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PENNSYLVANIA ENVIRONMENTAL HEARING BOARD

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

RICHARD P. QUIGLEY, SR.	:	
	:	
v.	:	**EHB Docket No. 2022-104-W**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and MATTHEW VELLO AND KATHLEEN G. SHEEHAN VELLO, Intervenors	:	**Issued: May 6, 2024**

OPINION AND ORDER ON
APPELLANT'S MOTION TO DISMISS INTERVENORS

By MaryAnne Wesdock, Judge

Synopsis

The Appellant's Motion to Dismiss Intervenors for lack of standing is granted where the Intervenors' changed circumstances cause them no longer to have a substantial, direct and immediate interest in the subject matter of the appeal.

O P I N I O N

Introduction

This matter involves an appeal of an Order issued by the Pennsylvania Department of Environmental Protection (Department) to Richard P. Quigley, Sr, his son, and Let's Cut a Deal Services, LLC, alleging multiple violations of the Solid Waste Management Act. The Order alleges that the violations occurred in connection with a tree trimming and removal service operated on property that Mr. Quigley owned jointly with his son until August 25, 2022 (the

Quigley site). Mr. Quigley filed this appeal with the Environmental Hearing Board (Board) on December 9, 2022.[1]

Shortly thereafter, on December 22, 2022, Matthew Vello and Kathleen G. Sheehan Vello (the Vellos) filed a Petition to Intervene (petition). The Vellos sought to intervene in this appeal as adjacent landowners to the Quigley site. (Petition, para. 10.) Their petition documents numerous complaints that they filed with the Department and the Allegheny County Conservation District regarding operations conducted on the Quigley site, including the alleged disposal of solid waste that caused sediment to enter a stream flowing through the Vellos' property. After providing an opportunity for the parties to respond to the petition and receiving no objections, the Board granted intervention by order dated January 23, 2023. On December 28, 2023 this matter was reassigned to Docket No. 2022-104-W.

On February 10, 2024, Mr. Quigley filed a Motion to Dismiss Intervenors (motion), seeking to dismiss the Vellos as intervenors. According to the motion, the Vellos no longer own the property adjacent to the Quigley site. The Vellos concede that they no longer own the property adjacent to the Quigley site but assert that they continue to have standing.

Mr. Quigley's motion was not accompanied by a memorandum of law, and this prompted the Vellos to file a letter entitled "Interim Response and Request for Guidance" (Interim Response) seeking clarification from the Board on how to proceed since the Board's Rules of Practice and Procedure set forth different requirements and response times depending on the type of motion filed. 25 Pa. Code §§ 1021.91-95. The Department advised the Board that it took no position on the motion but reserved the right to challenge the Vellos' standing. In response to the Vellos'

[1] A separate appeal was filed by Mr. Quigley's son and Let's Cut a Deal Services and that appeal is docketed at 2022-105-W.

Interim Response, the presiding judge issued an order on February 21, 2024 which recognized that the Motion to Dismiss Intervenors did not clearly fit into any of the specific categories of motion covered by the Board's Rules of Practice and Procedure at 25 Pa. Code §§ 1021.92-1021.94a, and, therefore, appeared to be a miscellaneous motion governed by 25 Pa. Code § 1021.95. The order set a deadline of March 15, 2024 for the filing of a memorandum of law in support of the motion. Mr. Quigley did not file a memorandum of law, and on March 26, 2024, the presiding judge issued an order directing the Vellos to file an answer to the motion. The order also provided the Department with an opportunity to respond if it chose to do so. By letter dated March 26, 2024, the Department again stated that it did not intend to respond to the motion. The Vellos filed an answer to the motion on April 9, 2024 in which they admit that they no longer own the property adjacent to the Quigley site.

