

**IN THE COURT OF COMMON PLEAS OF THE 39TH JUDICIAL DISTRICT
OF PENNSYLVANIA--FRANKLIN COUNTY BRANCH**

**APPEAL FROM THE GREENE TOWNSHIP
ZONING HEARING BOARD DECISION OF
THE VARIANCE APPLICATION OF
PENN-MAR ETHANOL, LLC,**

CIVIL ACTION

APPELLANTS:

**DeETTA ANTOUN
CITIZENS FOR A QUALITY ENVIRONMENT
JOHN LUCABAUGH
KRISTI KUSCH-LUCABAUGH
FLORA LaRUE
ROBERTA REDMON
JACKIE SALMON
JOHN SCHOENBERGER
CAROL SCHOENBERGER
DUANE SCHOOLEY
GINA SCHOOLEY**

NO. 2005-1581

JUDGE: RICHARD J. WALSH

PROthonary
FRANKLIN COUNTY
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LAND DEVELOPMENT
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OPINION

On or about June 16, 2005, Appellants submitted to the Court a *Petition for a Stay of Greene Township Proceedings Related to the Land Development of Penn-Mar Ethanol, LLC*. By Order of Court dated June 16, 2005, a Rule to Show Cause was issued upon respondents, returnable by a verified answer within twenty days of the date of service upon respondent. That Order also provided “[a]ll proceedings relating to the proposed Penn-Mar Ethanol, LLC facility before any Board, Department, or Officer of Greene Township, Franklin County shall stay in the meantime.” Penn-Mar Ethanol, LLC (also “Intervener” or “Penn-Mar Ethanol” or “PME”) filed a Notice of Intervention on July 6, 2005 in the matter and it filed an Answer to the Petition on the same date. The landowner, Letterkenny Industrial Development Authority (“LIDA”) did not intervene; and, as far as we can tell, did not participate in any aspect of these proceedings. The matter was set for hearing on September 19, 2005. It is now ready for decision.

Attach A TRUE COPY
Renee Jean Wong
L. L. LIND, PROthonary

A. Issue

The present issue before the Court for determination is whether the stay granted in the June 16, 2005 Order of Court should be lifted, in whole or in part. Appellants support the stay remaining as it is. Intervenor wants the stay lifted completely, or in the alternative, the stay lifted as to the land development process.¹

B. Elements of a Stay and Evidence for Review

The parties agree that the law governing the granting of a stay is set forth in Pennsylvania Public Utility Commission v. Process Gas Consumers Group, 467 A.2d 805 (Pa. 1983). The Process Gas court stated that

the grant of a stay is warranted if:

1. The petitioner makes a strong showing that he is likely to prevail on the merits.
2. The petitioner has shown that without the requested relief, he will suffer irreparable injury.
3. The issuance of a stay will not substantially harm other interested parties in the proceedings.
4. The issuance of a stay will not adversely affect the public interest.”

Process Gas, 467 A.2d at 808-809. Our research supports the parties’ contention and we rely upon Process Gas as the framework for our analysis in reaching our decision.

The parties disagree as to the scope of evidence we should consider in determining if Appellants have met their burden as to each element. Intervenor Penn-Mar Ethanol argues that the Court should consider only the record from the proceedings before the Zoning Hearing

¹ We note that neither the Greene Township Zoning Ordinance, nor the Greene Township Subdivision and Land Development Ordinance initially were made part of the record of this matter. Since hearing, and argument on the Appeal, the parties have by stipulation made the Greene Township Zoning Ordinance a part of the record.

Board. Appellants argue that the evidence taken by the Court at the September 19, 2005 hearing and directly relating to the four Process Gas factors noted above should be considered along with the record from below. We agree with Appellants.

