

ZONING HEARING BOARD
BARRETT TOWNSHIP, MONROE COUNTY, PENNSYLVANIA

In re: Appeal of Buck Hill Falls Company and Buck Hill Water Company	: Appeal from Decision of : Zoning Officer under : Township Zoning Ordinance : §§ 1503.A.1 and 1503.A.2, and : Municipalities Planning : Code § 909.1(a)(3) :
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DECISION

The Zoning Hearing Board of Barrett Township (the “Board”) takes final action by this Decision on the pending appeal for which a public hearing was advertised, the property was posted and a hearing was conducted by the Board at 6:00 p.m. on June 12, 2017 at the Barrett Township Municipal Building.

Procedural History

Buck Hill Falls Company and Buck Hill Water Company (the “water company”), (collectively the “Applicant”) made a written request to the Barrett Township Zoning Officer for an interpretation of the municipal Zoning Ordinance (the “Ordinance”). The water company is a regulated public utility and a wholly-owned subsidiary of the Buck Hill Falls Company. The issue to be resolved by an interpretation was whether a project being considered by the water company would be an accessory use to the water company’s existing water utility use. The Applicant has never made any municipal permit applications concerning this potential project.

Initially the Zoning Officer asked for additional information about the location of and a possible design for such a new facility, which information was provided by the Applicant in schematic form to the Zoning Officer. Based on the information, the Zoning Officer concluded, among other things, that the Applicant’s proposal to add a bulk water tank truck filling station would not qualify as an accessory use to the water company’s existing public water system use. The Applicant then filed this Appeal (the “Appeal”) to the Board contesting the opinion as a determination of the Zoning Officer.

The Applicant is the owner of many large contiguous tracts of land, including the tract of land on which a tank truck filling facility might be constructed. That parcel is located west of State Route 191 in Barrett Township, PA 18325 (the “property”). The

property is located west of the Buck Hill Falls community and contains 1,566 acres of forested land. It has already been developed by the water company with certain water system improvements. The parcel is identified by Monroe County tax code number 01/29/1/10 and is currently used by the water company for water system purposes and as woodlands.

Present at the hearing were George W. Westervelt, Jr., Esq., Counsel for the Applicant; special Barrett Township Solicitor for the Zoning Officer, James V. Fareri, Esq.; two witness for the Applicant, (1) Michael O'Shea, President and CEO of the Applicant, and (2) Brick Linder, P.E., an expert witness; one witnesses for the Township, Associate Zoning Officer, Shawn McGlynn.; three members of the Zoning Hearing Board (1) Richard L. Price, Jr., Chair, (2) Ralph Fish, Jr. and (3) Jill Shoesmith; Zoning Hearing Board Solicitor, Alan Price Young, Esq.; and members of the general public.

The Board Solicitor first explained how members of the public might choose to participate at the hearing. He then circulated a sign-up list on which persons could provide their names and addresses if they wished to make public comments only; wished to testify under oath; or wished to participate in the appeal proceeding as a party. A certified court stenographer, Donna Kenderdine McManus, was also present and made a record of the proceedings. All witnesses were sworn. The Board then heard testimony and received other evidence.

Testimony and Exhibits Hearing on June 12, 2017

A. Board matters.

The Board Solicitor made comments on the record to the public about the limited nature of the appeal hearing, the ways the public might participate in the hearing and the opportunity for public comment that would follow the closing of the hearing record. A copy of the Applicant's Zoning Hearing Board Appeal Application was marked as Board Exhibit 1. Notice of the hearing was advertised on May 20 and May 27, 2017 in the Pocono Record, a newspaper of general circulation within Barrett Township and Monroe County, Pennsylvania. A copy of the content of the Public Notice was marked as Board Exhibit 2. Proof of Advertising in the Pocono Record was marked as Board Exhibit 3. A copy of a letter from the Zoning Officer confirming posting of notice of the hearing on the property, etc. was marked as Board Exhibit 4. Neighbors and the parties were also mailed similar notices. The Board solicitor also introduced the four Board exhibits for the record (B-1 through B-4).

B. Representatives of the Applicant then testified as follows.

Mr. Westervelt first asked everyone present to confirm the date on which the Township adopted its first zoning ordinance. The consensus of the Board Chair and the Applicant's engineer was that the Township first adopted a zoning ordinance sometime in 1961.