Procedural Challenges to Motion to Dismiss Intervenors

Before turning to the substance of Mr. Quigley's motion, we first address the Vellos' procedural challenges. The Vellos first argue that Mr. Quigley's challenge to their standing is untimely. They assert that Mr. Quigley "has had ample opportunity—over 14 months—to challenge Vellos' intervention but has failed to do so." (Intervenors' Answer, para. 10.) However, as the Board has held on numerous occasions, a challenge to standing may be raised at any time. *Matthews International Corp. v. DEP*, 2011 EHB 402, 404, n. 2; *Highridge Water Authority v. DEP*, 1999 EHB 1, 7; *Del-Aware Unlimited, Inc. v. DER*, 1990 EHB 759, 785. *See also Greenfield Good Neighbors Group, Inc. v. DEP*, 2003 EHB 555 (Board upheld an objection to standing following a hearing on the merits.) Therefore, there is no basis for dismissing Mr. Quigley's motion on the grounds that it is untimely.

Next, the Vellos challenge the Board's ability to consider Mr. Quigley's motion due to his failure to file a supporting memorandum of law. They contend they have been hampered by having to guess at the basis for the motion and they entreat the Board to dismiss it outright. They further assert that the Board may not raise the issue of standing *sua sponte*. (Intervenors' Answer, n. 5.)[2]

While the motion is not a model of clarity, it is apparent that Mr. Quigley has raised a challenge to the Vellos' standing based on their changed circumstances. The motion avers that the Vellos no longer own the property adjacent to the Quigley site and, therefore, "there is no basis for them to continue as Intervenors in this action." (Motion, para. 5-6.) The Board directed the Vellos to file an answer to Mr. Quigley's motion in order to provide them with an opportunity to address the averments made therein and to aid the Board in ruling on the motion, including the question of whether the motion should be dismissed.

While we agree with the Vellos that it is troublesome that Mr. Quigley chose not to file a memorandum of law in support of his motion, we do not believe that the lack of a memorandum compels us to dismiss the motion, particularly where it raises a challenge to the Vellos' standing to participate in this appeal. Although a memorandum of law should have been filed pursuant to 25 Pa. Code § 1021.95, we do not believe that the Vellos have been hindered in responding to the

[2] The case cited by the Vellos in support of their argument that the Board may not raise the issue of an intervenor's standing *sua sponte* did not involve an intervenor. *In re Nomination Petition of DeYoung*, 588 Pa. 194 (2006), involved a petition to set aside a political candidate's statement of financial interest. The Commonwealth Court dismissed the petition on the grounds that the objector lacked standing to bring the challenge. The Supreme Court reversed, holding that the lower court had erred by raising the issue of standing *sua sponte*. This is a very different set of facts than the situation we are faced with here, where an intervenor's standing has been challenged by the person who brought the appeal. We do acknowledge that the Board has held on at least one occasion that standing may not be raised *sua sponte*: In *Thomas v. DER*, 1995 EHB 880, 886 (emphasis added), the Board stated, "This Board is not empowered to *sua sponte* decide an *appellant* lacks standing and dismiss an appeal." However, as with *deYoung*, the holding pertained to the standing of the party bringing the action, not an intervenor.

motion by the lack of a memorandum. Section 4 of the Board's Rules of Practice and Procedure states:

> The rules in this chapter shall be liberally construed to secure the just, speedy and inexpensive determination of every appeal or proceeding in which they are applicable. *The Board at every stage of an appeal or proceeding may disregard any error or defect of procedure which does not affect the substantial rights of the parties*.

