



HUBERT J. and BARBARA L. BREWSTER :
and HIGHWAY MATERIALS, INC. :

v. :

COMMONWEALTH OF PENNSYLVANIA, :
DEPARTMENT OF ENVIRONMENTAL :
PROTECTION :

EHB Docket No. 2008-196C
(Consolidated w/ 2008-211-C)

Issued: September 18, 2008

OPINION AND ORDER
ON PETITION FOR SUPERSEDEAS

By Michelle A. Coleman, Judge

Synopsis:

Highway Materials argues that the Board does not have jurisdiction, and, therefore cannot consider the supersedeas petition of the Department’s June 2, 2008 letter allowing blasting to occur within 25 feet of the Brewster’s property line. The Board finds that we do have jurisdiction because the Department’s regulations and, in this matter, the Noncoal Surface Mining Conservation and Reclamation Act preempt the local ordinance allowing blasting in such a close proximity to the Brewster’s residence. We supersede the Department’s June 2, 2008 letter.

Opinion

The Appellants, Hubert J. Brewster and Barbara L. Brewster (Brewsters or Petitioners) reside adjacent to Perkiomenville Quarry owned and operated by Highway Materials, Inc (Highway Materials). The Brewsters filed their appeal on June 13, 2008 objecting to the

Department of Environmental Protection's (DEP or Department) June 2, 2008 letter approving the Quarry's Blast Plan of May 28, 2008. Highway Materials filed an appeal on June 25, 2008 also objecting to the June 2, 2008 letter. These two appeals were consolidated by the Board on July 10, 2008.

Prior to the above consolidated appeals being filed, Highway Materials filed a petition for preliminary injunction to the Court of Common Pleas of Montgomery County. The Court, relying on local zoning, issued an order on May 23, 2008 permitting blasting within 25 feet of the Brewster's property and directing the Brewsters to refrain from occupying certain areas of their property during blasting. Petition for Supersedeas, ¶ 13. This order by the Court of Common Pleas is on appeal to the Superior Court. *Id.* at ¶ 14.

On June 26, 2008, the Brewsters filed a petition for supersedeas with the Board requesting that the Board supersede the Department's decision to allow Highway Materials to blast and surface mine pursuant to the June 2, 2008 letter. The Brewsters argue that the Department does not have authority to issue the June 2 letter and as a result will cause irreparable harm to the Brewsters. Petition for Supersedeas, ¶ 32. A supersedeas hearing was held on July 17, 2008 in Norristown, Pennsylvania before the Honorable Michelle A. Coleman. An order denying the petition for supersedeas was issued on July 24, 2008, however, after further consideration, the Board now grants the supersedeas. This Opinion follows:

There seems to be one issue on which all the parties agree: Marlborough Township allows blasting within 25 feet of a property line. (N.T. 51).¹ How each party has reacted to this fact is the basis of this consolidated case. While no party has raised the blasting ordinance as a specific issue, the appeal by the Brewsters and the subsequent appeal by Highway Materials are each brought in opposition to the June 2, 2008 letter.

¹ Citations to the transcript will be designated as "N.T."

The Brewsters properly took the issue of the inadequacy of the 25 foot setback to the Montgomery County Court of Common Pleas. In the interim, DEP issued modifications to Highway Material's blasting permit which were embodied in the June 2, 2008 letter. The modifications are a direct result of the decision from the Montgomery County Court of Common Pleas allowing blasting within 25 feet of the Brewster's property and placing restrictions on the Brewster's behavior during blasting. DEP also required more restrictions on how and when the blasting could occur. However, the Brewsters contend that these restrictions are not enough to protect them from harm of dust and dirt and the inconvenience of having to leave their home while blasting is taking place.

Arguments made by the Brewsters at the supersedeas hearing seem to suggest that DEP should impose setbacks on Highway Materials and overrule any municipal ordinance. The Noncoal Surface Mining Conservation and Reclamation Act provides,

Except with respect to ordinances adopted pursuant to the act of July 31, 1968 (P.L. 805, No. 247) known as the Pennsylvania Municipalities Planning Code, all local ordinances and enactments purporting to regulate surface mining are hereby superseded. The Commonwealth by this enactment hereby preempts the regulation of surface mining as herein defined.

52 P.S. § 3316. Thus, based on that section of the Act the setbacks imposed on Highway Materials fall under the Department's authority. In *Fontaine v. DEP*, it was stated that,

[t]his Board repeatedly has held that it does not have jurisdiction to consider local zoning ordinances . . . and that the Department's permitting decisions are not required to take into account local zoning. *Hanover Twp. v. DER*, 1992 EHB 119. In addition, the issuance of a permit by DEP does not in any way infringe on the exercise of the township's zoning powers.

1996 EHB 1333, 1353; *see also Hanover Twp. v. DER*, 1992 EHB 119, 121 (citing *Borough of Taylor v. DER*, 1998 EHB 237, the Board held that "[w]hile issuance of a permit for the

operation of a . . . facility does not excuse the permittee from complying with local zoning ordinances, that is a separate matter from DER's review under [environmental statutes].). Additionally, the Commonwealth Court has held that a township's blasting ordinance was preempted by the Non-Coal Surface Mining Conservation and Reclamation Act. *Tinicum Twp. v. Del. Valley Concrete, Inc.*, 812 A.2d 758 (Pa. Commw. 2002).