Michael O'Shea, President and CEO of Buck Hill Falls Company and Buck Hill Water Company. Mr. O'Shea first explained that the water company is a subsidiary of the Buck Hill Falls Company, which was founded in 1901. He confirmed the water company currently has 335 customers, 323 in the Buck Hill community and 12 outside the community. He identified Exhibit A-1, the Articles of Incorporation of the Buck Hill Water Company filed in 1902, well before adoption of a zoning ordinance in the Township.

Mr. O'Shea then confirmed a number of regulatory matters. Three state and regional regulatory bodies have jurisdiction over the water company's operations: (1) the Pennsylvania Public Utility Commission (PUC); the Pennsylvania Department of Environmental Protection (DEP); and the Delaware River Basin Commission (DRBC). Two of the agencies, DEP and DRBC, have set maximums on the monthly volume of water that the water company can withdraw from its existing water sources and provide to customers. The DEP allocation is higher, 25,000,000 gallons per month, and the DRBC allocation is lower, 15,500,000 gallons per month. Mr. O'Shea confirmed that at present the amount of the company's average monthly water use is less than 20% of the DRBC's approved allocation.

He also described other details about the public water system, which serves both residential and commercial customers. Its rates are set in a tariff document that was approved by the PUC, and the last rate increase approved by the PUC fifteen years ago. The PUC tariff sets water charges per thousand gallons, \$8.10 for residential customers and \$4.06 for commercial customers. There is also a PUC-approved charge for bulk sales of water to other customers. The only bulk water customer identified was SRI, a company that recently demolished the Buck Hill Inn hotel facility and related structures. SRI used metered water from water company hydrants for dust control and suppression.

Mr. O'Shea said the primary water source for the water company is Buck Hill Creek, and the secondary water source is a naturally flowing spring called Big Spring (the "spring"). The spring is located in Wildcat Hollow and is a part of the property that might be used for the project that is the subject of this appeal. The spring itself ~~is~~ has been enclosed completely inside two large chambers that protect the water flowing from the spring from any outside contamination. The water company also has drilled one water well that can supply water to the utility system.

Mr. O'Shea identified Exhibit A-5, which has a fold-out property map. He located the spring and creek on the map, and described two water system intake lines that connect to a single pipeline which continues downhill to the water treatment plant. The plant is located in the center of the Buck Hill community and is a half-mile up from a community's main road, Golf Drive. He confirmed that since less than 20% of the permitted DRBC water allocation is used, another 11,000, 0000 to 12,000,000 gallons per month is available for, but unused by, the water company. He thought that the possible bulk sales of water would no affects on the water supply, might defer a future water rate increase for customers and would have no impacts on the Applicant's property where the

spring is located, a Conservation zoning district.

He then identified Exhibits A-2 and A-3 and other materials he pulled from the Internet website of the Brodhead Creek Regional Authority (BCRA) that confirm BCRA's rates for bulk water sales. He said BCRA is the largest water utility in Monroe County and serves the Stroudsburg area. He said he also researched other Pennsylvania water companies that also sell water in bulk.

On cross examination by Mr. Fareri, Mr. O'Shea said that BCRA's water sources are in the Brodhead Creek watershed, but he was not sure if BCRA's bulk water sales were classified as an accessory use or not. He again reviewed the DEP and DRC approved water allocations and limits. He said the Applicant would have to prove to DRBC if there were any need to exceed DEP's 15.5 million gallons per month (Mgpm) limitation and possibly use up to the DEP-approved 25 Mgpm. He also reconfirmed that the PUC tariff for the water company already contains approval of and rates for bulk sales of water, and that he had been in contact with Niagara Water Company in Ontario, California about possible bulk sale of water for bottling off-site in the Lehigh Valley. He said the Applicant has no contract with Niagara and has no business plan for starting bulk sales of water. He also reconfirmed there would be no impact to the parcel of land located in the Conservation zoning district; would be no impact to the water table from potential bulk water sales; and had done no studies on these topics. That ended his testimony.

The Board Solicitor then asked questions of the two persons who had signed up to become parties in the appeal proceedings, Ms. Pratt and Mr. Burns. Both indicated on the record that they would rather make public comments only at the end of testimony, and would not seek to become parties to the proceedings. Therefore they did not ask this witness and questions. There was also a discussion with the Board about the date of incorporation of the water company and the date of the first approved tariff for the water company by the PUC.

