

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

PLUM BOROUGH,

Appellant,

vs.

PENNECO ENVIRONMENTAL
SOLUTIONS, LLC,

Appellee,

ZONING HEARING BOARD OF
THE BOROUGH OF PLUM

Appellee,

No.

NAME OF PLEADING:
NOTICE OF LAND USE APPEAL

FILED ON BEHALF OF:
Plum Borough

COUNSEL OF RECORD:
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Pa. I.D. 16470

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PENNSYLVANIA

PLUM BOROUGH,)	
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Appellant,)	No.
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PENNECO ENVIRONMENTAL)	
SOLUTIONS, LLC,)	
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Appellee,)	
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ZONING HEARING BOARD OF)	
THE BOROUGH OF PLUM,)	
)	
Appellee,)	

NOTICE OF LAND USE APPEAL

Pursuant to the Municipalities Planning Code (53 P.S. § 11001-A, *et al.*) the Borough of Plum, by and through its attorney Dayne F. Dice, Esquire, and Bruce E. Dice & Associates, P.C. hereby appeals the January 26th, 2022 decision of the Zoning Hearing Board of the Borough of Plum, and in support thereof states as follows:

Jurisdiction and Venue

1. Jurisdiction exists and venue is proper in this Court under Section 1102-A of the Pennsylvania Municipalities Planning Code, since the property in question is located in Allegheny County, Pennsylvania. 53 P.S. § 11002-A.

Factual and Procedural Background

2. The appellant is the Borough of Plum, (hereinafter “Plum”) a Pennsylvania Municipal Corporation and body politic with a business address at Plum Borough Municipal Building, 4575 New Texas Road, Plum Borough, Pennsylvania, 15239.
3. The appellee Penneco Environmental Solutions, LLC (hereinafter “Penneco”) is an affiliate of Sedat, Inc., the owner of property located at 1815 Old Leechburg Road, Lot & Block 1234-F-206 (hereinafter the “subject property”) located within a Rural Residential District within Plum Borough, as defined by the Plum Borough Zoning Ordinance #916-17, as amended (hereinafter “Zoning Ordinance”).
4. The appellee Zoning Hearing Board of the Borough of Plum (hereinafter “ZHB”) is a quasi-judicial body within the Borough of Plum. The principal office of the ZHB is the Plum Borough Municipal Building, 4575 New Texas Road, Plum Borough, Pennsylvania, 15239.
5. On or around November 2nd, 2021, Penneco submitted a request to expand a prior nonconforming use to the ZHB.
6. By mutual consent of the parties, the hearing on the matter was postponed until January 2022.
7. A hearing on Penneco’s request to expand a prior nonconforming use did occur on January 19th, 2022, at ZHB docket number ZHB-2021-15.
8. The ZHB rendered its written decision finding in favor of Penneco’s proposed expansion of a nonconforming use on January 26th, 2022. (A copy of the ZHB’s January 26th, 2022 written decision is attached hereto, incorporated herein, and marked as Exhibit “A”).

Reasons for Appeal

9. Penneco presented insufficient testimony and evidence as required by the Zoning Ordinance to support a grant of a special exception.
10. The ZHB incorrectly found that Penneco has a right to enlarge the nonconforming use by adding another injection well within the required setbacks of the subject property. Plum did present evidence and testimony from the Borough Engineer that the proposed expansion is located within the required five hundred (500) foot setback of the subject property.
11. The right of natural expansion of a nonconforming use extends only to use nonconformities, not dimensional nonconformities. Rennerdale Volunteer Fire Dept. v. Zoning Hearing Bd. of Collier Twp., 496 A.2d 431 (Pa. Commw. Ct. 2000); Narberth JKST Tennis Club, Inc. v. Zoning Hearing Bd. of Borough of Narberth, 938 A.2d 1144 (Pa. Commw. Ct. 2007).
12. The Zoning Ordinance specifically states, “For the purposes of determining if an enlargement or expansion of nonconforming use meets this requirement, the applicant shall file an application for Special Exception pursuant to the requirements of Article IV of this Ordinance. The applicant must meet all the applicable requirements and criteria of Article IV in addition to providing evidence that the enlargement or extension is necessitated by the natural expansion and growth of trade of the nonconforming use.” (Emphasis Added); Zoning Ord., Article X, §1002(C)(2); pg. 213.
13. Despite the express criteria of the Zoning Ordinance, the ZHB failed to properly consider and apply the factors contained in the Borough’s Zoning Ordinance, such as those factors contained in Section 403 “Special Exceptions,” Section 405 “General Standards for all Conditional Uses and Special Exceptions,” Section 1002(C) “Expansion or extension of

nonconforming use,” Section 1003 “Nonconforming Buildings or Structures,” and lastly Section 434 “Injection Well,” especially subsection C within Section 434 entitled “General Standards” and subsection D within Section 434 entitled “Setbacks/Location.”

