

BEFORE THE ENVIRONMENTAL APPEALS BOARD
FOR THE STATE OF DELAWARE

PUBLIC WATER SUPPLY COMPANY, :
INC., :

Appellant, :

v. :

Appeal No. 97-01

SECRETARY OF DEPARTMENT OF :
NATURAL RESOURCES & :
ENVIRONMENTAL CONTROL, :
STATE OF DELAWARE, :

Agency-below, :
Appellee, :

An appeal of the Secretary's
Order No. 97-W-0003 issuing
2 potable water wells, 3
irrigation wells and
allocation permits to Tunnell
Companies' for its Baywood
Greens Project.

and, :

TUNNELL COMPANIES, L.P., :

Permittee-below, :
Appellee. :

FINAL ORDER AND DECISION

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Before Chairman Clifton H. Hubbard, Jr., Diana Jones,
Robert S. Ehrlich, Charles Morris, Joan Donoho and Robert I.
Samuel, comprising a quorum of the Environmental Appeals Board.

This is an appeal by Public Water Supply Company, Inc. (hereafter "PWS") of the Secretary of the Department of Natural Resources & Environmental Control's (hereafter "Secretary" or "DNREC") January 16, 1997 Order and decision (hereafter "Order" or "Decision") issuing two potable [referred to as "public"] water well permits, three irrigation well permits and corresponding water allocation permits to Tunnell Companies, L.P. (hereafter "Tunnell") for its Baywood Greens Project (hereafter "Project") located approximately 6.5 miles northeast of Millsboro, Sussex County, Delaware.

On January 28, 1997, PWS filed its notice of appeal in a timely manner and in accordance with 7 Del. C. § 6008. PWS initially claimed its interest was substantially affected by the Secretary's Order, and the Decision is erroneous on four grounds. The alleged errors are:

1. It would allow Tunnel to operate a water utility without the requisite CPCN;
2. It would allow Tunnel to serve water to a recorded development where public water is available;
3. It would violate the spirit and substance of the Department's duly adopted regulations, including § 3.02 of the Water Allocation Regulations; and
4. It would otherwise defeat the intent and purposes of 7 Del. C. Chapter 60 as it pertains to the utilization of the State's water resources. Specifically, the decision violates *Subchapter V of Title 7*.

On April 18, 1997, following a pre-hearing conference among counsel for the parties and the Board, Marc P. Niedzielski, Esquire, the Secretary filed a Motion in Limine to exclude PWS's offer of new technical evidence, not presented below. On May 2, 1997, Tunnell also moved the Board to exclude any new evidence offered by PWS. PWS responded to the Motions on May 2, 1997.

On July 22, 1997, a hearing was convened and completed before the Board at the Richardson & Robbins Building Auditorium, 89 Kings Highway, Dover, Delaware. The hearing was bifurcated to first hear from Counsel on the Motions in Limine, and then to consider the substantive issues on appeal. After hearing the motions, the Board unanimously denied the Motion in Limine for the reasons set forth below and proceeded to hear the evidence and arguments of counsel.

I. Summary of the Evidence

The evidence in this matter consists of: the entire record of the testimony, proceedings and submissions presented to the Secretary's Hearing Officer, Robert R. Thompson, Esquire, on May 29, 1996 and thereafter; the Hearing Officer's Report of November 12, 1996; the Secretary's Order of January 16, 1977; the challenged five water well and two allocation permits; and, the record of the proceedings, testimony, exhibits before the Board.

