

**IN THE DALLAS TOWNSHIP ZONING HEARING BOARD  
LUZERNE COUNTY, PENNSYLVANIA**

*IN RE:* APPLICATION OF  
CHIEF GATHERING LLC

)  
) DALLAS TOWNSHIP ZONING  
) HEARING BOARD  
)  
)

**CHIEF GATHERING LLC'S BENCH BRIEF DEMONSTRATING THE NATURAL  
GAS IN THE PROPOSED METER STATION PROJECT IS NOT A HAZARDOUS  
SUBSTANCE AS THAT TERM IS SET FORTH IN THE  
DALLAS TOWNSHIP ZONING ORDINANCE**

**I. INTRODUCTION**

The natural gas that Chief Gathering LLC ("Chief") will transport through its pipeline and proposed natural gas metering station project in Dallas Township is not a "hazardous substance." The Dallas Township Zoning Ordinance ("Zoning Ordinance") purports to prohibit within the relevant zoning district any "use which utilizes and/or stores any hazardous substances as defined in Article 2 of this Ordinance." Zoning Ordinance, § 502.3. The Zoning Ordinance defines "Hazardous Substances" as

Any material that, by reason of its quantity, concentration, or physical, chemical or infectious characteristics may:

1. cause, or significantly contribute to, an increase in mortality or an increase in a serious irreversible or incapacitating irreversible illness.
2. pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, disposed of or otherwise managed.

This definition shall be deemed to include radioactive material, medical waste and any incendiary device and/or explosive device or material[.]

Zoning Ordinance, § 203.

Pennsylvania law has clearly set forth that natural gas is *not* a hazardous substance. According to the Pennsylvania General Assembly and all levels of the court system, natural gas cannot be treated as a "hazardous substance." In light of those decisions and other aspects of Pennsylvania law, a reading of the Zoning Ordinance as deeming natural gas to be a prohibited hazardous substance would violate state law and would render the Zoning Ordinance void as unconstitutionally vague. Therefore, the Dallas Township Zoning Hearing Board (the "Board") should grant Chief's pending special exception zoning application and cannot deny its Zoning Application (filed under protest) on the basis that the meter station would somehow store and/or utilize a hazardous substance.

## II. FACTS AND BACKGROUND

On January 19, 2011, Chief submitted an Application to the Board for Special Exception approval, under protest,<sup>1</sup> (the "Zoning Application") for construction of a compressor station, metering station, communications tower and associated structures, facilities and equipment incidental to operation of a natural gas pipeline in Dallas Township, Luzerne County, Pennsylvania ("Dallas Township"). Chief's proposed meter site at 49 Hildebrandt Road, Dallas, Pennsylvania 18612, is located on a property owned by Robert and Jacqueline Hayes, in an area zoned as A-1 Agricultural District (the "Proposed Site"). To date, Dallas Township has held four public hearings on the Zoning Application.

The project currently being presented by Chief consists solely of a natural gas metering

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<sup>1</sup> Throughout this process, Chief has maintained its position that Special Exception approval is not necessary for the metering station or the natural gas pipeline. However, in the spirit of cooperation with township officials and residents, to provide information, and to allow issues of concern to be considered and, if appropriate, addressed, Chief has been utilizing the process.

station (the "Meter Station Project") on the Proposed Site.<sup>2</sup> The meter station will employ specialized meters to measure the natural gas as it flows through the pipeline, collect data and record/transmit information, including the flow rate of the natural gas as it moves through the pipeline, operation status, pipeline natural gas pressure and temperature. The systems work in real time, meaning there is little lag time between the measurement taken along the pipeline and the transmission of the information to a control station. The data is continuously monitored by system controllers which allow operating conditions to be adjusted as necessary to ensure safety along the pipeline. All of these measures provide for greater safety and protection than that afforded by the supply lines of natural gas to residences and businesses within the township.

The following equipment and materials will be utilized or stored as part of the Meter Station Project. The equipment at the Proposed Site will include a metering station and other equipment associated with natural gas meter stations and pipelines. Specifically, such equipment will include a receiver (for the "pig" that is used for pipeline cleaning approximately twice per year), a 50 barrel (i.e., 2,000 gallon capacity) tank/container for temporary collection of liquids collected through the receiver, an inlet separator/filter, 2 filter separators, 3 meter tubes located inside buildings with associated recording devices, 3 flow control valves in a separate building, an automatic over-pressure protection valves, a gas chromatograph (inside a building), and a back-up generator (in a building).