14. The ZHB does note in its decision that an applicant seeking to increase or expand a nonconforming use must file an application for Special Exception pursuant to the requirements of Article IV under the Zoning Ordinance. *See* ¶33 of the ZHB decision.
15. Despite the ZHB acknowledging Article IV of the Zoning Ordinance in the ZHB’s decision, there is no analysis or examination of the Article IV criteria within the ZHB’s decision, or Penneco’s failure to meet the criteria contained in Article IV.
16. The ZHB further failed to consider Penneco’s duty under the Zoning Ordinance to demonstrate that the proposed expansion of the nonconforming use is not detrimental to the health, safety, and welfare of the neighborhood, as required by the Zoning Ordinance. Zoning Ord., Article IV, §404(A)(6); pg. 91.
17. Specifically, the Zoning Ordinance requires the following, “Burden of Proof: In proceedings involving a request for a use by Special Exception, both the duty of initially presenting evidence and the burden of persuading the ZHB that the proposed use is authorized as a use by Special Exception and satisfies the specific or objective requirements for the grant of a use by Special Exception as set forth in this Ordinance rest upon the applicant. The applicant shall demonstrate that the request is not detrimental to the health, safety, and welfare of the neighborhood.” (*Emphasis Added*); Zoning Ord., Article IV, §404(A)(6); pg. 91.
18. Several residents gave testimony regarding the adverse impacts of the injection well on their property. A nurse further gave testimony regarding the adverse health impacts of injection wells.

19. It is the position of Plum that Penneco has not met the requirements to expand a nonconforming use.

20. For the reasons set forth herein, and any other reasons which may be set forth in Plum's brief regarding the herein appeal, the Borough asks that the January 26th, 2022 decision of the ZHB be overturned.

WHEREFORE, the Appellant, the Borough of Plum, respectfully requests this Honorable Court to reverse the decision of the Zoning Hearing Board of the Borough of Plum.

Respectfully Submitted,

2/23/22
Date



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THE ZONING HEARING BOARD OF PLUM BOROUGH
ALLEGHENY COUNTY, PENNSYLVANIA

IN RE: Application for Variance by
Penneco Environmental Solutions, LLC

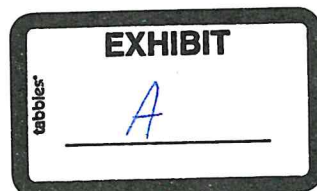
ZHB-2021-15

FINDINGS OF FACT,
CONCLUSIONS OF LAW
& DECISION

Filed on Behalf of:

The Zoning Hearing Board of Plum
Borough

4575 New Texas Road
Pittsburgh, PA 15239



THE ZONING HEARING BOARD OF PLUM BOROUGH
ALLEGHENY COUNTY, PENNSYLVANIA

IN RE: Application for Variance by
Penneco Environmental Solutions, LLC

ZHB-2021-15

FINDINGS OF FACT, CONCLUSIONS OF LAW & DECISION

Findings of Fact:

1. Penneco Environmental Solutions, LLC (Applicant), owns real estate identified as Lot & Block 1234-F-206 in the Allegheny County Recorder of Deeds Office.
2. The property is in Plum Borough with an address of 1815 Old Leechburg Rd., New Kensington, PA 15068.
3. The property is zoned "RR" Rural Residential under Plum Borough Zoning Ordinance No. 916-17, as amended (Ordinance).
4. The property's size is 69 acres.
5. Since approximately January of 1989, either the Applicant or its predecessor in interest, Sedat, Inc., has operated a production gas well at the property.
6. On or about March 31, 2016, the Applicant applied to United States Environmental Protection Agency (EPA) requesting permission to operate an underground injection control (UIC) facility at the property.
7. UIC facilities serve to dispose of exploration and production fluids from oil and gas operations by placing the fluids into porous geologic formations.
8. The disposal of waste products from oil and gas operations is subject to the oversight of the EPA and the Pennsylvania Department of Environmental Protection (PaDEP).
9. On September 9, 2016, the Applicant submitted to the Borough and the Plum Borough Zoning Hearing Board (ZHB) a "Petition to Challenge the Validity of Ordinance No. 731-04" (the Borough's previous zoning ordinance).

10. The Applicant's challenge claimed that Ordinance No. 731-04 illegally excluded the operation of an UIC facility in all zoning districts in the Borough, and that Ordinance No. 731-04 was preempted by state and federal law.

11. In June of 2017, the Borough publicly announced its plans to propose and subsequently adopt a new zoning ordinance that, in part, would regulate UIC facilities.

12. On October 18, 2017, the ZHB conducted a hearing on the Applicant's validity challenge.

13. The ZHB denied the Applicant's substantive validity challenge on the grounds that the matter was not ripe for review because the Applicant had not yet obtained federal and state permits for the proposed conversion of its production oil and gas well into an underground injection well.

