with the Fayette County Office Planning Zoning and Community Development copies of materials in its files with PaDEP. This does not affect the physical operation of the LMM Facility. It does not establish any new requirement for data collection or analysis. It simply allows the County and its citizens to see what LMM provides PaDEP in a timely fashion It allows the County or neighbors to see if LMM is complying with its PaDEP mandates. The Ordinance requires at § 1000 -507(B) that all appropriate PaDEP permits be obtained as a condition of zoning approval. It would be absurd to suggest that condition to be one time only and that an applicant could abandon those permits or abuse those permits and not ever be required to show continued compliance. There is no burdensome requirement on LMM and it has shown none in the record. It is information that is public but only after more than a year's delay. It is the same information that LMM transmits to PaDEP and only the postal address or email address is different. There is no abuse of discretion.

4. LMM shall file with Fayette County an Emergency Response Plan, including an evacuation plan for residents of Hope Hollow Road and Honor Roll Road in the event of an accident. The evacuation procedure under this plan will be communicated to nearby residents of Hope Hollow Road and Honor Roll Road in writing.

5. LMM shall communicate to nearby residents notice of all planned blowdowns.

LMM proposes only to coordinate with local first responders and notify property owners about emergency drills. Bezjaks have no objection to those conditions but they do not go far enough. This industrial use runs 24/7. It processes flammable gas some of which is hazardous. It hauls out 1,000 barrels a month of liquid waste which it classifies at toxic. All of this is in the record. These two roads are the only way out for the neighbors. Neighbors have testified to adverse reaction to Facility discharges. Being able to know when planned discharges will occur will allow them to some degree to minimize exposure. It is hardly unreasonable for LMM to notify people of what they are doing when LMM is intentionally emitting gases that are leaving its property. Population density is low and the effort to notify a few people is not burdensome. The conditions are reasonable and supported by credible evidence in the record before the Board.

6. LMM shall not operate the gas fired engines at any time with the doors to the engine enclosures open.

There is no evidence in the record that there are federal regulations which requires equipment doors to be open at any time. There is evidence in the record with the testimony of the neighbors as to noise and the lack of quality of life that running the engines with the doors open is harmful. LMM makes a commitment in its brief to attempt to operate the engines with the doors closed. There is no evidence in the record that the Facility could not operate with the doors closed. If in the future some Commonwealth or federal regulation requires the doors to be open (certainly highly unlikely) then LMM can seek relief from this condition and show how the noise from open doors will be mitigated.

8. LMM shall plant and maintain a Number 1 bufferyard pursuant to § 1000-212 Table 5 along the common border of the Bezjaks property.

LMM operates an industrial use, See: *Robinson, supra,* in a rural agricultural zoning district. It does not have trees on its common property line with the Bezjaks. The Bezjaks do because growing trees is about all they can do with their property. The testimony of Joseph Bezjak demonstrates that the property has been devalued and can't be used for residential or nursing home use. This bufferyard is one of the few mitigating measures that could allow development of the Bezjaks property. The Ordinance has bufferyard requirements for precisely that reason. LMM is blaming the victim in its brief. The condition is reasonable, based within the Ordinance and evidence in the record supports its imposition. It is not an abuse of discretion.

9. No future improvement which will generate emissions, glare, or noise shall be installed within 200 feet of the Bezjaks Property line and no current improvement may be moved or reconstructed closer than its current location.

10. LMM shall reapply to the ZHB for a new Special Exception in the event that the equipment at Springhill Compressor Station changes or the capacity of the Springhill Compressor Station is increased by any other means by more than 10%.

The Board has the power to protect the health, welfare and safety of the neighbors pursuant to Art I Sec 27 of the Pennsylvania Constitution. These conditions are directly related to Ordinance provisions and are permitted pursuant to § 1000-858. The record of LMM past management practices are relevant and in the record. LMM has demonstrated that it will not respect Ordinance provisions without action by the County that constantly reminds LMM of its responsibilities.

11. LMM shall remove the encroachments on the Bezjaks property.

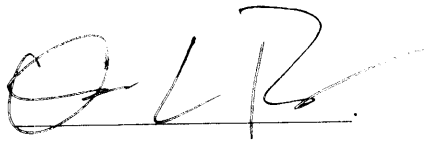
Placing an improvement which is part of LMM's use on someone else's property is not a private property dispute beyond the jurisdiction of the Board. *Gulla v. North Strabane Twp.,676 A.2d 709 (Pa. Cmwlth. 1996)* The Ordinance requires LMM's use to be on a lot and an applicant pursuant to the MPC and the Ordinance must be the landowner (Bezjaks) or someone with the permission of the landowner. LMM is neither. It is uncontroverted in the record from Bezjaks' survey that there is an encroachment on the Bezjaks property. Certainly LMM had time to do its own survey between the first and second hearing before this Board. It did not and it presented no evidence that could create a hint of a boundary dispute. That is not cannot be before the Board. It is reasonable for the Board to condition any approval of the use on the removal of the encroachment.

12. Zoning approval shall be revoked by the Zoning Officer for violations of these conditions as well as after notification by DEP of violations of permit # GP5-26-00587D, or any subsequent GP5 permits which may be issued from time to time.

While LMM attempts to raise constitutional issues and alleges it is contrary to law it is not the case. In regards to a non-Ordinance violation, it is PaDEP that would notify the County of the violation. LMM would, if cited by PaDEP have all the rights to contest the citation granted by law. The Office of Zoning Planning and Community Development will have no role in that. Upon the revocation of the occupancy permit by the Zoning Officer for a local condition violation or because of a notice from

PaDEP of a final determination, LMM would have all the appeal rights set forth in the MPC and the Ordinance. Given LMM's history of non-compliance it is a reasonable and important condition to assure LMM's attention to proper operation of the Facility.

WHEREFORE, the Bezjaks request this Board to impose all the conditions proposed in its proposed finding of fact and conclusions of law.



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Dated July 14, 2016