25 Pa. Code § 1021.4 (emphasis added).

The Vellos have been given an opportunity to respond to the motion, including the ability to raise new matter that they wish the Board to consider. They have been given an opportunity to counter Mr. Quigley's challenge to their standing to participate in this proceeding and to demonstrate to the Board why they believe they have standing despite their changed circumstances. They have not been deprived of due process or their substantive rights. While we do not condone Mr. Quigley's failure to file a memorandum of law nor his disregard of the Board's order, we prefer to decide this matter on the merits and we do not believe that Mr. Quigley's procedural failure prevents us from doing so. As we stated in *Neville Chemical Co. v. DEP*, 2003 EHB 530, "the Board's preference is to decide motions based on the merits rather than procedural technicalities, so long as the substantive rights of the parties are unaffected." *Id.* at 532 (quoting *Kleissler v. DEP*, 2002 EHB 737, 739). *See also Starr v. DEP*, 2002 EHB 799, 815, n. 12 (The Board chose to consider the merits of a motion to amend an appeal despite its failure to comply with the Board's rule). In *DEP v. Danfelt*, 2011 EHB 519, the Board elected to consider a defendant's miscellaneous motion (a Motion to Compel Amended Complaint) even though it was not accompanied by a memorandum of law as required by 25 Pa. Code § 1021.95 and contained "little legal support." *Id.* at 520. The Board considered the motion "[d]espite these procedural errors." *Id.* In *Jefferson Township Supervisors v. DEP*, 1999 EHB 837, the Board

declined to deem facts admitted where a party filed a memorandum of law but no response to a motion to dismiss. The Board determined that "the parties' factual disputes and arguments are readily discernible [from the memorandum of law] and the Board finds the error to be *de minimus*.") *Id*. at 840, n. 3.

Likewise, here the parties' factual statements and arguments are readily discernible from Mr. Quigley's motion and the Vellos' answer. We believe it is in the best interest of the parties and the Board to ensure that the parties in this case have the necessary standing to pursue this matter. We therefore decline to dismiss the motion on purely procedural grounds.[3] Rather, we will consider the merits of Mr. Quigley's motion and the Vellos' answer.

Substantive Challenge to Intervenors' Standing

Section 4(e) of the Environmental Hearing Board Act, 35 P.S. § 7514(e), governs intervention and provides that "any interested party may intervene in any matter pending before the Board." In the context of intervention, the phrase "interested party" means "any person or entity interested, i.e., concerned, in the proceedings before the Board." *Browning Ferris, Inc. v. Department of Environmental Resources*, 598 A.2d 1057, 1060 (Pa. Cmwlth. 1991) ("*BFI*"). The interest required to demonstrate standing to intervene "must be more than a general interest in the proceedings; it must be such that the person or entity seeking intervention will *gain or lose by direct operation of the Board's ultimate determination*." *Consol Pennsylvania Coal Co. v. DEP*, 2002 EHB 879, 880 (emphasis added) (quoting *P.H Glatfelter v. DEP*, 2000 EHB 1204 (quoting *Giordano v. DEP*, 2000 EHB 1154, 1155-1156)).[4]

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[3] This decision should not be seen as condoning a party's failure to comply with the Board's Rules of Practice and Procedure and the Board's orders.

[4] The opinion also quotes *Conners v. State Conservation Commission*, 1999 EHB 669, 670-71 (citing *Wheelabrator Pottstown, Inc. v. Department of Environmental Resources*, 607 A.2d 874, 876 (Pa. Cmwlth. 1992); *BFI*, 598 A.2d at 1060-61; *Wurth v. DEP*, 1998 EHB 1319, 1322-23).

In considering whether a person has standing to intervene, we must determine whether that person "would have been an appropriate party to seek relief in the first instance because he personally has something to gain or lose as a result of the Board's decision." *Consol*, 2002 EHB at 881 (quoting *Glatfelter, supra*). A person has standing if the person is among those who have been or are likely to be adversely affected in a substantial, direct, and immediate way. *Id.* (citing *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, 120 S. Ct. 693, 704-05 (2000); *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269, 280-83 (Pa. 1975)).[5] The harm suffered by the would-be intervenor must be greater than that of the population at large – that is, it must be "substantial." *Id*. (citing *William Penn*, *supra*). Additionally, there must be a "direct" and "immediate" connection between the action under appeal and the person's alleged harm - in other words, there must be causation in fact and proximate cause. *Id.* It is within the Board's discretion whether to grant or deny intervention in accordance with the standard of Section 4(e) of the Environmental Hearing Board Act. *BFI,* 598 A.2d at 1060.

