



COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BOROUGH OF JESSUP	:	
	:	
v.	:	EHB Docket No. 2023-068-L
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION and LACKAWANNA	:	Issued: January 25, 2024
ENERGY CENTER, LLC, Permittee	:	

**OPINION AND ORDER ON
MOTION TO DISMISS IN PART**

By Bernard A. Labuskes, Jr., Board Member and Judge

Synopsis

The Board denies a permittee’s motion to dismiss certain objections raised in an appellant’s notice of appeal concerning the relation of local zoning matters to the Department’s issuance of the permittee’s Title V operating permit. The Department considered the zoning matters during its permit review, so it is appropriate for the Board to evaluate on appeal.

OPINION

The Borough of Jessup (the “Borough”) has filed an appeal of the Department of Environmental Protection’s (the “Department’s”) issuance of Title V Operating Permit No. 35-00069 to Lackawanna Energy Center LLC (“LEC”) for the operation of a natural gas-fired power plant in Jessup Borough, Lackawanna County. The Title V permit was issued under the Air Pollution Control Act, 35 P.S. §§ 4001 – 4015, and it regulates the air emissions generated by LEC’s facility. The Borough asserts in its notice of appeal, among other things, that the Title V permit is “inconsistent” with a January 2016 decision of the Jessup Borough Council approving LEC’s facility as a conditional use in the Borough (the “Conditional Use Decision”) and with an agreement between the Borough and LEC called the Host Community Agreement.

LEC has moved to dismiss this part of the Borough's appeal. LEC argues that the Borough's Conditional Use Decision and the Host Community Agreement are local zoning decisions that are irrelevant to this appeal of LEC's Title V permit. LEC contends that the Board does not have jurisdiction to consider these objections. The Department has filed memoranda in support of LEC's motion. Both LEC and the Department also argue that the Borough's objections should be dismissed because they say the objections are not specific enough in describing how the Title V permit is inconsistent with the Conditional Use Decision and the Host Community Agreement.

The Borough opposes the motion. The Borough points out that the Department has acknowledged considering the Conditional Use Decision before issuing the Title V permit. The Borough says its appeal merely asserts that the Department did not consider that decision properly. Regardless, the Borough argues that its claims are properly before the Board because portions of the Municipalities Planning Code require state agencies like the Department to consider local zoning ordinances when reviewing permit applications. *See* 53 P.S. §§ 11105(a)(2) and 10619.2. The Borough adds that it is also appropriate for the Board to evaluate the claims under Article I, Section 27 of the Pennsylvania Constitution, PA. CONST. art I, § 27.¹

The Board evaluates motions to dismiss in the light most favorable to the nonmoving party and will only grant the motion when the moving party is clearly entitled to judgment as a matter of law. *Protect PT v. DEP*, EHB Docket No. 2023-025-W, slip op. at 2 (Opinion and Order, Jan.

¹ Article I, Section 27 of the Pennsylvania Constitution provides:

The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic, and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all people.

PA. CONST. art I, § 27.

10, 2024); *Ritsick v. DEP*, 2022 EHB 283, 284. For purposes of resolving motions to dismiss, the Board accepts the nonmoving party’s version of events as true. *Downingtown Area Regional Auth. v. DEP*, 2022 EHB 153, 155. Motions to dismiss will be granted only when a matter is free of doubt. *Bartholomew v. DEP*, 2019 EHB 515, 517; *Northampton Township v. DEP*, 2008 EHB 563, 570. This same standard applies to motions for partial dismissal like the one before us here. *Latkanich v. DEP*, EHB Docket No. 2023-043-B, slip op. at 5 (Opinion and Order, Oct. 6, 2023).

In its memoranda in support of LEC’s motion the Department admits that it considered the Borough’s Conditional Use Decision in rendering its own decision on the Title V permit. (DEP Resp. Memo. at 5 n.2; DEP Reply Memo. at 5-7.) The Department tells us that it referenced the Conditional Use Decision at least 19 times in the Department’s response to public comments document. (See LEC Ex. 1.) That fact alone is enough to warrant denial of the motion to dismiss. “If the Department considered an issue in its evaluation of a permit then it is likewise appropriate for us to review the same issue.” *Marshall v. DEP*, 2020 EHB 60, 71. See also *Friends of Lackawanna v. DEP*, 2017 EHB 1123, 1165 (“Although we are not necessarily limited to what the Department considered, we clearly can and should at a minimum review what the Department did consider when we evaluate whether it made the correct decision.”). If the Department relied on the Conditional Use Decision in making its permitting decision, then we must decide whether it erred in doing so (which is not argued) or whether it did so correctly. Under certain circumstances, where a potential zoning conflict is brought to the Department’s attention during the permit review process, the Department must decide how to proceed in light of that information, which is then, of course, reviewable by this Board. See *Snyder v. DEP*, 2015 EHB 857, 876-80.