Brick Linder, P.E., Linder Engineering. Mr. Linder first testified about his professional qualifications. He confirmed that his office is located in Canadensis, and that he has been a licensed Professional Engineer in Pennsylvania for civil engineering for 30 years. He has a Bachelor's Degree in Civil Engineering from Penn State, and has worked on projects for the Applicant for ten to twenty years, including projects for and other assistance to the water company dealing with its water system. He then reconfirmed the DEP and DRBC maximum monthly water allocations for the water company.

He identified in Exhibit A-5, a letter dated February 20, 2017 that he sent to the Township Zoning Officer seeking a determination of a zoning question on behalf of the Applicant. His goal was to get the Zoning Officer to make a determination under the Zoning Ordinance about a possible bulk water filling station for tank trucks. He then referred to a March 28, 2017 letter from the Zoning Officer, Shawn McGlynn, which is part of Exhibit B-1. The Zoning Officer's letter stated that a bulk water filling station would not qualify as an accessory use for the primary utility use as a water company, was not the same use as the principal use on the lot and also was also not a permitted use in

the Conservation zoning district. Mr. Linder then confirmed that the Applicant has installed multiple water system improvements on various parcels of land. The possible filling station would use water from the spring, at least in part, would be located on property owned by the Applicant as part of its water supply system.

Using a portion of a USGS map that is part of exhibit B-1, Mr. Linder then described water company's existing facilities in general terms and noted the locations of specific parts of that water system. He identified the possible location for the bulk water filling station, the actual location of the water system's existing primary water source (an intake structure in the Buck Hill Creek), and the system's existing secondary water source known as Big Spring, or the spring. He also identified two supply pipes and their point of joinder into one main pipeline supplying the water system's filtration plant and its storage tank.

He described the sophisticated intake system built in the stream, the primary point of collection, and stated that the stream has multiple sources of water other than the Big Spring. He discussed the existing raw water supply lines, the main pipeline, the filtration plant, and the high volume storage tank for the finished water. He said the two supply pipes carry virtually the same quality of raw water from the two points of collection (two intakes) down to the main supply pipeline for the system.

Mr. Linder said he is aware of one existing bulk water filling station that is located in Stroudsburg operated by the Brodhead Creek Regional Authority, and that he had worked personally on that bulk water connection. He said he did engineering work for BCRA to help create its bulk water filling station.

Mr. Linder confirmed he is familiar with the Barrett Township Zoning Ordinance, and that it does not describe bulk water filling stations or sales. He was then asked to offer his professional opinion under the Zoning Ordinance as an expert whether a bulk water filling station would be customarily incidental and subordinate to an existing water company use. He answered affirmatively, saying the bulk water filling station should be deemed an accessory use to the existing public utility water company use on the property.

On cross-examination, Mr. Linder was asked for the basis of this opinion, and stated bulk water sales were an inherent part of a water company. He did not know whether the BCRA bulk water filling station was approved as an accessory use in Stroud Township or not. He was also asked about pre-treatment of water to be supplied in bulk at the contemplated bulk water filling station, and said that mostly likely the water would just be disinfected there using UV (ultraviolet) light and then stored there until dispensed into 10,000 gallon tanker trucks.

Mr. Linder confirmed that in his letter of February 20, 2017 to the Zoning Officer he made no formal, final proposal of any kind to the Township; that his first letter was submitted to the Zoning Officer for the sole purpose of getting an opinion from the Zoning Officer; that the letter was based on preliminary discussions with Niagara Water Company; that the additional information he provided later at the request of the Zoning

Officer was conceptual only and was not a final design; that the additional information contained specific details that were only added only at the request of Mr. McGlynn; and that the bulk water would be removed from the site by trucks, not by pipes.

Mr. Ferari then asked Mr. Linder questions about Exhibit A-5. He confirmed the photos used in the exhibit came from a Niagara facility located in southwest Pennsylvania, as did the schematic plans.

Mr. Linder confirmed when asked about Exhibit A-1, the Application, that there were technical issues about the tax parcel ID number and deed reference because the large parcel in question has an antiquated legal description in the most current deed as filed in the early 1900s. He called that information 'a nightmare from a records' prospective'. He then said no proposed location for a bulk water filling station has been picked.