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<sup>2</sup> Chief has made all of these adjustments solely as accommodations, since each of the components removed are common practices and features of operations within the natural gas industry, existing safely throughout the country. Chief amended its Zoning Application on February 24, 2011 to remove the compressor station component of the project from the plans for the Proposed Site and now will install the compressors completely outside of Dallas Township. Chief has also worked with its business partner, Transco, to allow the mercaptan (a substance universally used to odorize natural gas for safety purposes) to be stored and added to the natural gas miles outside of Dallas Township. Chief also eliminated the need for installation of a communications tower at the Site. For increased security at the Proposed Site, Chief added video cameras with external monitoring to the six-foot surrounding chain link fence with three strand barbed wire above the fence.

Although bi-annual cleaning of the pipeline, another safety precaution, will result in the collection of some amounts of water mixed with ethylene glycol, that material will be collected in a closed tank and promptly removed by a vacuum truck and transported to an appropriate recycling or disposal facility. Thus, no chemicals will be stored or utilized at the site. Moreover, water mixed with ethylene glycol is a commonly used product, well known for its use as automotive antifreeze (it can be found in every car radiator) and also universally used as de-icing fluid that is, for example, sprayed on airplanes by the commercial airlines at airports. It is very biodegradable (it breaks down within days in the natural environment) and the amounts and concentrations that could be temporarily present at the meter station as a result of the twice-per-year cleaning are non-toxic.

The Meter Station Project and accompanying natural gas pipeline are a vital element of the development of natural gas resources in Dallas Township and the surrounding areas. In constructing the pipeline and meter station, Chief will incorporate safeguards required by the Federal Department of Transportation (DOT Part 192 requirements). Chief also will construct and operate the project in full accord with those regulations, as well as all other applicable federal and state regulations.

### **III. LAW AND ARGUMENT**

The Meter Station Project and accompanying pipeline do not involve the utilization or storage of hazardous substances. To conclude otherwise would violate Pennsylvania law and run counter to established legal precedent in many respects. First, the Pennsylvania Municipal Planning Code (the "MPC") requires that each municipality provide for the reasonable development of minerals, which includes natural gas. Determining natural gas to be a hazardous substance and, therefore, prohibited in seven of the township's eight zoning districts, violates this

mandate of the MPC. Second, the Federal Government, Pennsylvania General Assembly and all levels of the Pennsylvania court system recognize that natural gas is not a hazardous substance. Third, while the Zoning Ordinance defines natural gas as a "mineral," its definition of hazardous substance is one that, if read to include natural gas, would be void for being vague and encompassing nearly anything, such as water, electricity, and even soil, as a hazardous substance.

**A. *A Determination by the Board That Natural Gas Is a Hazardous Substance Would Violate the MPC's Mandate That Municipalities Provide for the Reasonable Development of Minerals***

The MPC, which governs this Board and these proceedings, mandates that every municipality provide for the reasonable development of minerals. 53 P.S. § 10603(i) ("Zoning ordinances *shall* provide for the reasonable development of minerals in each municipality.") (emphasis supplied). Since natural gas is a mineral under the MPC, Dallas Township must provide for its reasonable development in its ordinances. *Huntley & Huntley, Inc. v. Borough Council of the Borough of Oakmont*, 964 A.2d 855, 867 (Pa. 2009); Zoning Ordinance, § 203: "Minerals."

In order to "reasonably develop" natural gas, the gas must be transported to market so it can reach the public. *See, e.g., Chartiers Block Coal Co. v. Mellon*, 25 A. 597, 599 (Pa. 1893) ("Coal, oil, gas, and iron are absolutely essential to our common comfort and prosperity. To place them beyond the reach of the public would be a great public wrong."). That transportation must be accomplished by way of a pipeline system that includes metering stations. To deny Chief's application on the basis that natural gas is a hazardous substance would prohibit the development of natural gas (extraction, development, processing, or transportation) within at least seven of the eight zoning districts in the township, thereby violating the MPC's mandate

and exceeding the Board's authority.<sup>3</sup> Accordingly, a decision by the Board that natural gas is a hazardous substance would result in a violation of Pennsylvania's law mandating that the township provide for the reasonable development of minerals.<sup>4</sup>

**B. *Natural Gas Is Not a Hazardous Substance as a Matter of Law***

The Federal Government, Pennsylvania General Assembly and all levels of the Pennsylvania court system have determined that natural gas is not a "hazardous substance" under Pennsylvania law. This Board lacks the authority to make a decision that runs counter to that established precedence.