The Vellos were permitted to intervene in this matter based on their status as adjacent landowners to the Quigley site. Their petition outlined the ways in which the alleged violations at the Quigley site interfered with the use and enjoyment of their property. As adjacent property owners, they had a substantial, direct and immediate interest in the appeal of the Department's order directing the Quigleys to correct the alleged violations on their site.

Mr. Quigley has now raised a challenge to the Vellos' standing to continue as intervenors in this matter. In their answer to the motion, the Vellos admit that they sold their property on August 25, 2023 and they no longer live adjacent to the Quigley site. (Intervenors' Answer, para.

[5] *See also Muth v. Department of Environmental Protection*, No. 1346 C.D. 2022 (Pa. Cmwlth. April 16, 2024) (A person seeking to challenge an action of an administrative agency must have a direct interest.)

5.) The Vellos claim, however, that they continue to have standing based on their status as *former* owners of the adjacent property because 1) they have relevant information about activities conducted at the Quigley site and 2) the harm they suffered while residing next to the Quigley site provides them with continued standing.

The Vellos argue that they have standing because they "are in the unique position of having directly observed the activities at [the Quigley site] and have unique evidence relative to the illegal activity," as well as "valuable evidence relative to the direct involvement of Appellant Quigley Sr." (Intervenors' Answer, para. 8.) While the Vellos' knowledge of activities at the Quigley site may qualify them to be witnesses at a hearing on the merits, it does not provide them with standing to participate as a party in the appeal. As we have stated, standing requires a substantial, direct and immediate interest in the matter on appeal, not simply a knowledge of the facts. A witness to a vehicular accident may have important information to provide at trial, but it does not mean they should be a party to the case. Likewise, the Vellos' knowledge of activities at the Quigley site does not provide them with standing to proceed as an intervenor.

The Vellos also argue that the harms they have allegedly suffered as a result of activities on the Quigley site provide them with a continued interest in this matter. They rely on the case of *Giordano v. DEP*, 2000 EHB 1184, as support for their position that harm suffered in the past may provide a person with the necessary standing to intervene in an appeal. In that case, landowners who lived approximately two miles from a landfill appealed a major modification to the landfill's permit. Their standing was challenged by the permittee. In articulating the standard that must be met by the appellants to establish standing, the Board stated:

> In order to establish standing, appellants must prove that (1) the action being appealed *has had* - or there is an objectively reasonable threat that it will have- adverse effects, and (2) the appellants are

> among those who *have been* - or are likely to be - adversely affected in a substantial, direct, and immediate way.

Id. at 1185-86 (emphasis added) (citing *Friends of the Earth,* 120 S. Ct. at 704-05; *William Penn*, 346 A.2d at 280-83).

Relying on this language, the Vellos assert:

> The Board's intentional usage of the past tenses throughout the *Giordana* [sic] opinion when referring to the "harm suffered" undermines any perceived notion by Appellant that simply because the harms suffered by the Vellos occurred in the past the Vellos do not continue to have a direct, substantial, and immediate connection between the action under appeal and the harms they suffered and those harms placed upon the community.

(Intervenors' Answer, para. 19.)

We disagree with the Vellos' interpretation of the Board's language in *Giordano*. First of all, because the landfill in the *Giordano* case had been operating under its new permit for approximately one year at the time of the hearing, it made sense for the Giordanos to present evidence of harm they had suffered during its operation. Second, although we agree that a party before the Board may demonstrate standing based on past harm, there still must be a continuing nexus to the action complained of. In the case of the Giordanos, they continued to live in the vicinity of the landfill at the time of the appeal. In the case of the Vellos, they no longer live next to the site that is the subject of the Department's order and, therefore, any ruling on the Department's order will have no effect on them – past harm without any threat of future harm is not enough to establish standing.