We believe there was no reason for Appellants to have presented evidence before the Zoning Hearing Board dealing with the Process Gas factors. The issue below was whether a variance should be granted to Penn-Mar Ethanol, LLC, not whether a stay should be granted or remain in place. In making a case against a variance, as Appellants were doing below, there is no reason for them to have presented evidence on irreparable injury to themselves, substantial harm to other interested parties and adverse effects to the public interest related to a stay. Thus, common sense leads us to conclude that we should consider the evidence from the September 19, 2005 hearing.²

There is scant case law on the scope of evidence a court should consider in deciding the issue of a stay in an appeal such as this. Our research led us to the case of In re Appeal of Burger, 17 Pa. D. & C.4th 280 (Ct. Com. Pl. 1992). In that case, the court's opinion refers to testimony it had received regarding adverse effects on the interest to the public. Thus, the Burger court relied upon evidence beyond that contained in the record below. Based upon this

² We made it clear to counsel in advance of the September 19, 2005 evidentiary hearing that it was not in any sense our intention to consider substantive evidence relating to the granting of one or more variances. We went to some length to focus the nature of the proceedings on September 19 to the Process Gas factors, which both counsel agreed and noted in their pre-hearing memoranda were required to be considered by the Court in deciding what we convened to decide—whether to lift the stay in whole or in part. Granted, some of the evidence which we heard might well be evidence also heard in a variance proceeding before the Zoning Hearing Board or in a conditional use hearing before the Board of Supervisors; but we made it abundantly clear that we imposed upon ourselves the “limitation” that the evidence was to be considered only as it related to the Process Gas factors.

authority, logic and a common sense analysis, we will consider the record below and the evidence received—for a limited purpose—at the hearing on September 19, 2005.

C. Analysis

In order for the stay to remain in effect, Appellants must establish the four criteria outlined in Process Gas: (1) strong showing of success on the merits; (2) irreparable harm to Appellants without stay; (3) no substantial harm to other interested parties; and (4) no adverse effect on the public interest. We will review each in turn.

1. Strong Showing of Success on the Merits.

Process Gas urges that the requirement that the applicant for a stay show that it is likely he will prevail on the merits should not be an inflexible rule. This criterion must be considered and weighed relative to the other three criteria. Process Gas, 467 A.2d at 809, n. 8. Accordingly, we will decline to impose an inflexible rule in the instant case. Appellants produced substantial evidence that the proceedings below were defective. We pass no judgment in this opinion on whether the proceedings were, in fact, defective; but we consider the evidence we heard on September 19, 2005 and the record of the proceedings below, certified to this court, to conclude that Appellants have made a colorable and credible showing that authorities in Greene Township failed to adhere to the requirements of their own Zoning Ordinance. Among other things, we heard evidence suggesting that any use not specifically listed as a permitted use must be passed upon by the Board of Supervisors, rather than by the Zoning Hearing Board; that the solicitor for the Board of Supervisors acknowledged in a written letter to Appellants' counsel

that the use sought by Penn-Mar Ethanol was not specifically listed as a permitted use; and that persons not authorized by statute or by the Greene Township Zoning Ordinance decided that the applied for use was a permitted use. The Appellants offered, and the Court received evidence without objection, that the Zoning Officer failed to administer the zoning ordinance in accordance with its literal terms.

We conclude that the Appellants' burden is far from insurmountable under the Pennsylvania Supreme Court's holding in Process Gas; and, in fact, that the Appellants have adduced a sufficient quantum of evidence to have met the first prong of the Process Gas analysis: they have made a strong showing that they are likely to prevail on the merits.

We hasten to add that there is no assurance that the Appellants will prevail on the merits. In fact, the Process Gas court addressed, albeit somewhat indirectly, the issue of "ultimately prevailing." Although the procedural posture of this case and the Process Gas court are not similar, the analysis is helpful. In Process Gas, the Public Utilities Commission ("PUC") had entered an order directing certain affected gas utility companies to submit proposed residential conservation programs which were to be funded by certain revenues which had accumulated as of a certain date. Process Gas Consumer Group filed with the PUC a motion for a stay of the order pending judicial review (and that distinguishes in some measure Process Gas from our case in which there is no evidence of record that the Appellants sought before the Greene Township ZHB a stay pending judicial review). The PUC denied the motion for a stay and the Process Gas Consumer Group sought review by petition to the Commonwealth Court. The Commonwealth Court granted the stay and the PUC then appealed to the Pennsylvania Supreme Court.