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<sup>3</sup> The only zoning district which allows the use or storage of "hazardous materials" is the I-1 General Industrial district, which is approximately less than 1% of the acreage in the township. *See* Zoning Ordinance; Zoning Map.

<sup>4</sup> "Municipalities are creatures of the state and have no inherent powers of their own. Rather, they 'possess only such powers of government as are expressly granted to them and as are necessary to carry the same into effect.'" *Huntley & Huntley, Inc.*, 964 A. 2d at 862.

**1. The Federal Government has Clearly Determined Natural Gas is not a Hazardous Substance**

The United States federal government has determined that natural gas is not a hazardous substance. Pipeline and Hazardous Materials Safety Administration ("PHMSA"), which is part of the Department of Transportation ("DOT"), regulates natural gas pipelines pursuant to 49 CFR 191-192. PHMSA also regulates the transport of hazardous materials separately under 49 CFR 171-180. A list of hazardous materials is incorporated in 49 CFR 172.101 and it does not include natural gas transported in pipelines as a hazardous material. In fact, the Federal Definition of hazardous substance in 49 CFR 171.8 specifically *excludes* natural gas. Natural gas is *only* considered a hazardous material if it is in compressed cylinders. The proposed Chief Gathering metering station and pipeline does not have natural gas in compressed cylinders. As a result, natural gas is not a hazardous material under federal standards.

**2. The Pennsylvania General Assembly Has Determined That Natural Gas is not a Hazardous Substance**

The Pennsylvania General Assembly already has determined that natural gas is not a hazardous substance. When enacting the Hazardous Sites Clean Up Act, the General Assembly defined "Hazardous Substance" as

(1) [a]ny element, compound or material which is: (i) designated as a hazardous waste under the act of July 7, 1980 (P.L. 380, No. 97), known as the Solid Waste Management Act, and the regulations promulgated thereto, (ii) defined or designated as a hazardous substance pursuant to the Federal Superfund Act, (iii) contaminated with a hazardous substance to the degree that its release or threatened release poses a substantial threat to the public health and safety or the environment as determined by the department, (iv) determined to be substantially harmful to public health and safety or the environment based on a standardized and uniformly applied department testing procedure and listed in regulations proposed by the department and promulgated by the Environmental Quality Board.

35 P.S. § 6020.103. Importantly, the statute goes on to clarify specifically that:

(2) The term [hazardous substances] **does not include** petroleum or petroleum based product, including crude oil or any fraction thereof, which are not otherwise specifically listed or designated as a hazardous substance under paragraph (1); **natural gas, natural gas liquids, liquefied natural gas or synthetic gas usable for fuel or mixtures of natural gas and synthetic gas usable for fuel.**

*Id.* (emphasis added). Thus, the General Assembly has expressed, clearly and explicitly, its decision that natural gas shall *not* be construed as or considered a hazardous substance.

Therefore, this Board should not make a decision that runs afoul of this decision by the General Assembly, especially when oil and gas development is a statewide concern. *See, e.g.*, 58 P.S. § 601.102; 58 P.S. § 601.602; *Range Resources-Appalachia, LLC v. Salem Twp.*, 964 A. 2d 869 (Pa. 2009).

**3. Pennsylvania Courts Consistently Have Found Natural Gas and its Production are Not To Be Prohibited or Treated as a Hazardous Substance**

Likewise, the Pennsylvania courts recognize that natural gas is not a hazardous substance or that its development should be prohibited, simply because it may possess the possibility of negative effects under certain specific circumstances. In the *Municipality of Mount Lebanon v. Reliance Insurance Company*, the Superior Court recognized that natural gas, or any substance for that matter, cannot be deemed a pollutant or hazardous material simply because it may have harmful effects under certain specific circumstances, since such a *per se* hazardous rule would create an absurd result. 778 A.2d 1228, 2001 Pa. Super. 177 (2001) (interpreting whether natural gas was considered a hazardous substance and dangerous as a pollutant as defined in a municipality's general liability insurance policy).

