Established Ordinance Interpretation and Special Exception Standards; Land Use and Planning

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Byline: Blaine A. Lucas and Alyssa E. Golfieri

Body

With the rise of unconventional shale development in many portions of Pennsylvania, there has been a corresponding increase in litigation stemming from local government actions approving and disapproving of a wide variety of oil and gas facilities. In a case with origins predating both Act 13 of 2012 and the ensuing challenge to it in *Robinson Township v. Commonwealth, 83 A.3d 901 (Pa 2013)*, on Sept. 26, the Commonwealth Court rendered a decision in *MarkWest Liberty Midstream & Resources v. Cecil Township Zoning Hearing Board, 2014 Pa. Commw. LEXIS 470 (Pa. Commw. Ct. 2014)*, addressing the scope of a zoning hearing board's authority when considering an applicant's request for land use approval related to a natural gas compressor station.

In 2010, MarkWest Liberty Midstream & Resources applied to the Cecil Township Zoning Hearing Board for a special exception to construct and operate a natural gas compressor station in the township's I-1 light industrial district, pursuant to a provision in its unified development ordinance (UDO), which authorized "comparable uses which are not specifically listed" in that district, provided any such use: would have an equal or lesser impact than, and is of the same general character as, any of the township's permitted conditional uses or uses by right; meets the township's area and bulk requirements; complies with the express standards and criteria specified for the most nearly comparable I-1 use; and is consistent with the intent set forth in the UDO for industrial districts. The board denied MarkWest's application, finding that it failed to satisfy these criteria, a decision the Washington County Court of Common Pleas affirmed. However, the Commonwealth Court reversed and remanded the case with direction that the special exception be granted, subject to the board's determination as to whether any conditions are needed to ensure compliance with the UDO.

The threshold issue in MarkWest was whether a natural gas compressor station was comparable to other uses authorized in the I-1 district. MarkWest asserted that it was of the same general character as an "essential service," a permitted use by right in the I-1 district. The UDO defined the term, in part, as "the erection, construction, alteration or maintenance of gas, electrical and communication facilities." However, the definition excluded "private commercial enterprises such as cellular communication facilities."

The board determined that MarkWest is a commercial enterprise and is neither a public utility nor does it provide a service essential to the public. The board found that the proposed use is more comparable to a cellular communications facility, which was expressly excluded from the definition of essential service. It also concluded that the compressor station was not an essential service because the gas was not transmitted to the end user.

The Commonwealth Court rejected all of these conclusions, finding that: the ordinance definition does not require that an essential service be a public utility; it was unreasonable to extend the exclusion of telecommunications facilities to compressor stations in light of the fact that "natural gas compressor station" was a defined term under the UDO and was not excluded; the UDO's definition of essential services does not require that the applicant transmit natural gas directly to an end user; and the proposed use was not required to be of "the same character" as an essential service, but only of the "same general character."

The board articulated a number of other bases for its denial of MarkWest's special exception application, all of which were rejected by the Commonwealth Court.

The board stated that the proposed compressor station "would have a greater impact in an adverse way upon the environment than an essential service," and "would cause certain carcinogenic materials and other hazards to be expelled into the air." However, the Commonwealth Court pointed out that the board made no factual findings supporting these conclusions, made no comparison of the proposed facility to manufacturing uses permitted in the I-1 district, and specifically noted that MarkWest would obtain minor air permits from the Department of Environmental Protection.

The board also concluded that the special exception application failed "as a matter of law" because MarkWest did not present "documentation or expert reports demonstrating compliance with the requirement that its proposed use is of the same general character as uses permitted by right in the I-1 light industrial district." The Commonwealth Court reversed, finding that such an obligation was not supported by the UDO, and that while MarkWest had the initial burden of demonstrating compliance with the specific objective requirements of the UDO, there was no authority mandating it to produce expert reports.

The board also rejected the special exception application on the basis that MarkWest did not produce "noise or sound studies" establishing that it met the ordinance requirement that "excessive noise shall be required to be muffled so as not to be objectionable to surrounding property owners due to intermittence, beat frequency, shrillness or volume." Reversing this determination, the Commonwealth Court again noted that there was no such study requirement under the UDO, and that MarkWest presented testimony that with sound mitigation measures it would meet a decibel limit of 60 dBA at the property line. The Commonwealth Court reversed a board finding with regard to odor thresholds and the "emission of smoke or particulate matter" on similar grounds.

The board's final conclusion was that MarkWest failed to meet its burden to establish that the proposed use "would impact neighboring properties in a manner that was equal to or less than the impact of permitted uses" in the I-1 district. Specifically, the board found that MarkWest failed to provide rebuttal testimony on neighbors' testimony regarding real estate values, failed to show similarities in noise, odor and air emissions between the proposed facility and other uses by right in the I-1 district, and failed to

produce studies that demonstrate that the facility would have no greater impact on neighboring properties than other I-1 uses.

The Commonwealth Court again reversed, noting the substantial testimony presented by the applicant on these issues. As a result, the court reiterated the established law that the burden shifted to objectors to "show a high degree of probability that [the proposed use] will substantially affect the health and safety of the community."

Operators, municipalities and property owners are faced with a multitude of challenges in connection with unconventional shale gas development, particularly as to the interpretation and application of zoning ordinances regulating these uses. When applying zoning ordinance provisions, the law gives deference to a local agency's interpretation. However, as evidenced by the Commonwealth Court's decision in MarkWest, that discretion is not unfettered. A local agency must be cognizant that it is sitting in its quasijudicial capacity, as opposed to a legislative capacity. As a result, it may not arbitrarily modify or alter a zoning ordinance, impose additional requirements or prescribe a higher burden on applicants than that which is mandated under established Pennsylvania land use law principles.

Blaine A. Lucas is a shareholder, and Alyssa E. Golfieri is an associate, in the public sector services and energy and natural resources groups of the Pittsburgh law firm of Babst Calland. Lucas coordinates the firm's representation of energy clients on land use and other local regulatory matters. He also teaches land use law at the University of Pittsburgh School of Law. Golfieri focuses her practice on zoning, subdivision, land development, taxation, real estate, code enforcement, public bidding and contracting matters.

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