Tunnell is the owner and of a parcel of real property in excess of 500 acres located in the quadrant formed by the

intersection of State Routes 24 and 5, approximately 6.5 miles north east of Millsboro, Sussex County, Delaware. The property does not include a moderate sized parcel directly adjacent to the above intersection. (PWS's exhibit ["PX"]11) Tunnell is in the process of developing this parcel know as the Baywood Greens Project. The Project when completed will consist of a mobile home park and a semi-public golf course. Tunnell intends to lease lots for twelve-year terms to owners of mobile homes, as tenants, who will be provided with necessary electric, sewer and water services as part of the rent. The Project requires 5 water wells to serve the needs when completed, 2 wells for drinking water and 3 wells to supply water to irrigate the golf course. While Tunnell initially considered having PWS supply the necessary water, it decided to provide water and sewer, itself, to the Project based on economic considerations. (Hearing Officer's Report of November 12, 1996 ["Report"] at 7-8)

PWS is a water utility and holds a Certificate of Public Convenience and Necessity ("CPCN") for a service area that would include the Project. PWS presently has potable [also referred to as "public"] water wells to the south of the Project. If PWS had the right to serve the Project's intended goal of 700 tenants and the golf course, it would realize significant economic benefits as it would increase PWS total customers by 30%. (Hearing Officer transcript, May 29, 1996 ["HO.Tr"] at p.110-112)

At the hearing, PWS offered the testimony of Lee J. Beetschen, P.E., Tucker Moorshead, a Professional Geologist, and 15 exhibits. Tunnell offered the testimony of Kevin Burdette, Kenneth Woodruff, a Professional Geologist, and 4 exhibits. Finally, DNREC offered the testimony of Stewart Lovell, Manager of Water Supply Section of DNREC.

Lee J. Beetschen testified as to his professional qualifications, his experiences with public water utilities and his work on behalf of PWS. Beetschen explained the present extent of PWS's service area and offered opinion regarding PWS's ability to provide water to the Baywood Greens project and the amount of capital investment by PWS. He opined that if PWS were to supply water to the Project it would represent a substantial increase in the number customers for PWS. (TR 66-73)

Beetschen also provided a 24" by 36" map of the area in question that was admitted as PWSC 6 which shows the location of PWS's wells and pipelines in relation to the Baywood Project. PWSC 6 reveals that PWS has three existing wells in close proximity to the Project. One of the wells is located near the Long Neck Church at the intersection of Long Neck Road and Delaware Route 24. The other two wells are on the north side of Long Neck Road approximately 6,000 feet due east of that same intersection and approximately 2,500 feet south of the tidal portion of Guinea Creek.

Tucker Moorshead testified he was retained in May 1997 by PWS to review the information submitted in connection with Tunnell's application for the well permits. (TR 106-107, 133) Essentially, Moorshead testified generally about potential saltwater intrusion based on the locations of the Tunnell wells in relation to the tidal portion of Guinea Creek, that these wells were not located on or above the 10 foot water table gradient¹ and the inadequacy of the well test supervised by Kenneth Woodruff. Moorshead **did not** testify that it is likely that the operation of this wells in accordance with the allocation permits would cause saltwater intrusion. Instead, he opined that there "could" be a saltwater problems and recommended another well test be conducted for 72 hours. (TR 122-123)

On behalf of Tunnell, Kevin Burdette testified about the location of the wells in relation to bodies of salt water, the water well test and that PWS lacked the capacity to supply Baywood Project with water from their existing wells. (TR 136-166)

Kenneth Woodruff testified about the location of the water wells, the well test and the potential for salt water intrusion. Woodruff testified that the aquifer supplying the Baywood Project was "extremely good aquifer, very high yielding"

¹ Moorshead testified in crossexamination that he did not know whether the wells were on or above the 10 foot water table contour. (TR. 124) PWS's Exhibit 6 has a legend reference for the 10 foot water table contour, but no such contour is on their map. (TR 135)

and based on the well test "there would be no saltwater intrusion." (TR 168) In response to Moorshead's testimony, Woodruff also stated that the 27 hour well test was sufficient based on the fact there was very little draw down of the water table in the test well despite the fact that the pump was run at a rate that was 8 times higher than its permitted capacity and the wells are located at or above the 10 foot water table contour. (TR 169-174)

On behalf of DNREC, Stewart Lovell testified that after hearing the evidence, including the testimony of Moorshead which was not provided to the Secretary's hearing officer, his opinion remains that Tunnell's was properly granted well and allocation permits, that the water well test was appropriate and salt water intrusion is not a likely problem. Moreover, Lovell testified that DNREC constantly monitors water wells in the area expressly for salt water intrusion. (TR 192-203)

II. Findings of Fact

We find the record before the Secretary and this Board, establishes by a clear preponderance the following:

1. PWS had ample opportunity to present the "new" technical evidence presented to the Board to the Secretary or his hearing officer, but chose not to do so.