Also, in *Birnbaum v. Moosic Borough*, a business was seeking zoning approval to



construct a plant where propane gas was to be sold and marketed. 38 Pa. D. & C.2d 135 (Lackawanna Co. 1963). Specifically, the court needed to determine whether or not such an endeavor constituted a prohibited hazardous activity. Opponents to the project argued the propane gas by itself was a hazard; yet, the court correctly recognized the mere possibility of harm does not connote a probability or likelihood of such harm. Thus, if the propane gas operator was taking effective steps to reduce the possibility of harm, the project was acceptable and not considered a hazardous activity. The Court also noted the project proponent had developed the plan in a way to meet and exceed state requirements and had included effective controls against fire. As a result, the court, as a matter of law, determined that gas and its use in a business setting was, itself, not noxious or hazardous or offensive to the inhabitants and was therefore permitted. Similarly, in the instant matter, Chief will transport natural gas in a safe manner, in accordance with state and federal requirements, including the ability to control and stop the transport of gas in an emergency.

Further, the Pennsylvania Supreme Court has also recognized that natural gas production activities are not hazardous. In *Mahony v. Township of Hampton*, the Court held that the activities associated with gas production are not noisy or unduly hazardous and Hampton Township's "...prohibition of private gas production bears no real and substantial relation to the health, safety and welfare of the community. That being the case, it is an invalid exercise of the police power." 651 A.2d 525, 539 Pa. 193, 198 (1995). Similarly, the transportation of the natural gas resulting from the more invasive production side of the development must also be safe and non-hazardous. Any municipality's attempt to prohibit such activity would not hold legal muster.

**C. *Under the Language of the Zoning Ordinance and Pennsylvania Law, the Board Must Interpret Natural Gas as not Being a Hazardous Substance***

First, Pennsylvania state law requires the Board interpret the hazardous substances provision in favor of protecting landowner rights and limiting the restrictions on land use. As the Zoning Ordinance hazardous substances provision could be subject to more than one interpretations, the Zoning Ordinance must be interpreted in the manner least restrictive on the land's use. If any doubt exists as to the meaning of a zoning ordinance or its language, such ambiguity "must be resolved in favor of the landowner and the least restrictive use of the land." *Borough of Fleetwood v. Zoning Hearing Bd. of the Borough of Fleetwood*, 649 A.2d 651, 657, 538 Pa. 536, 548 (1994). This philosophy protects landowners and reflects Pennsylvania courts' general approach to landowner rights. As one court stated, "a permitted use must be afforded the broadest interpretation so that landowners may have the benefit of the least restrictive use and enjoyment of their land." *Human Svcs. Consultants, Inc. v. Zoning Hearing Bd. of Butler Twp.*, 587 A.2d 40, 42, 137 Pa. Commw. 594, 597 (Pa. Commw. Ct. 1991).

Second, in Pennsylvania, construction of a statute or ordinance that leads to an unreasonable or absurd result or that leads to an ineffective provision of law is to be avoided. *See, e.g.*, 1 Pa.C.S. § 1922(1)&(2). These well-settled legal principles are based as much on practicality as jurisprudence. Interpreting the hazardous substances provision as creating a standard of improper and irresponsible management of the substance would create an untenable result which would not allow society to continue or withstand court review. If the Board were to prohibit the use of any substance that could somehow be potentially hazardous if treated, stored, transported in an improper manner, then almost every material or use could arguably be prohibited. For example, electricity can shock or electrocute humans and animals, water in a

poorly maintained swimming pool can breed bacteria or drown individuals who improperly swim, soil when inadequately moved or stored can asphyxiate people. Similarly, natural gas, which provides vital power and heat to millions of homes across America and throughout residences and businesses within Dallas Township, cannot be subject to a standard of prohibition turning on the most extreme scenario and assuming improper management and usage.

Moreover, such an interpretation is wholly unnecessary. Rather, a proper analysis of the Zoning Ordinance supports the legally-required least restrictive view, which is that natural gas is not a hazardous substance. Section 502.3 of the Zoning Ordinance prohibiting zoning for any use which utilizes and/or stores any hazardous substance as defined in Article 2 of the Zoning Ordinance is wholly inapplicable to the Meter Station Project. First, the Zoning Ordinance specifically defines natural gas as a "Mineral," not as a hazardous substance. The Zoning Ordinance defines "Minerals" as:

any aggregate or mass of mineral matter, whether or not coherent. The term shall include, but it is not limited to, limestone and dolomite, sand and gravel, rock and stone, earth, fill, slag, iron ore, zinc ore, vermiculite and clay, anthracite and bituminous coal, coal refuse, peat, and crude oil *and natural gas*.

