WEST VIRGINIA ENVIRONMENTAL QUALITY BOARD
CHARLESTON, WEST VIRGINIA

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SEP 17 2024
Environmental Quality Board

J.C. BAKER & SON, INC.
and BAKER OIL COMPANY,

Appellants,

v. **Appeal No. 22-03-EQB**

KATHERYN D. EMERY, DIRECTOR,
DIVISION OF WATER AND WASTE
MANAGEMENT, WEST VIRGINIA
DEPARTMENT OF ENVIRONMENTAL
PROTECTION,

Appellee.

APPELLEE WVDEP'S RESPONSE
TO APPELLANTS' MOTION TO AMEND
NOTICE OF APPEAL AND RE-OPEN RECORD

The Appellee, Jeremy W. Bandy[1], Director, Division of Water and Waste Management, West Virginia Department of Environmental Protection ("WVDEP"), by counsel, hereby files its response in opposition to the Appellants' motion to amend the Appellants' Notice of Appeal in the above-styled case and to re-open the record in the initial portion of the bifurcated evidentiary hearing ("Appellants' Motion").

The Appellants move the Board to permit it to amend the Notice of Appeal to add an assignment of error regarding its argument that the underground storage tanks ("USTs") at issue were fixtures not owned by the Appellants. The Appellants further move the Board to re-open the initial portion of the bifurcated[2] evidentiary hearing, which portion was held to determine the

[1] At the time that the Notice of Appeal was filed, Katheryn D. Emery was Director of the Division of Water and Waste Management. Jeremy W. Bandy is her successor in that position.
[2] The Appellants themselves requested that the evidentiary hearing be bifurcated. WVDEP opposed bifurcation.

ownership and/or operation of the USTs, in order to allow the Appellants to present additional evidence.[3]

WVDEP opposes the Appellants' Motion. In support of its opposition, WVDEP states as follows.

ARGUMENT

I. The stipulations in the case do not address the issue of whether the USTs were fixtures.

The Appellants and WVDEP stipulated to certain facts prior to the initial evidentiary hearing. The stipulations addressed the following undisputed facts:

a. The Appellants never owned the businesses associated with the USTs;

b. The Appellants never operated the businesses associated with the USTs;

c. WVDEP could not confirm or deny whether the Appellants ever purchased the USTs;

d. WVDEP could not confirm or deny whether the Appellants ever installed the USTs; and,

e. The Appellants do not appear in the chain of title for, and never owned, the real property upon which the USTs were situated.

f. The USTs have been removed.

The above stipulations do not address whether or not the USTs themselves were connected to the real property in such a way as to be "fixtures." The Board has previously ruled that the stipulations are therefore irrelevant to that issue.[4]

2. Amendment of the Notice of Appeal raises no issues not already raised in the Notice of Appeal.

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[3] The Appellants move to continue the second portion of the bifurcated evidentiary hearing if WVDEP so requests. WVDEP does not request a continuance.

[4] In their current motion, the Appellants include e-mails between counsel for the Appellants and counsel for WVDEP. The Appellants find the content of the e-mails "unfathomable" unless WVDEP had conceded to their position. Speculation as to WVDEP's motives and litigation strategy in negotiations is irrelevant and inappropriate.

The Appellants' Notice of Appeal includes, as its first assignment of error and in relevant part, asserts that "[neither Appellant] is, or was, the owner or operator of, or otherwise liable for, [the USTs] . . . ."

The argument regarding fixtures goes directly to the issue of whether the Appellants are or ever were the owners or operators of the USTs. The Notice of Appeal already explicitly raises the issue of whether the Appellants are or ever were the owners or operators of the USTs. The Appellants elected, as argued below and as noted by the Board, not to put on any evidence regarding fixtures that would support this assignment of error. Amendment of the Notice of Appeal has no practical effect except to allow the Appellants to re-open the record in the initial portion of the bifurcated evidentiary hearing.

3. The Appellants inappropriately seek to amend their appeal in an untimely manner.

The Appellants seek, deep into the pendency of the appeal, to amend their Notice of Appeal. This is untimely and inappropriate.

Between the filing of the Notice of Appeal and the Appellants' current motion, almost two and a half years have passed. Two days of the bifurcated evidentiary hearing have already taken place, including the entirety of the initial portion of the bifurcated evidentiary hearing. Lengthy and thorough briefings, including supplemental briefs, have been submitted by the parties, as have post-hearing motions. The Board has entered an order. That order has been appealed to both the Intermediate Court of Appeals and the Supreme Court of Appeals.