Notably, after the language quoted by the Vellos, the Board in *Giordano* went on to state:

> The first question [that the action being appealed has had or will have an objectively reasonable threat] expresses the Board's gatekeeper function; *the Board will not allow a waste of resources on cases where there is no actual harm or credible threat of any harm to anybody and, therefore, no legitimate case or controversy*.

> The appellants are not required to prove their case on the merits, but they must show that they have more than subjective apprehensions, and that the likelihood of adverse effects occurring is not merely speculative. *Ziviello v. DEP*, [2000 EHB 999, 1005]. The second question [that the appellants are among those that have been or are likely to be adversely affected] focuses on the particular appellants to ensure that they are the appropriate parties to seek relief because *they personally have something to gain or lose as a result of the Board's decision.*

2000 EHB at 1186 (emphasis added).

Here, there is no credible threat of ongoing or future harm to the Vellos and, therefore, no legitimate case or controversy. The Vellos nonetheless implore the Board to recognize that the sale of their property "does not magically vitiate the approximately three years of harm suffered" while the adjacent site was "under Appellant Quigley Sr.'s control." (Intervenors' Answer, para. 20.) We understand their frustration and do not make light of any harm they may have experienced in the past. However, as we have discussed, that is not enough to establish standing. The Vellos have not demonstrated that they have anything to gain or lose as a result of the Board's decision in this matter other than a general interest in seeing Mr. Quigley obey the law. Whether the Board upholds the Department's order to Mr. Quigley or overturns it, there will be no tangible effect on the Vellos. While we recognize that the Vellos may have a desire to see this matter through, that alone does not create a basis for standing.

When a party's standing is put at issue, that party must be able to show that they do in fact have standing. *Giordano*, 2000 EHB at 1187. Here, the material facts are not in dispute – the Vellos admit that they no longer live next to the Quigley site. They have not articulated how they are likely to be adversely affected by the outcome of this appeal in a substantial, direct, and immediate way; they have not shown that they personally have anything to gain or lose as a result of the Board's decision. As former owners of the property adjacent to the Quigley site, they have

not demonstrated that their interest in this matter is any greater than that of the general public. They no longer have a personal stake in the outcome of this appeal. Even viewing the motion in the light most favorable to the Vellos as the non-moving party and accepting their allegations as true, there is simply no basis for finding that the Vellos have standing to intervene in this matter. They are not "interested parties" as required by Section 4(e) of the Environmental Hearing Board Act.

We hasten to point out that it is likely to be a rare occurrence for an intervenor to lose standing once they have been admitted to a case. However, the particular facts of this case lead us to the conclusion that the Vellos no longer have standing as intervenors. Because we find that the Vellos do not have standing to intervene in this matter, we enter the following order dismissing them from the appeal.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

RICHARD P. QUIGLEY, SR.	:	
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v.	:	**EHB Docket No. 2022-104-W**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and MATTHEW VELLO AND KATHLEEN G. SHEEHAN VELLO, Intervenors	:	

O R D E R

AND NOW, this 6th day of May, 2024, it is hereby ordered that the Appellant's Motion to Dismiss Intervenors is **granted**. Henceforth, the caption shall read:

RICHARD P. QUIGLEY, SR.	:	
	:	
v.	:	**EHB Docket No. 2022-104-W**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ENVIRONMENTAL HEARING BOARD

s/ Steven C. Beckman
STEVEN C. BECKMAN
Chief Judge and Chairperson

s/ Bernard A. Labuskes, Jr.
BERNARD A. LABUSKES, JR.
Judge

s/ Sarah L. Clark
SARAH L. CLARK
Judge

s/ MaryAnne Wesdock
MARYANNE WESDOCK
Judge

s/ Paul J. Bruder, Jr,
PAUL J. BRUDER, JR.
Judge

DATED: May 6, 2024

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