

Commonwealth Court of Pennsylvania

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From: Court

Subject: 284 MD 2012

Date: 4/12

Pages: 13

Comments: Memorandum Opinion

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Robinson Township, Washington :
 County, Pennsylvania, Brian Coppola, :
 Individually and in his Official :
 Capacity as Supervisor of Robinson :
 Township, Township of Nockamixon, :
 Bucks County, Pennsylvania, :
 Township of South Fayette, :
 Allegheny County, Pennsylvania, :
 Peters Township, Washington County, :
 Pennsylvania, David M. Ball, :
 Individually and in his Official :
 Capacity as Councilman of Peters :
 Township, Township of Cecil, :
 Washington County, Pennsylvania, :
 Mount Pleasant Township, :
 Washington County, Pennsylvania, :
 Borough of Yardley, Bucks County, :
 Pennsylvania, Delaware Riverkeeper :
 Network, Maya Van Rossum, the :
 Delaware Riverkeeper, Mehernosh :
 Khan, M.D., :

Petitioners

v.

Commonwealth of Pennsylvania, :
 Pennsylvania Public Utility :
 Commission, Robert F. Powelson, :
 in his Official Capacity as Chairman :
 of the Public Utility Commission, :
 Office of the Attorney General of :
 Pennsylvania, Linda L. Kelly, in :
 her Official Capacity as Attorney :
 General of the Commonwealth of :
 Pennsylvania, Pennsylvania :
 Department of Environmental :
 Protection and Michael L. Krancer, :
 in his Official Capacity as Secretary :
 of the Department of Environmental :
 Protection, :

Respondents

No. 284 M.D. 2012

Heard: April 17, 2012

OPINION NOT REPORTED**MEMORANDUM OPINION
BY SENIOR JUDGE QUIGLEY****FILED: April 20, 2012**

Before the Court at this time are the petition for leave to intervene filed on behalf of the Pennsylvania Independent Oil and Gas Association (PIOGA), the Marcellus Shale Coalition (MSC), MarkWest Liberty Midstream & Resources, LLC (MarkWest), Penneco Oil Company (Penneco) and Chesapeake Appalachia, LLC (Chesapeake) (collectively the "Industry") and the petition to intervene filed on behalf of Senator Joseph Scarnati, III and Representative Samuel H. Smith (Legislators), and petitioners' answers thereto.

Petitioners filed a March 29, 2012 petition for review in this Court's original jurisdiction challenging the constitutionality of the Act of February 14, 2012, P.L. ___, 58 Pa. C.S. §§2301-3504, known as Act 13. Act 13 repealed Pennsylvania's Oil and Gas Act¹ and replaced it with a codified statutory framework regulating oil and gas operations in the Commonwealth. Generally, petitioners allege that Act 13 provides for a "one-size fits all" zoning scheme applicable to every political subdivision in the Commonwealth. Petitioners allege Act 13 violates the Pennsylvania Constitution, in particular, Article 1, §1 (relating to inherent rights of mankind); Article 3, §32 (relating to certain local and special laws); Article 1, §10 (in part relating to eminent domain); Article 1, §27 (relating to natural resources and the public estate); Article 3, §3 (relating to form of bills) and the doctrine of separation of powers. Petitioners further allege that Act 13 impermissibly delegates authority to the Department of Environmental Protection and is unconstitutionally vague.

¹ Act of December 19, 1984, P.L. 1140, *as amended*, 58 P.S. §§601.601-601.605.

On April 3, 2012, petitioners filed an application for special relief in the nature of a preliminary injunction. The Court scheduled a preliminary injunction hearing for April 11, 2012. In the interim, the Industry filed its petition for leave to intervene. The Court scheduled argument on the Industry's application for April 17, 2012, and permitted the Industry to participate in the preliminary injunction proceedings as *amicus*.

After argument on petitioners' application for special relief in the nature of a preliminary injunction and in-chambers discussion with counsel, the Court preliminarily enjoined any section of Act 13 providing for immediate pre-emption of local zoning ordinances, pending further order of court. The Court further enjoined for a period of 120 days the effective date of section 3309 requiring municipalities to amend their zoning ordinances within 120 days of the effective date of Act 13.

On April 16, 2012, Legislators filed their petition to intervene.