Consistent with *Fontaine*, we are not considering any local zoning ordinance in this matter, nor have any of the parties provided a specific reference to the local ordinance. What is most important here is the language of Section 3316 and the fact that the Department's regulations preempt local zoning. There is no indication that the Court of Common Pleas considered the Department's regulations, nor was the Department a party to that action. Independent of any local zoning ordinance and Section 3316, we find that the Department does have authority to impose setback limitations on the blasting by Highway Materials and that we have jurisdiction over this appeal. Disposing of that issue leads us to the merits of the supersedeas.

In order for the Board to grant a supersedeas, the Board's rules provide that factors to be considered include: irreparable harm to the petitioner, likelihood of the petitioner to prevail on the merits, and the likelihood of injury to the public or other parties. 35 P.S. § 7514(d)(1), (2); 25 Pa. Code § 1021.63(a); *Tinicum Township v. DEP*, 2002 EHB 822. The Board assesses the supersedeas by balancing the factors and the interests of the parties and public. *UMCO Energy, Inc. v. DEP*, 2004 EHB 797.

The Department's letter, under appeal here, allows the blasting to occur within 25 feet of the Brewster's property line and within 300 feet of the Brewster's residence. The Brewster's primary argument in this matter is that blasting by Highway Materials is too close to the

Brewster's property on which a house, barn and shed now stand. The people and animals, the Brewsters contend, are subjected to dust and dirt which blow into the property after blasting. (N.T. 41)

Highway Materials contends that the only issue in this case is whether Highway Materials current blasting is a violation of any ordinance, Department regulation or statute. The Department's counterargument is that it has inspected and reviewed both the quarry and its operations. The quarry's permit has been reviewed according to both DEP regulations and the Order of the Court of Common Pleas. Where DEP thought that corrections or changes would benefit the operations of the quarry or safety of the Brewsters, these changes were made.

The Brewsters argue that less damage would be done if the blasting area setbacks in DEP regulations were adhered to by the Department. According to Mr. Brewster's testimony at the hearing he stated,

When they're getting ready to blast, I have to leave the property and stay 300-foot away. I leave part of the house to stay back until they can blast. I know my house is 250-foot from the property line and that another 50-foot would be there. So, basically, they're allowed to blast within 225 feet, according to the Judge's order, and the DEP regulations is 300-foot.

N.T. 29. The Department regulations provide that,

A person may not conduct noncoal surface mining activities, other than borrow pits for highway construction purposes, as follows:

...

(2) Within 300 feet (91.44 meters) of an occupied dwelling house or commercial or industrial building, unless released by the owner thereof.

25 Pa. Code § 504.

Considering the fact that when blasting is occurring within 25 feet of the property line the

Brewsters must leave part of their house because their house is 250 feet from where blasting is allowed to occur. In essence, blasting is occurring less than 300 feet from their residence, in violation of the above cited Department regulation.

When reviewing the factor of the likelihood of the petitioner to prevail on the merits, we determine that this factor heavily outweighs the other two factors to be considered in this matter. From first blush, it appears that the Department has abused its discretion when issuing the June 2, 2008 letter consistent with the common pleas court order, allowing blasting to occur within 25 feet of the Brewster property line.

The other two factors are not as convincing, but we do find some support that there is a possibility of irreparable harm. The Brewsters argue that they are harmed by dust, dirt and the inconvenience of having to leave their home. However, the evidence presented at the hearing in support of these arguments was not enough to show irreparable harm. The Department's witness, blasting expert, Richard Lemkie, who was consulted on the plan and the decision by the Department to add specific conditions for different distances, could not guarantee that the blasting, as currently conducted, is completely safe. He stated that the methods used are good, effective and up-to-date, but could not guarantee safety. (N.T. 266-73) Mr. Lemkie also did not dispute Mr. Brewster's testimony that dust and dirt would be driven onto the Brewster property at times. Mr. Lemkie was a very credible witness. We agree, however, that there are no guarantees in blasting and are not willing to gamble on this issue.

Given the undisputed evidence of fugitive dust entering the property and the Department being unable to guarantee complete safety of the blasting conditions, the Board finds that there may be irreparable harm and the possibility of injury to the public. Alone, these factors would not tip the scale in the Brewsters' favor. However, these two factors coupled with the fact that



blasting is occurring so close to the Brewsters' residence, in violation of the Department's regulations, is enough for us to supersede the letter of June 2, 2008. We, therefore enter the following order.



**COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD**

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ORDER

AND NOW, this 18th day of September 2008, upon consideration of Petition for Supersedeas and subsequent hearing, IT IS ORDERED as follows:

- 1.) The Order issued July 24, 2008 denying the supersedeas is withdrawn and this Order shall be issued in its place.

- 2.) The Petitioner’s request to supersede the Department’s June 2, 2008 letter is **granted.**

ENVIRONMENTAL HEARING BOARD

MICHELLE A. COLEMAN
Judge

DATED: September 18, 2008

c: DEP Bureau of Litigation
Attention: Brenda Morris, Library



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