14. The Applicant filed a timely appeal.

15. The Common Pleas Court of Allegheny County, at docket number SA-17-001052, reversed the decision of the ZHB.

16. The ZHB and the Borough filed a timely appeal.

17. The Commonwealth Court affirmed the reversal of the Common Pleas Court at In re Penneco Environmental Solutions, LLC, 205 A.3d 401 (Pa.Cmwlth. 2019).

18. As a result of the Commonwealth Court's decision allowing the Applicant to operate within the Borough, and following the necessary regulatory agency approvals, the Applicant began to operate the UIC facility at 1815 Old Leechburg Rd. on February 25, 2021.

19. The property is currently being used by the Applicant for an UIC facility that includes an UIC well, an observation well, and accompanying facilities.

20. Said use of the property is a preexisting nonconforming use because the current use of the property was commenced prior to the adoption of the current Ordinance.

21. Facilities for the disposal of production fluids from oil and gas operations are in high demand.

22. The Applicant wants to expand the nonconforming use to add another injection point and observation well to be serviced by the already existing facilities.

23. On or about November 23, 2021, a representative of the Applicant applied to the ZHB to authorize the expansion of the non-conforming use.

24. A hearing on the Application occurred on January 19, 2022, at which time the Applicant was permitted to testify in support of its request and objectors were permitted to testify and submit evidence in opposition to the granting of the Application.

25. The Applicant testified that no new construction on the site will occur to facilitate the addition of another injection point and observation well.

26. The Applicant testified that no additional roads will be needed to facilitate the addition of another injection point and observation well.

27. The Applicant testified that truck traffic to the property is estimated to increase from 30 loads per day to 45 loads per day.

28. The Applicant's testimony stated that product capacity will increase by 50% because of the expansion.

29. According to the Applicant, the footprint of its operation will not change, and the necessary changes to the facility will occur underground.

30. The Board recognizes that Robinson Township v. Commonwealth, 83 A.3d 901, 977-84 (Pa. 2013) (invalidating portions of Pennsylvania's Act 13) expressly preempted local ordinances that attempt to regulate well site procedures and operations but not local ordinances that regulate well location.

31. The location of facilities on the property will not be changed from their preexisting and nonconforming location.

32. The Ordinance gives landowners the right to enlarge a nonconforming use after making application to the ZHB.

33. Under Ordinance §1002(C):

No such nonconforming use shall be enlarged or increased or extended to occupy a greater lot area than was occupied at the effective date of adoption or amendment of this Ordinance, unless the ZHB shall interpret that the enlargement or extension is necessary by the natural expansion and growth of trade of the nonconforming use. For the purposes of determining if an enlargement or expansion of nonconforming use meets this requirement, the applicant shall file an application for Special Exception pursuant to the requirements of Article IV of this Ordinance. The applicant must meet all the applicable requirements and criteria of Article IV in addition to providing evidence that the enlargement or extension is necessitated by the natural expansion and growth of trade of the nonconforming use.

34. The right of natural expansion is a constitutional right protected by the due process clause: "If we were to prevent the natural growth and expansion of a protected non-conforming use, we would invade the constitutional guarantees of due process which indeed brought the non-conforming principle into being." Upper Darby Twp. Appeal, 138 A.2d 99, 102 (Pa.1958).

35. Under this principle, a non-conforming use may be extended in scope, as a business increases in magnitude, over ground used for that business purpose at the time of the enactment of the zoning ordinance. Chartiers Township v. William H. Martin, Inc., 542 A.2d 985 (Pa.1988).

36. The burden of proving the existence and extent of the pre-existing non-conforming use will fall upon the property owner who seeks to expand the use. Overstreet v. Zoning Hearing Board of Schuylkill Township, 412 A.2d 169 (Pa.Cmwlt. 1980).

37. The Applicant met its burden when it provided competent evidence that the addition of another injection point and observation well to be serviced by the already existing

facilities is a natural expansion of the current existing non-conforming use and is necessary for the growth of its trade.

38. The Applicant will not be permitted to operate an injection well on the property unless the EPA and DEP grant the required permits and approvals.

39. All members of the ZHB are residents of the Borough are gravely concerned with the Applicant's use of the property, but are constrained under the law to allow this expansion.

40. Any complaints regarding the operation of the facility are to be directed to the EPA and/or PaDEP.

Decision:

The request to permit the expansion of a nonconforming use made in the Application to the Zoning Hearing Board filed November 23, 2021, is GRANTED¹.


Michelle Chapkis, Chairperson

1/26/22
Date

¹ Under Plum Borough Zoning Ordinance No. 916-17, Article XII, Section 1208(C): "If the variance involves physical improvements that have not been substantially initiated within two (2) years of the date of approval or authorization approval of the variance, the approval shall lapse. Under Section 1208(C)(b): "The variance approval shall also lapse if, after starting construction, the construction is discontinued for a period of two (2) years."

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