At the April 17, 2012 hearing on the Industry's petition for leave to intervene, petitioners agreed that Legislators could present their argument for intervention, instead of convening another hearing, so long as petitioners could file an answer to the Legislators' petition. Petitioners filed their objections to the Legislators' petition to intervene on April 18, 2012.²

² The Court permitted petitioners to file their objections by facsimile. The Court's facsimile machine indicates that petitioners' objections were received April 18, 2012 at 16:27, or 4:27 p.m. Petitioners' objections to Legislators' petition to intervene were time-stamped April 19, 2012 when the Court opened for business. On April 19, 2012, Legislators filed their reply to petitioners' objections to the petition to intervene. The Court has reviewed Legislators' reply in its determination.

Pennsylvania Rules of Civil Procedure Nos. 2326 through 2350 govern intervention. Rule 2327 provides that “[a]t any time during the pendency of an action, a person not a party thereto shall be permitted to intervene therein,” subject to the following rules:

- (1) the entry of a judgment in such action or the satisfaction of such a judgment will impose any liability upon such person to indemnify in whole or in part the party against whom judgment may be entered; or
- (2) such person is so situated as to be adversely affected by a distribution or other disposition of property in the custody of the court or of an officer thereof; or
- (3) such person could have joined as an original party in the action or could have joined therein; or
- (4) the determination of such action may affect any legally enforceable interest of such a person whether or not such person may be bound by a judgment in the action.

Pa. R.C.P. No. 2327.

Rule 2329 requires that a hearing on petition to intervene be held and that the court, if the allegations of the petition have been established, enter an ordering allowing intervention. A petition to intervene may be refused if:

- (1) the claim or defense of the petitioner is not in subordination to and in recognition of the propriety of the action; or
- (2) the interest of the petitioner is already adequately represented; or
- (3) the petitioner has unduly delayed in making application for intervention or the intervention will

unduly delay, embarrass or prejudice the trial or the adjudication of the rights of the parties.

Pa. R.C.P. No. 2329.

Thus, if the petitioner is a person within one of the classes described in Rule 2327, the allowance of intervention is mandatory unless one of the grounds in Rule 2329 is present. *LaRock v. Sugarloaf Twp. Zoning Hearing Bd.*, 740 A.2d 308 (Pa. Cmwlth. 1999). Equally, if the petitioner does not show that he falls within one of the classes described in Rule 2327, intervention must be denied, regardless of whether any grounds for refusal of intervention exists. *Id.* (citing *In re Pennsylvania Crime Comm'n*, 453 Pa. 513, 524 n.11, 309 A.2d 401 n.11 (1973)); 7 Goodrich Amram 2d *Intervention* §2329:3 (1992).

Legislators' petition to intervene

In their petition to intervene, Legislators, Senator Joseph Scarnati, III, President Pro Tempore of the Pennsylvania State Senate, and Representative Samuel H. Smith, speaker of the Pennsylvania House of Representatives, allege that the Senate adopted Act 13 in its final version on February 7, 2012, that the House adopted the final version of Act 13 on February 8, 2012, and that Governor Corbett signed Act 13 into law on February 14, 2012. Both Legislators voted in favor of Act 13 in their respective chambers.

According to Legislators, petitioners' constitutional challenge to Act 13 makes various allegations regarding the legislative intent underlying Act 13. *See* Pet. for Review ¶¶3, 7, 11, 141. Legislators assert that the Court's review of the constitutionality of Act 13 will require inquiry into the underlying purposes of Act 13

and the legislative process for its passage, including whether the Legislature passed Act 13 to advance the health, safety and welfare of local communities. Petitioners make further allegations regarding the Legislature's intent manifested in the Pennsylvania Municipalities Planning Code, Act of July 31, 1968, P.L. 805, *as amended*, 53 P.S. §§10101-11201.

Legislators acknowledge that the Attorney General is charged with defending the constitutionality of acts of the Legislature but claim that the Attorney General may deem the Legislature's "intent or processes" irrelevant to the Court's review and, therefore, may not defend Act 13 on this basis. This would leave petitioners' allegations of the legislative intent unanswered. Legislatures further rely on comity between the judicial and legislative branches, citing a few cases where legislators have been permitted to intervene in matters pending before Court.³

Clearly, Legislatures do not fall with the category of persons permitted to intervene as described in Pa. R.C.P. No. 2327 (1) through (3). The question