On re-direct, Mr. Linder identified Exhibit A-4, a certificate of entitlement to use water issued by DRBC to the Applicant, Buck Hill Falls Company and its subsidiary, the water company. On re-cross he reconfirmed that the DRBC certificate authorized withdrawal of 15.5 million gallons per month for use by the customers of the water company. The members of the Board and its counsel asked questions about his testimony and about the now-demolished Buck Hill Inn, which had previously been a major commercial customer of the water company. At that point the Applicant rested its case and the Board admitted Exhibits A-1 through A-5 for the record.

C. A representative of the Township testified as follows.

Shawn McGlynn, Alternate Township Zoning Officer. Mr. McGlynn testified on direct examination that he is a third-party consultant who provides community services, and has done so in Barrett Township since 2015. He confirmed he is appointed as the Alternate Barrett Township Zoning Officer; works for seven municipalities in Monroe County; is the Zoning Officer in five municipalities; and is the municipal codes official in all seven of the municipalities. Mr. McGlynn also stated that he is an ICC-certified Building Code Official; has a BS degree in environmental studies; has been a municipal zoning officer since 2001; and teaches certification courses in his professional field.

Mr. McGlynn confirmed he received an inquiry from Mr. Linder, a letter that is part of Exhibit B-5, and identified all of the attachments to that exhibit. He stated he responded by letter dated March 28, 2017, which is also part of A-5. He testified that in his opinion the bulk water filling station is a new principal use in the Conservation zoning district, and not an accessory use. He confirmed the principal use of the parcel, which includes the spring, would be a public utility water system use, and that a new bulk water filling station use was not a use listed in the Zoning Ordinance. He then said the Applicant was attempting to pigeon-hole this new use into the Zoning Ordinance. He recited language from section 304 of the Zoning Ordinance that no other uses are permitted in that zoning district. He also said the filling station was not an accessory use because Zoning Ordinance section 10.03(C)(1)(a) requires an F-1 (Utility) use must only

be “for the benefit of the Barrett Township community”. He testified that the primary facility of the water system is its water treatment plant.

He said that only buildings are regulated by the municipal Zoning Ordinance; that pipes are not regulated; that the potential new building is regulated and would treat the water; and that trucks would remove the water. He opined that the existence of BCRA bulk water filling station now serving Stroudsburg was not relevant to Barrett Township because it is in another township with different zoning ordinances; that the potential filling station is not on the same lot as the treatment plant, and is not customarily incidental to a water company. To the contrary, he said the filling station is a commercial use of the land with regulated rates and with other state controls. He called it a private company selling a product. He did not know if the PA Public Utility Commission (PUC) controls bulk sales of water. He then quoted Zoning Ordinance § 10.03(g)(17) that no conditional uses are permitted in a Conservation zoning district, even for uses that are not specifically identified in the ordinance.

When cross-examined by Mr. Westervelt, Mr. McGlynn confirmed that the Applicant had not applied for a building permit; had not submitted a SALDO (Subdivision and Land Development) plan for approval; had not made a conditional use application; had not applied for any special exception; but denied that the sole issue in the appeal is whether or not the bulk water filling station is an accessory use. He said he asked for more information in order to “avoid other problems down the road.” He stated it was “absolutely essential that we look at this whole package” and to have the Applicant “[g]ive us the details.” He stated that “this building and this use of this land for a new use ... is regulated.” Mr. Westervelt then reviewed portions of the Zoning Ordinance with the witness. Mr. McGlynn agreed the water company utility included multiple uses on multiple parcels of land; but said even if the transfer of water into trucks didn’t require a building, and did involve a structure, it would still be a new use. He then said the bulk sale of water that will leave Barrett Township violates the Zoning Ordinance and is not permitted because it’s not part of the utility. He opined that the PUC approval of bulk water sales is irrelevant and doesn’t negate Barrett Township Zoning. He did admit that the water company’s infrastructure predates the Township’s adoption of a Zoning Ordinance.