Zoning Code, § 203: "Minerals" (emphasis added). The Zoning Ordinance separately addresses hazardous substances and this definition does not include either minerals or natural gas. Thus, since natural gas is specifically defined as a mineral under the Zoning Ordinance it cannot be a hazardous substance.

Even if the hazardous substances section of the Zoning Ordinance were somehow applicable to the natural gas which the pipeline will transport as part of the Meter Station Project, it would still not qualify as a hazardous substance. The Zoning Ordinance defines "Hazardous Substances" as follows:

Any material that, by reason of its quantity, concentration or physical, chemical or infectious characteristics may (1) cause or significantly contribute to an increase in mortality or an increase in serious irreversible or incapacitating irreversible illness, (2) pose a substantial present or potential hazard to human health or the environment when *improperly* treated, stored, transported, disposed of or otherwise managed.

Zoning Code, § 203: "Hazardous Substances" (emphasis added). Natural gas transported through a pipeline cannot contribute to increased mortality or serious or incapacitating illness. Moreover, Chief will properly handle, treat, store, transport, dispose of and otherwise manage the natural gas in its pipeline. Thus, natural gas cannot be considered a hazardous substance as that term is defined in the Zoning Ordinance.

**D. *Due to its Unconstitutionally Vague and Nonspecific Language, the Zoning Ordinance's Hazardous Substances Provision is Void and Unenforceable***

The hazardous substances provision in the Zoning Ordinance is unconstitutionally vague and violates due process. Constitutional protections require the language of zoning ordinances be both certain and definite in order for the ordinance to be upheld as valid and enforceable. See *Cleaver v. Bd. of Adjustment*, 200 A.2d 408, 413, 414 Pa. 367, 374 (Pa. 1964) ("Certain and definite and valid standards for zoning must be prescribed in the . . . Zoning Ordinance."). As Pennsylvania courts have stated, a zoning ordinance is unconstitutional and unenforceable "when persons of common intelligence must guess at its meaning." *Farley v. Zoning Hearing Bd. of Lower Marion Twp.*, 636 A.2d 1232, 1239, 161 Pa. Commw. 229, 243 (Pa. Commw. Ct. 1994) (citations omitted). An unconstitutionally vague ordinance is one that "proscribe[s] activity in terms so ambiguous that reasonable persons may differ as to what is actually prohibited" and "invite[s] arbitrary and discriminatory enforcement" due to the lack of "reasonably clear guidelines for law officials and courts." *Id.*

The hazardous substances language of the Zoning Ordinance regarding hazardous substances produces precisely the sort of ambiguity and opportunity for discrimination that Pennsylvania courts have consistently attempted to avoid. As stated above, this provision is drafted so vaguely that it is subject to absurd interpretations and results that would prohibit even the most common daily activities and land usages. Accordingly, this language is unconstitutional, void and unenforceable and the Board cannot attempt to apply it to prohibit Chief's proposed land use.

#### IV. CONCLUSION

This Board should approve Chief's Zoning Application. To treat natural gas as a hazardous substance or to find that Chief would "utilize and/or store a hazardous substance" would run contrary to established Federal and Pennsylvania law, as well as judicial precedent. The General Assembly expressly and clearly excluded oil and natural gas from the definition of "hazardous substances" when it enacted the Hazardous Sites Clean Up Act. Moreover, the courts have held, in the context of oil and gas related cases, that natural gas is not a "hazardous substance."

Treating natural gas as a hazardous substance for purposes of the Zoning Ordinance would unreasonably limit the use, transportation and/or development of oil and gas within less than 1% of the acreage in the township, such that the township would be in violation of the MPC's mandate that it must allow for reasonable development of minerals, including natural gas.

Such a finding would also subject the hazardous substances provision in the Zoning Ordinance to a potential challenge as void for its unconstitutional vagueness as well as having the potential for creating absurd results. Similarly, under an interpretation of the Zoning Code finding natural gas to be a "hazardous substance," one would also have to find soil, water, and

electricity to qualify as "hazardous substances," not permitted in 99% of the township. This cannot be the result intended by the township when it passed the Zoning Ordinance.

Therefore, this Board should find that natural gas is not a hazardous substance under the Zoning Ordinance and approve Chief's Meter Station Project and accompanying pipeline.

Respectfully submitted,

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