³ See *Grimaud v. Commonwealth*, 581 Pa. 398, 865 A.2d 835 (2005), *Pa. Sch. Bds. Ass'n, Inc. v. Commonwealth Ass'n of Sch. Adm'rs*, 569 Pa. 436, 805 A.2d 476 (2002), *Pa. Prison Soc'y v. Commonwealth*, 565 Pa. 526, 776 A.2d 971 (2001), *Harrisburg Sch. Dist. v. Hickock*, 563 Pa. 391, 761 A.2d 1132 (2000); *DeWeese v. Weaver*, 880 A.2d 54 (Pa. Cmwlth. 2005), *Alaica v. Ridge*, 784 A.2d 837 (Pa. Cmwlth. 2001), and *Common Cause/Pa. v. Commonwealth*, 710 A.2d 108 (Pa. Cmwlth. 1998). The Court has reviewed each of these cases, and it appears that the determination as to intervention was made prior to the reported opinion. There is no discussion of the Civil Rules governing intervention. To the extent possible, the Court searched its docket system to determine if there were unreported opinions discussing why the parties were permitted to intervene. The search revealed that the Supreme Court allowed intervention on appeal without a hearing in *Pennsylvania School Boards Association, Inc. and Pennsylvania Prison Society*. In *Alaica*, the petitioners did not object to the intervention. In all other cases, there was merely an order granting intervention.

therefore is whether Legislators have a legally enforceable interest. The Court concludes that they do not.

Although Legislators claim that their interest is defending the legislative intent behind enactment of Act 13, that interest is not a “legally enforceable interest” as required by Rule 2327(4).⁴ Further, when the validity of a statute is at issue, the courts look to the Statutory Construction Act of 1972,⁵ to aid in the construction and interpretation of the statute. Courts must first consider the words of a statute to determine the Legislature’s intent. *Kilmer v. Elxeco Land Servs., Inc.*, 605 Pa. 413, 990 A.2d 1147 (2010). If the words of a statute are not clear, the Legislature’s intention may be ascertained by reviewing those considerations listed in 1 Pa. C.S. §1921(b). Among the considerations is the statute’s contemporaneous legislative history. Here, there is no suggestion that the purposes of Act 13 cannot be ascertained by the traditional methods of statutory construction. For these reasons, Legislators’ petition to intervene is denied.

Industry’s petition for leave to intervene

In its petition for leave to intervene, the Industry describes each entity and its purported interest in this action. PIOGA is a non-profit trade association, and its members operate the majority of crude oil and natural gas wells in Pennsylvania. Its members also include contractors, service companies, manufacturers, distributors, professional firms, consultants, royalty owners, and others interested in the oil and

⁴ Notably Legislators do not seek to intervene on the basis that petitioners allege that Act 13 violates the single-subject rule, which calls into question the procedures by which a law is enacted. See *City of Philadelphia v. Commonwealth*, 575 Pa. 542, 838 A.2d 566 (2003).

⁵ 1 Pa.C.S. §§1501-1991.

gas industry. MSC is a non-profit trade association that represents companies operating in the area of natural gas exploration and production from unconventional sources. MarkWest is a midstream facility that transports compressed and processed oil, gas and other substances. MarkWest also owns property located in Cecil Township, one of the petitioners here. Penneco is a Pennsylvania private natural gas exploration production company. Finally, Chesapeake is actively drilling for and producing natural gas in Pennsylvania and holds various leaseholds interests throughout the state.

In its brief and at hearing on the petition for leave to intervene, the Industry noted the following “legally enforceable interest” in this action. Some of the Industry members, like Penneco and MarkWest, have either purchased land in the petitioner townships or have leasehold interests throughout the Commonwealth. Another asserted interest is the significant financial investments in the Commonwealth’s oil and gas industry, in terms of developing facilities, the number of employees hired, and the materials and equipment deployed across the Commonwealth. The Industry also alleges an interest based on its active advocacy of Act 13 in an attempt to standardize inconsistent and often conflicting local ordinances related to oil and gas operations throughout the Commonwealth.