Mr. McGlynn stated again the existence of the BCRA bulk water filling station is not relevant to the accessory use determination, and that he had no knowledge about two appellate court decisions cited by Mr. Westervelt. He confirmed that the phrase “customarily incidental and subordinate” would be used to determine if something is an accessory use, and that the phrase is not defined in the Zoning Ordinance. Mr. Westervelt then asked if Mr. McGlynn was aware of Pennsylvania Municipalities Planning Code § 603.1 which states where doubt exists about interpretation of a zoning ordinance, the language must be interpreted in favor of the landowner and against the municipality. Mr. McGlynn confirmed he did not consult a dictionary, including Black’s Law Dictionary, and did not consult the Township solicitor before sending Mr. Linder his determination letter, which stated that the filling station was not an accessory use but was a new use that must be essential to serve the Township of Barrett.

The Board's solicitor then provided extended comments on the question of the interaction between the municipal zoning ordinance and the PUC statute, regulations and the approved tariff.

On re-direct, Mr. McGlynn said Zoning Ordinance § 1003 was a catch-all provision that makes uses not listed in the ordinance Conditional Uses that are permitted in areas other than Conservation zoning districts. He also said the water company use is a class F-1 use in the Zoning Ordinance. At that point the Township rested its case.

The Board then had its Solicitor give each member of the public who had signed up at the start of the hearing (to make public comment, to give sworn testimony or to have party status) an opportunity to do so. When asked, however, each person who had signed up chose to give public comments only to the Board off the record. The Board spent an hour listening to the public comments.

Discussion

Jurisdiction. The Pennsylvania Municipalities Planning Code¹ (the "MPC") in § 909.1(a)(3)² gives the Barrett Township Zoning Hearing Board jurisdiction to decide this appeal application which is governed by the municipality's Zoning Ordinance (the "Ordinance"), the MPC as well as other state laws and regulations.

Background. The Applicant directed its engineer to request an opinion from the municipal Zoning Officer whether a bulk water filling station for water tankers would be permitted as an addition to the Applicant's existing water utility system. The Zoning Officer initially responded to the engineer seeking more details about a building design and location for a filling station. The engineer did so but in schematic terms only. The Zoning Officer then made a determination in his opinion letter that the bulk water filling station as proposed was not an accessory use to the existing water company use, but instead was a new commercial use that is not permitted in the Conservation zoning district. To be clear, the Applicant only asked for an opinion only about the question of an accessory use. It had not designed or located a tank truck bulk water filling station, and had not applied to the municipality for any permits or approvals for such a project when it got the request for other information from the Zoning Officer.

Existing Water Company Use and its Legal Authority. The sole question asked in this matter was stated in the Applicant's initial request for a zoning ordinance determination from the Zoning Officer: whether a conceptual project, filling water tanker trucks, would be classified an accessory use to the existing water system use, as regulated, permitted and certified by both the PA PUC and the PA DEP.

As already stated on the record of the hearing, the Board looked at this question quite carefully. It involves not just the Zoning Ordinance, but a legal hierarchy of laws

¹ 53 P.S. § 10101, etc.

² 53 P.S. § 10909.1(a)(3)

and regulations that all apply to this situation. The parties have disagreed about which of those legal standards is more senior legally in the hierarchy and therefore controlling. The more senior standards trump other conflicting legal standards which are of lower rank. The precise issue must be resolved by determining if the PUC law and regulations as applied to the water company in an approved tariff preempt some or all of the local municipal zoning requirements.

The Board concludes that is the case, and that for the most part, the PUC approvals do trump local zoning requirements. The Board rejects the Zoning Officer's personal view of the scope of the current use under zoning as well as his legal opinion that the PUC approval is irrelevant. The Board looked instead to the water company's PA PUC-approved tariff for its primary legal guidance for the following reasons.

First, under state PUC law and regulations, matters approved in a regulated utility's tariff legally trump local zoning ordinance requirements generally. PPL Electric Utilities Corp. v. City of Lancaster, 125 A.3d. 837 (Pa. Cmwlth. 2015). The only land use issue that might still be regulated for a utility company by the municipality's land use ordinances could be the permitting of specific 'buildings'. That would happen only in situations in which the PUC itself has not held a hearing and ruled on the appropriateness of such a building. Pa. Municipalities Planning Code § 619, 53 P.S. § 10619.³ Therefore, far from being irrelevant as the Zoning Officer indicated, under our state's appellate court decisions and laws, the legal rights granted by the PUC to the water company preempt local zoning. The regulated water system utility's tariff is legally superior to and takes legal priority over any conflicting local municipal zoning regulations.