LEC says that the Host Community Agreement explicitly provides that any litigation involving the agreement filed by one party to the agreement against another party to the agreement

must occur in the Court of Common Pleas of Lackawanna County, and that the terms of the agreement therefore preclude the Board from hearing the Borough's claims. This appeal of the Department's decision to issue a Title V permit is not litigation over the Host Community Agreement. We are not reviewing any party's compliance with the Host Community Agreement or the Conditional Use Decision. We are reviewing the permit itself as we and only we obviously must. We do not detect any attempt by the Borough to challenge any provision of the Host Community Agreement or Conditional Use Decision. The Borough maintains that it is not seeking to have the Board decide any zoning issues. Our focus is on the permit under appeal and any decision on the merits by this Board will be addressed to the permit.

The positions laid out by LEC and the Department in their initial memoranda and reply memoranda morph from arguments that the Board does not have jurisdiction over any claims relating to zoning and land use matters to assertions that the Borough's claims should be dismissed because the claims are not, in their words, specific enough. LEC and the Department say we must dismiss these objections because the Borough has not sufficiently detailed *how* the Title V permit is "inconsistent" with the Conditional Use Decision, and because the Borough has not identified "any legally significant inconsistency" between the permit and the Conditional Use Decision, (LEC Reply Memo. at 4). However, these arguments have more to do with whether there is adequate support for a claim, not whether the Board can entertain a claim at all on its face. An evaluation of the merits is not something that comes into play in deciding a motion to dismiss. The standard of review for motions to dismiss requires us to accept the Borough's version of events as true. *Downingtown Area Regional Auth., supra*. In other words, for purposes of evaluating this motion, we presume the Title V permit is in fact "inconsistent" with the Conditional Use Decision

and Host Community Agreement, as the Borough claims in its appeal. In the context of a motion to dismiss, the arguments advanced by LEC and the Department are entirely premature.

Whether a party bearing the burden of proof has adequately supported a particular claim or made out a *prima facie* case for a claim is more appropriately suited for a summary judgment motion after the parties have conducted adequate discovery, not in a motion to dismiss.

A motion to dismiss is typically appropriate where a party objects to the Board hearing an appeal because of a lack of jurisdiction, some issue of justiciability, or another preliminary concern....In contrast, a motion for summary judgment requests that the Board make a ruling *specifically regarding the merits of the appeal...*

Consol Pa. Coal Co. v. DEP, 2015 EHB 48, 54 (emphasis in original). “A motion to dismiss generally does not involve an evaluation of the merits or strength of the appellant’s claims; rather, ‘the operative question is: even assuming everything the non-moving party states is true, can – or should – the Board hear the appeal?’” *Protect PT v. DEP*, EHB Docket No. 2022-072-B, slip op. at 8 (Opinion and Order, June 29, 2023) (quoting *Consol Pa. Coal*, 2015 EHB at 55).

Discovery in this appeal is far from over. In accordance with a joint case management schedule submitted by the parties in November 2023 and approved by the Board, all written discovery must be served by April 15, 2024 and all fact discovery must be completed by May 15, 2024, with the exchange of expert reports continuing through August 2024. Dispositive motions are to be filed by September 13, 2024. Under the current schedule agreed to by the parties, there is ample opportunity for LEC and the Department to seek clarity on the Borough’s objections or ascertain its support for those objections. Indeed, the Borough says that LEC has already served discovery on the Borough seeking the bases for the objections in the notice of appeal.

In *Protect PT, supra*, (Opinion and Order, June 29, 2023), we denied a motion to dismiss that argued that certain claims pertaining to the use of PFAS were speculative in an appeal of

unconventional gas well permits. We found the motion to dismiss was premature because discovery was continuing: “We cannot simply assume in the context of a motion to dismiss that an appellant’s claims are speculative where discovery is still ongoing.” *Id.*, slip op. at 8. The same is true here. LEC and the Department do not provide any legal support for the notion that we should be dismissing an appellant’s objections before the completion of discovery because those objections are allegedly too vague.²

Accordingly, we issue the Order that follows.

² LEC also argues that the Borough’s notice of appeal does not comply with 25 Pa. Code § 1021.51(e), which requires an appellant to set forth its objections to the challenged Department action in separately numbered paragraphs. Although the Borough’s notice of appeal contains 31 numbered paragraphs, LEC complains that it cannot differentiate which of these paragraphs might be providing background information and which contain actual objections to the permit. LEC says it cannot figure out the scope of the Borough’s appeal. LEC’s complaint, to the extent it has any merit at all here, elevates form over substance and does not provide a basis for the dismissal of any part of this appeal. *Jake v. DEP*, 2012 EHB 477 (denying motion to dismiss premised on alleged noncompliance with 25 Pa. Code § 1021.51(e) and finding that “the Department has not cited, nor are we independently aware, of any instance where the Board has dismissed an appeal for such a minor procedural defect”).



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ORDER

AND NOW, this 25th day of January, 2024, it is hereby ordered that the Permittee’s motion to dismiss in part is **denied**.

ENVIRONMENTAL HEARING BOARD

s/ Bernard A. Labuskes, Jr.

BERNARD A. LABUSKES, JR.
Board Member and Judge

DATED: January 25, 2024

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