In its opinion the Supreme Court addressed in a footnote the “likelihood of prevailing on the merits” prong,

The requirement that the applicant for a stay show that it is likely he will prevail on the merits should not be an inflexible rule. This criterion must be considered and weighed relative to the other three criteria. Under Rule 1781 of the Pa.R.A.P., a petition for a stay is to be presented, in the first instance, to the tribunal which rendered the order being challenged. If the likelihood of success on the merits is a rigid standard, then the requirement of seeking the stay in the first instance would be a futile gesture. It is that very tribunal which has just rendered an adverse decision on the merits which would be required to consider the likelihood of success factor. It is extremely unlikely that the lower tribunal will find it likely that its order will be reversed on the merits. On the other hand, there are ample instances where the lower tribunal could find that the applicant has presented a substantial case on the merits even though it disagrees.

Process Gas, 467 A.2d 805 at 809, footnote 8 (emphasis supplied).

Here we find that the Appellants have raised a significant number of credible legal issues and they have presented a substantial case on the merits; and we must *apply flexibly* the rule that Appellants are likely to prevail on the merits relative to the other three criteria, addressed below.

2. Irreparable Harm to the Appellants.

The Appellants presented cogent testimony both before the Zoning Hearing Board and before this Court at the September 19, 2005 evidentiary hearing of harm incapable of repair if the stay is lifted and construction moves forward at this juncture. Among other things, there was ample evidence that the project would involve the construction of a grain receiving elevator 160 feet in height in an area where there was no evidence of any structure coming close in height. Photographs produced before the Zoning Hearing Board confirm Appellants’ claims that views in the vicinity are bucolic and pastoral. There was evidence suggesting potential danger and risk

attendant to the production of ethanol at a location not far from where federal munitions are stored.

In this regard, the Appellants do not carry a heavy burden and we believe the threshold to be low. They are required to establish only that without the requested relief, they will endure irreparable injury. It is noteworthy that in Process Gas, the Supreme Court determined that the irreparable harm prong had been satisfied, even though, as the court noted, “the realities of the controversy here go [only] to the disposition of money.” *Id.* At 809. Granted that the regulatory scheme under review by the Supreme Court in Process Gas was a complicated one; but if the court found irreparable harm where the controversy related only to the disposition of money, we are hard pressed not to find irreparable harm where the landscape and the horizon are to endure changes that will entirely change their character in the vicinity. The Appellants have amply demonstrated that they will suffer irreparable harm if the stay does not remain in place.

3. No Substantial Harm to Other Interested Parties.

Appellants’ arguments on this prong are persuasive. There is little evidence that Penn-Mar Ethanol believes time to be a critical element of these proceedings. On Petition of the Appellants for a stay, this Court issued a preliminary stay on June 16, 2005 as part of a Rule to Show Cause. Penn-Mar Ethanol did not become a party to these proceedings until it filed a Notice of Intervention almost three weeks later on July 6, 2005. Penn-Mar Ethanol then filed a Praecipe for Determination of the stay issue on August 1, 2005 and the Appellants requested that the matter be set down for evidentiary hearing. That hearing was held on September 19, some

three months after the issuance of the preliminary stay. Penn-Mar Ethanol, as applicant below for the variance, had resources at its disposal to get the matter to court on a faster track. The Municipalities Planning Code provides that “the landowner whose use or development is in question may petition the court to order the Appellants to post bond as a condition of proceeding with the appeal.” 53 P.S. §11003-A(d). Afterwards, “the court shall hold a hearing to determine if the filing of the appeal is frivolous.” *Id.* At no time did Penn-Mar Ethanol approach or petition the court to require that the Appellants post a bond.³ It was a matter of curiosity to the Court during the course of the summer that Penn-Mar Ethanol made no such approach.