Second, because of the general preemption of zoning by PUC determinations, the Board must look to the approved PUC tariff for specific details about the scope of the existing water system use by the regulated utility. The content of the PUC-approved tariff provides direct evidence of the legal scope of the existing use. It authorizes the water company to operate its water system generally in compliance with the tariff, and specifically sets rates for residential and commercial users within its service area. More importantly, to answer the specific question that is before the Board, the approved tariff legally authorizes the water company to sell bulk water at an approved cost per gallon within its volume restrictions. Whether the water company currently does not sell any

³ Section 619. Exemptions This article [on zoning] shall not apply to any existing or proposed building, or extension thereof, used or to be used by a public utility corporation, if, upon petition of the corporation, the Pennsylvania Public Utility Commission shall, after a public hearing, decide that the present or proposed situation of the building in question is reasonably necessary for the convenience or welfare of the public. It shall be the responsibility of the Pennsylvania Public Utility Commission to ensure that both the corporation and the municipality in which the building or proposed building is located have notice of the hearing and are granted an opportunity to appear, present witnesses, cross-examine witnesses presented by other parties and otherwise exercise the rights of a party to the proceedings.

bulk water or whether it ends up selling bulk water in large volume makes no difference to that grant of authority. And at this juncture, because the location and design of a facility really are not a consideration at present, the only legal issue to be resolved is the scope of the principal use.

The key here is that the water company is properly authorized as a regulated water system utility to sell bulk water by its existing PUC, DRBC and DEP permits and approvals. Therefore, the sale of bulk water is already part of the principal, legally authorized water system use. And because the bulk sale of water is *part of the principal use as a regulated water system*, the Board need not address the issue of those bulk water sales being permitted as an accessory use.

Two other matters deserve further comment. First, the additional schematic materials requested by and relied on by the Zoning Officer really do not relate to the issue that is before the Board. The Applicant has not designed a project, nor has it applied for any permits for a project. No zoning permit application is pending nor is any land development permit application. The additional materials requested by the Zoning Officer ended up complicating this matter unnecessarily, and so the Board has chosen to set those materials aside. They are premature and incomplete at best and therefore not relevant to legal question before the Board. The Zoning Officer might have chosen instead to 'coach' the Applicant about his 'big picture' concerns, meaning issues that might limit future development. He also could have consulted with his own solicitor as well before formulating a legal opinion. He chose instead to opine on his own about legal matters affecting a publicly-regulated utility and the interplay between state public utility law and local land use regulations.

Second, the Applicant asked for a specific legal opinion only, not a formal review of a hypothetical future design or permit application. If the Applicant completes such a design in the future, state law would require the Applicant to apply for permits at that time, perhaps under parts of the Township's zoning and SALDO regulations that might apply, or, alternatively, in an administrative proceeding it could file with the PUC.

To summarize, the question before the Board is answered quite simply. The bulk sale of water is already part of the principal water system use authorized in the approved tariff for the water company. Bulk water sales are one of three categories of sales of water specifically authorized by the PUC in the approved tariff. Because the tariff for the water company authorizes it to sell water in bulk as part of its principal water system use, the Board need not consider whether the bulk sales of water are an accessory use.

Conclusion. For these reasons, a majority of the members of the Barrett Township Zoning Hearing Board voted to grant the Applicant's appeal for the reasons just discussed, deciding that the proposed bulk sale of water is already authorized as part of the public utility's principal water system use. It need not be evaluated as an accessory use.