2. The "new" technical evidence was not material as to possible salt water intrusion, as PWS's witness did not offer evidence that Salt water intrusion was scientifically likely.

3. There is no significant salt water intrusion risk from the wells as permitted under the existing allocation permits.

III. Conclusions of Law

The great weight of the issues presented by this appeal are legal, not factual. The first issue is DNREC's and Tunnell's Motions to exclude the new technical evidence being offered by PWS.

(a) Motions in Limine

Following argument, the Board unanimously voted to deny those motions. It is clear that after hearing that offered evidence was not material to the risk of salt water intrusion, instead it was offered to merely cast doubt on Tunnell's water well test. Moorshead did not offer any testimony that there was a salt water intrusion problem nor was one likely to occur. Moorshead's conclusion was to merely suggest another well test.

DNREC and Tunnell argued that under Delaware law PSC offer of new evidence is improper, where there has been a full hearing before the Secretary. Tuluo v. Raytheon Service Co., Del. Super., 659 A.2d 796 (1995). The Board agrees that as there was a full hearing below, evidence that could have been presented below should not be received for the first time before the Board on appeal. That appears contrary to the duty of the Board under 7 Del.C. § 6008(b) which is to review the Secretary's decision in light of the evidence before him. Nevertheless, the Tulou Court concluded that the Board could hear new evidence, but must give

appropriate deference to the Secretary's decision.

In the present matter, the Board could only make the above findings and conclusions after hearing the evidence. If the Board had concluded that the new evidence materially undermined the Secretary's decision, the only proper procedure would be a simple remand for the Secretary to consider the new evidence.

In the future, the Board may wish to amend its regulations to prevent the offering of evidence before the Board, where the offering party had an reasonable opportunity to present that evidence to the Secretary.

(b) The Substantive Legal Issues

PWS contends that Tunnell is required to hold a CPCN, § 6077(b) requires PWS, a CPCN holder, to supply water to Tunnell and DNREC violated its own Permit Regulations which require a view toward regionalization. (TR. 41-55)

PWS's argument that Tunnell is required to have a CPCN is based on the definition of a "water utility" under § 6002(27) to mean: "any person or entity operating within this State any water service, system, plant or equipment for public use." The term "public use" is not defined. However, we conclude that the Secretary's decision that Tunnell's providing water to its tenants is not a "public use" is well reasoned and without legal error, for the reasons found at in the Hearing Officer's Report at pages 21 to 28.

PWS next contends that Tunnell's Baywood project is required to be served by a CPCN holder under the terms of § 6077(b)(3)².

We disagree and conclude the Secretary was correct that § 6077(b) does not prevent the issuance of the potable water permits³ for the reasons given by the Secretary in his Order of January 16, 1997 and in the Hearing Officer's report at pages 28 to 29.

Finally, PWS contends that Section 3.02E of DNREC's Regulations Governing the Allocation of Water requires that new housing developments should be served by a water utilities. To the extent Section 3.02E could be construed to require the Secretary to deny a potable water well permit, where § 6007 requires the issuance of the permit, the Regulation is of no effect. 7 Del.C. § 6010(a).

² Which provides:

Following the issuance of a Certificate of Public Convenience and Necessity to a water utility, the Department shall not withhold a potable water well in an area served by a water utility to utilize the services of a utility, unless:

* * *

(3) The applicant is a resident of a municipality, county water district or recorded development where public water is available.

³ It is clear that § 6077(b) does not apply to the irrigation well permits issued to Tunnell.