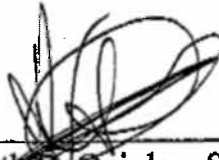
The Court disagrees that the Industry’s investment in terms of money, manpower, and equipment deployment, and its active advocacy for Act 13, is the type of “legally enforceable interest” contemplated by the intervention rules. Notwithstanding, the petition for leave to intervene alleges that members of the Industry hold property interests that will be affected by Act 13. See Industry’s Application for Leave to Intervene, ¶¶ 3, 4, 5, 10, 15, 17; *cf. The Pennsylvania Med.*

Soc'y, v. Dep't of Pub. Welfare, __ Pa. __, 39 A.2d 267 (2012) (determining that association had standing to bring action against the Department of Public Welfare where it alleged that at least one of its members would suffer immediate and threatened injury and that the association had an interest in the litigation that was substantial, immediate, and direct); *Malt Beverages Distrib. Ass'n v. Pa. Liquor Control Bd.*, 966 A.2d 1165 (Pa. Cmwlth. 2009), *aff'd*, 607 Pa. 560, 8 A.3d 885 (2010); *Malt Beverage Distrib. Ass'n & Tanczos Beverages, Inc. v. Pa. Liquor Control Bd. (Bethlehem Wegmans)*, 965 A.2d 1254 (Pa. Cmwlth. 2009). Accordingly, the Court concludes the Industry falls within the class of persons permitted to intervene under Pa. R.C.P. No. 2327(4).

Our inquiry does not end there, however. The Court may refuse an application to intervene under Rule 2329, if the purported intervenor's claims or defenses are not subordinate to or in recognition of the propriety of the action, the purported intervenor is already adequately represented, or the purported intervenor unduly delayed in seeking to intervene. We agree with the Industry that it is not attempting to raise new claims and that it did not delay in seeking to intervene.

We disagree, however, that its interests are not adequately represented. All parties acknowledge it is the Commonwealth's duty to defend the constitutionality of Act 13. Act 13 is either constitutional or unconstitutional based on the legal theories petitioners advance. The Industry's interests, as identified, have no bearing on that determination.

Accordingly, the Industry's application for leave to intervene is denied.



Keith B. Quigley, Senior Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Robinson Township, Washington :
 County, Pennsylvania, Brian Coppola, :
 Individually and in his Official :
 Capacity as Supervisor of Robinson :
 Township, Township of Nockamixon, :
 Bucks County, Pennsylvania, :
 Township of South Fayette, :
 Allegheny County, Pennsylvania, :
 Peters Township, Washington County, :
 Pennsylvania, David M. Ball, :
 Individually and in his Official :
 Capacity as Councilman of Peters :
 Township, Township of Cecil, :
 Washington County, Pennsylvania, :
 Mount Pleasant Township, :
 Washington County, Pennsylvania, :
 Borough of Yardley, Bucks County, :
 Pennsylvania, Delaware Riverkeeper :
 Network, Maya Van Rossum, the :
 Delaware Riverkeeper, Mehermosh :
 Khan, M.D., :

Petitioners

v.

Commonwealth of Pennsylvania, :
 Pennsylvania Public Utility :
 Commission, Robert F. Powelson, :
 in his Official Capacity as Chairman :
 of the Public Utility Commission, :
 Office of the Attorney General of :
 Pennsylvania, Linda L. Kelly, in :
 her Official Capacity as Attorney :
 General of the Commonwealth of :
 Pennsylvania, Pennsylvania :
 Department of Environmental :
 Protection and Michael L. Krancer, :
 in his Official Capacity as Secretary :
 of the Department of Environmental :
 Protection, :

Respondents

No. 284 M.D. 2012

ORDER

NOW, April 20, 2012, the application for leave to intervene filed on behalf of the Pennsylvania Independent Oil and Gas Association, the Marcellus Shale Coalition, MarkWest Liberty Midstream & Resources, LLC, Penneco Oil Company, and Chesapeake Appalachia, LLC, and the petition to intervene filed on behalf of Senator Joseph Scarnati, III, and Representative Samuel H. Smith, are denied.

It further appearing that the parties seek expedited review of this matter, respondents shall file a responsive pleading to the petition for review no later than April 30, 2012. In the event that the responsive pleading is in the nature of preliminary objections, respondents shall file and serve a brief in support of the preliminary objections (15 copies) at the same time they file the preliminary objections. Petitioners' brief in opposition to any preliminary objections (15 copies) shall be filed and served no later than 14 days after service of respondents' preliminary objections and supporting brief.

Any dispositive motions and supporting briefs (15 copies) shall be filed and served no later than May 7, 2012 and any briefs in opposition (15 copies) to the dispositive motions shall be filed and served no later than May 21, 2012.



Keith B. Quigley, Senior Judge