Findings of Fact

1. The Applicant, Buck Hill Falls Company and its subsidiary, Buck Hill Water Company, own the land and all of the water company assets that are identified in this appeal. T-8
2. One parcel of property contains approximately 1566 acres and is located in a Conservation (C) zoning district on the west side of PA Route 191 in Barrett Township, Monroe County, Pennsylvania. T-52, 64
3. The property is forested woodland with springs, streams and areas of steep slopes. T-14, 40-41
4. The water company was incorporated in 1902, has constructed and operated a public water system that has provided potable water to the public in its service area ever since. T-9
5. The water company's water system infrastructure predates the effective date of the first Barrett Township Zoning Ordinance. T-76
6. The water company constructed certain essential improvements that are all part of the overall water system owned and operated by the water company. T-41-44
7. The water company's improvements include engineered, fully-enclosed water intake structures located in portions of Big Spring, a secondary water source for the water company, as well as pipes that transport the water from the intakes downhill to the balance of the public water system. T-41-42
8. The water company currently operates as a regulated public utility under a tariff approved by the Pennsylvania Public Utility Commission (PUC) for water service to residential, commercial and bulk water customers. T-11
9. The water company is authorized by the Pennsylvania Department of Environmental Protection to supply up to 25,000,000 gallons of water per month to customers. T-17
10. The water company is also authorized by the Delaware River Basin Commission to supply up to 15,500,000 gallons of water per month to customers. T-17
11. On average, the water company only withdraws and distributes to customers approximately 20% of the maximum of 15,500,000 gallons per month permitted by the Delaware River Basin Commission. T-11, 17
12. The approved PUC tariff under which the water company operates includes approved charges for the sale of bulk water to customers of the water company. T-12

13. The Applicant is contemplating the addition of a bulk water filling station for tanker trucks as part of the water system located on property that it owns. T-11-12
14. The Applicant has not designed such a facility nor submitted applications for any permits for such a facility either to Barrett Township or to the PA PUC. T-47-48
15. The Applicant requested that the Zoning Officer opine whether the bulks sale of water by filling tanker trucks is an accessory use to the existing water systems use of the Applicant's property. T-38
16. The Zoning Officer did not opine at first, but instead responded with a request for additional information from the Applicant so he "could look at the whole package." T-72
17. Based on the additional information provided by the Applicant, the Zoning Officer determined that any contemplated bulk water filling station was a new business, a commercial use that was not permitted on the Applicant's property. T-63, 66
18. The Zoning Officer also opined that the water company's tariff as approved by the PUC was irrelevant to his determination. T-75-76
19. The Zoning Officer opined specifically that the proposal to sell bulk water was not part of the water system utility. T-66-67
20. The Brodhead Creek Regional Authority sells water in bulk and operates a tank truck filling station for that purposes at its facilities in the Stroudsburg area. T-19, 43

Conclusions of Law

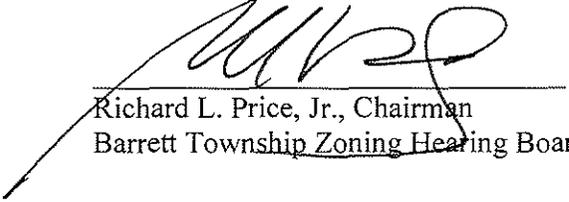
1. The Zoning Hearing Board has jurisdiction in this matter, an appeal from a determination of the Zoning Officer, under Municipalities Planning Code § 909.1(a)(3), 53 P.S. § 10909.1(a)(3).
2. The PA PUC-approved tariff for the water company is based on applicable PUC laws and regulations that preempt the provisions of the Barrett Township Zoning Ordinance, particularly as to the legal scope of the principal use of the water company. PPL Electric Utilities Corp. v. City of Lancaster, 125 A.3d. 837 (Pa. Cmwlt. 2015).
3. In making his official determination, the Barrett Township Zoning Officer requested and relied on schematic information that was not relevant to the legal issue at hand, and he also made certain other determinations that are not supported by state law. Id.
4. As evidenced by the Applicant's existing tariff, the Applicant's is authorized to sell bulk water by operating a tank truck bulk water filling station as part of the existing

water system's principal use as a PUC-regulated public water system utility.

Order

The Barrett Township Zoning Hearing Board, by majority vote of its members on July 31, 2017, hereby enters this Order that Applicant's appeal is granted and that the opinion of the Barrett Township Zoning Officer is reversed as a matter of law. The Applicant has the authority to operate a tank truck filling station for the sale of bulk water because those sales are within the legal scope of the water system's principal use as a PUC-regulated public water system utility.

Dated: July 31, 2017


Richard L. Price, Jr., Chairman
Barrett Township Zoning Hearing Board

Copies to: Barrett Township Zoning Hearing Board Members
Barrett Township Board of Supervisors
Todd Weitzman, Esq., Barrett Township Solicitor
James V. Fareri, Esq., Barrett Township Zoning Officer Special Solicitor
Jeryl Rinehart, Barrett Township Zoning Officer
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Buck Hill Falls Company and Buck Hill Water Company, Applicant
Y&H Barrett Township Zoning Hearing Board file 558/062