Further, we heard uncontradicted evidence that Penn-Mar Ethanol’s air quality application to the Pennsylvania Department of Environmental Resources (“DER”) is likely to be pending for a period of at least six months; and that an appeal either by Appellants or by Penn-Mar Ethanol of an adverse decision of the DER would head to the Environmental Quality Board for further review. In that the air quality application is a matter winding its way through regulatory pathways and in that final air quality approval is apparently necessary before Greene Township may approve a final land development plan, little harm will accrue to Penn-Mar Ethanol by the continuation of this stay.

³ We are mindful that Penn-Mar Ethanol is not yet a landowner in the Cumberland Valley Business Park. Nevertheless, Penn-Mar Ethanol, as an applicant for a variance before the Greene Township Zoning Hearing Board, arguably stands in the shoes of the landowner with respect to the application process. As applicant for the variance, it would at least have had an argument that under the cited provision of the Municipalities Planning Code, it stood in position to urge the court to impose a bond requirement on the Appellants of the Zoning Hearing Board decision. Supporting such argument is Section 11004-A of the Municipalities Code which allows for intervention by “the municipality and any owner or tenant of property directly involved in the action appealed from.” Since no interested party made objection to the intervention of Penn-Mar Ethanol, PME would have had a colorable argument that it had been treated as an owner or tenant of property subject to the use variance. Whether that argument would have held water or not, we are not prepared to say. What is clear is the Penn-Mar Ethanol at no time undertook even to make that argument.

Finally, we note that the clear evidence establishes that Penn-Mar Ethanol has no funding in place to proceed with this estimated \$85 million project, suggesting that this is yet another factor contributing to the project's lack of momentum at this juncture.

We conclude that permitting the stay to remain in place will not cause substantial harm to Penn-Mar Ethanol.

4. No Adverse Effect on the Public Interest.

We find, as did the Supreme Court in Process Gas, that the public interest is best served by having the substantial legal issues raised by the Appellants decided correctly on their merits.

D. Conclusion

Having determined that Appellants have satisfied each prong of the four part test set out in Process Gas, we conclude that the stay earlier imposed shall remain in effect and Penn-Mar Ethanol's request to lift it is denied. An order will issue.

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NO. 2005-1581

DEPUTY
LINDA L. FERRARO
PROTHONOTARY

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PROTHONOTARY
FRANKLIN COUNTY

JUDGE: RICHARD J. WALSH

ORDER OF COURT

October 31, 2005, this matter having come before the Court for an evidentiary hearing on September 19, 2005 on Appellants' *Petition for a Stay of Greene Township Proceedings Related to the Land Development of Penn-Mar Ethanol, LLC* and the Court having considered the evidence presented at that hearing, as well as the Petition and Penn-Mar Ethanol, LLC's Answer, the briefs, the pre-hearing memoranda prepared by counsel, the written closing arguments submitted by counsel, and the law,


IT IS ORDERED THAT Appellant's Petition for Stay is **GRANTED**. The May 31, 2005 written decision of the Zoning Hearing Board of Greene Township, Franklin County, Pennsylvania shall remain stayed pending the Appeal. Further, the stay shall remain with respect to Penn-Mar Ethanol's pending land development plan.

Pursuant to the requirements of Pa.R.C.P. 236(a)(2), (b), (d), the Prothonotary shall immediately give written notice of the entry of this Order, including a copy of this Opinion and Order, to each party's attorney of record or to each party, if unrepresented, and shall note in the docket the giving of such notice and the time and manner thereof.

MAKES A TRUE COPY

Patricia Jean Walsh
PROTHONOTARY

By the Court,


Richard J. Walsh, J.

The Prothonotary shall give notice to:

D. Reed Anderson, Esq., Counsel for Penn-Mar Ethanol, LLC
Frederic G. Antoun, Jr., Esq., Counsel for Petitioners/Appellants
David C. Cleaver, Esq., Solicitor for the Greene Township Zoning Hearing Board
Welton J. Fischer, Esq., Solicitor for Greene Township