The Board has the authority to permit amendment of notices of appeal. However, § 46-4-5.3 clearly contemplates such amendment taking place prior to the evidentiary hearing, the conduct of which is governed by the next section, § 46-4-5. The Board's authority is discretionary.

The Appellants have obviously taken issue with the Board's ruling, initially styled as a final order, and have appealed to both the Intermediate Court and the Supreme Court. Both appellate courts have ruled that these appeals are premature and not immediately appealable.[5] The Appellants retain their right to appeal any final order entered by the Board subsequent to the conclusion of the bifurcated evidentiary hearing, including assigning error to the Board's actions to this date. In any potential appeal, the Appellants may again raise to the appellate courts the issue of whether the Board was correct in its ruling on the fixtures issue. Amendment of the Notice of Appeal at this late date is inappropriate.

4. Analysis of the fixtures issue includes a factual component for which the necessary evidence was not provided.

WVDEP does not argue that the Appellants could not raise the fixtures issue with proper support. However, WVDEP does contend that any argument establishing or disproving a connection between fixtures and real property necessarily implicates material facts which must be addressed in an evidentiary hearing. The Appellants did not provide evidence of those material facts.

When the question arose as to whether the Board could perform a fixtures analysis in its consideration of the appeal, the Board requested supplemental briefing on the issue. The Board specifically asked that the parties offer their interpretations of two cases, *Snuffer v. Spangler*, 79 W.Va. 626, 92 S.E. 106 (1917) and *In re Weikle*, No. 1:17-BK-10001, 2017 WL 4127994 (Bankr. S.D.W.Va. 2017). WVDEP here reiterates its interpretation in its supplemental brief.

Snuffer provides a three-pronged test to determine whether personal property used in connection with real estate constitutes a fixture:

[5] The parties agreed that the Board's order should be considered a final order as to the initial issue, making the decision immediately appealable. On the parties' joint motion, the Board entered an order to that effect. The appellate courts disagreed.

> *First*, It must be attached to the real estate, and by this we do not mean that it has to become so attached as to do serious damage to the realty, or to the property itself in order to remove it, but that it must be so attached as that the two, the real estate and the fixtures, work together to one end; *second*, it must be reasonably necessary and adapted to the purposes for which the real estate is being used; and, *third*, it must be the intention of the party placing such property upon the real estate to make it a part thereof. If the first two of these elements concur -- that is, its attachment to the real estate and it adaptability to the purposes for which the real estate is being used -- it will be presumed that the party attaching it intended that it should be a part of the real estate, **unless a contrary intention appears from the conduct of the parties in relation to it**. (Italic emphasis in original, bold emphasis added.)

Weikle elaborates further on the Snuffer test by clarifying that WVDEP is afforded the opportunity to address the intention of the placing party, stating that "[w]hen the first two requirements are satisfied, **there is a rebuttable presumption** that the party intended to create a fixture." (Emphasis added.)

The Appellants did not raise the fixtures issue prior to or during the evidentiary hearing. If the issue could be resolved by purely legal argument, the Appellants could raise it after the conclusion of the hearing, as they attempted to do. However, the issue is not one that can be resolved by purely legal argument. *Snuffer* makes clear that a factual component must be analyzed, that component being the intention of the parties relating to it appearing from the conduct of the parties in relation to it.

The Appellants did not introduce sufficient evidence as to their intention regarding the tanks. *Snuffer* specifically calls for evidence based on "the conduct of the parties in relation to it." The parties have exhaustively argued their positions regarding burden of proof, and the Board has ruled that the initial burden of proof is borne by the Appellants. The Board has further ruled that the Appellants did not offer any material evidence regarding the fixtures issue at the evidentiary hearing, either on direct or cross-examination. There is no persuasive reason at this late date for the Board to overturn its own ruling.

CONCLUSION AND PRAYER FOR RELIEF

The Appellants move the Board to allow them to amend their appeal in the actual middle of an evidentiary hearing that was bifurcated at their own request; to raise with alternate language an assignment of error already asserted in the Notice of Appeal; and, to re-open the record for this portion of the hearing after briefings, post-hearing motions, entry of the Board's order, and appeals to two separate appellate courts. In so doing, the Appellants ask the Board to overturn its own rulings without any reason not already sufficiently considered.

WVDEP does not request a continuance of the currently scheduled evidentiary hearing.

Accordingly, WVDEP moves the Board for entry of an order denying the Appellants' Motion, and for such other relief as may be deemed just and appropriate.

Respectfully Submitted,
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By Counsel

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