

Saint Thomas Township and Stearn v. St. Thomas Development

TOWNSHIP OF SAINT THOMAS, Plaintiff, and FRANK M. STEARN, Plaintiff, Joining,

v. ST. THOMAS DEVELOPMENT, INC., Defendant

Court of Common Pleas of the 39th Judicial District of Pennsylvania,

Franklin County Branch

Action for Declaratory Judgment, No. 2004-1374

Declaratory Judgments Act; Second Class Township Code; Municipal Officers; Bias and Prejudice

1. A member of a local governing body must recuse himself from voting on matters in which he has a direct personal or pecuniary interest; before such a person must recuse himself, the record must demonstrate bias, prejudice, capricious disbelief or prejudgment, and the party seeking the member's recusal bears the burden of proof on the issue.
2. A member of a board of township supervisors shall not be disqualified from voting on any issues before the board solely because the member has previously expressed an opinion on the issue in either an official or unofficial capacity.
3. A member of the board of township supervisors was not required to recuse himself from voting on matters pertaining to the construction of a quarry, concrete plant and asphalt plant within the township because the developer did not carry its burden of proving that the member's personal opposition to the project rose to the level which renders him unable to bring an impartial and objective mind to bear on the issue.

Appearances:

John M. Lisko, Esq., *Counsel for Township of Saint Thomas*

John H. Broujos, Esq., *Counsel for Frank M. Stearn*

G. Bryan Salzmann, Esq., *Counsel for St. Thomas Development, Inc.*

OPINION

Herman, J., February 13, 2006

Introduction

This is an action for relief under the Declaratory Judgments Act, 42 Pa.C.S.A. §§7531-7341. The plaintiff is the Township of Saint Thomas, a municipal corporation with an office in Franklin County. The joining plaintiff is Frank M. Stearn, a Township resident and a member of the three-person Board of Supervisors for the Township. The defendant is St. Thomas Development, Inc., a business concern which is principally located in Blue Bell, Pennsylvania.

On July 11, 2003, the defendant submitted a preliminary land development plan for an asphalt plant, concrete plant and quarry ("the project") to be located within the Township. As a private citizen of the Township, Stearn publicly urged the Board of Supervisors not to grant preliminary approval to the

project. After a one-month campaign which focused on opposition to the project, Stearn was elected to the Board of Supervisors for a six-year term in November 2003. The incumbent against whom Stearn campaigned challenged the election results in the Court of Common Pleas, which issued a ruling on February 6, 2004, confirming Stearn's election to the Board. In the interim, the Board as it was then constituted approved the preliminary plan on November 19, 2003. The Board's approval was based on the Saint Thomas Subdivision and Land Development Ordinance. Because the ordinance does not have zoning requirements, the proposed use of the defendant's property as a quarry, asphalt plant, and concrete plant is a use which is permitted as of right. No person or other entity appealed the Board's approval to the Commonwealth Court. The plan was then submitted to the Department of Environmental Protection, which reviews such matters and issues permits, providing that certain conditions are satisfied.

Stearn was sworn in as a Board member on or about February 13, 2004. The defendant's counsel sent a letter dated February 18, 2004 to the Board chairman, alleging Stearn was biased against the project and therefore unable to carry out his duty as a public official to examine all matters which come before the Board in an unprejudiced and non-discriminatory manner. The letter, first seen by Stearn as he prepared to participate in the first regular Board meeting since this court's ruling on the election, requested Stearn to recuse himself from voting and/or expressing opposition as to all matters before the Board connected with the project or else "liability may attach and/or may render a vote on the matter void as a matter of law." It was the defendant's position that as a Township taxpayer and one of Stearn's constituents, the defendant was entitled to have its project reviewed by a Board which could be objective and impartial as to the project's merits, the same as any other taxpayer. After discussing the letter with the Township Solicitor, Stearn decided to temporarily refrain from participating as a Board member on any matters connected with the project until the question of his entitlement to vote was finally resolved so as to avoid exposing the Township and/or himself to potential legal and financial liability. He has maintained this position of non-participation up through the present time.

The Township, with Stearn as joining plaintiff, filed a complaint seeking declaratory relief, asking this court to decide whether Stearn is legally entitled to vote on matters before the Board which relate, either directly or indirectly, to the project, or whether he must permanently recuse himself from such matters on the ground that he is biased against the project, thereby depriving the defendant of its due process rights to have its project judged on the merits and granted final approval provided that it satisfies the Township Ordinance and DEP requirements. After the pleadings were closed, the court held a pretrial conference. The defendant filed a motion for summary judgment on the issue of whether this action is a proper one for relief under the Declaratory Judgments Act. Upon considering the record and written argument, the court issued an Opinion and Order on September 15, 2005, denying the motion and directing that the case proceed to trial.¹ A bench trial was held before the undersigned on September 19 and 20, 2005. The transcript was filed on October 11, 2005 and the parties submitted written argument by November 8, 2005.

During the course of this litigation, the defendant's permit application for the preliminary land development plan has been pending with the DEP. Sometime in the near future, the Board will have to vote on whether to grant final approval to the project.

Legal Background

In presiding over this case, the court has kept in mind the relevant statutory and case authority which must govern our decision. In its February 18, 2004 letter, the defendant cited cases which hold that a municipal officer must avoid the appearance of impropriety by disqualifying himself from voting on matters in which he has a personal and/or pecuniary interest, or about which he has demonstrated bias or prejudice. These well-established concepts have since been summarized as follows:

As a general rule, a municipal officer should disqualify herself from any proceedings in which she has an immediate or direct personal or pecuniary interest...The court recognizes that due process requires a local governing body in the performance of its quasi-judicial functions to avoid even the appearance of bias or impropriety. A showing of actual bias is unnecessary in order to assert a cognizable due process claim; the mere potential for bias or the appearance of non-objectivity may be sufficient to constitute a violation of that right...**While an appearance of non-objectivity is sufficient to trigger judicial scrutiny, the significant remedy of invalidation often depends on something more intangible...Before it can be said that a judge [or Zoning Hearing Board member] should have recused himself, the record must demonstrate bias, prejudice, capricious disbelief or prejudgment.**

15, 2004) [emphasis supplied], citing Appeal of Miller & Son Paving, Inc. v. Plumstead Township, 636 A.2d 274 (Pa.Cmwlth. 1993), quoting In re Blystone, 600 A.2d 672, 674 (Pa.Cmwlth. 1991). Although Christman involved a zoning hearing board member and not a township supervisor, it is clear from Commonwealth Court decisions that a supervisor acts in an adjudicative capacity when deciding whether to approve or disapprove a subdivision and/or land development application. Thornbury Township Board of Supervisors v. W.D.D., Inc., 546 A.2d 744 (Pa.Cmwlth. 1988). As was the situation in Christman, the test used in Thornbury to decide whether recusal was necessary was the bias test, rather than the appearance of impropriety test. Although the concept of the appearance of impropriety has been discussed in cases focusing on the importance of fairness and due process [and Christman cites these cases, specifically, Kuszyk v. Zoning Hearing Board of Amity Township, 834 A.2d 661 (Pa.Cmwlth. 2003) and Prin v. City Council of the Municipality of Monroeville, 645 A.2d 450 (Pa.Cmwlth. 1994)], the test applied by the court was the one which requires proof of actual, demonstrable bias as a prerequisite for an official's recusal.

Another source of authority is the Second Class Township Code, 53 P.S. §65603 as amended on April 2, 2002 which provides: "A member of the board [of township supervisors] shall not be disqualified from voting on any issue before the board solely because the member has previously expressed an opinion on the issue in either an official or unofficial capacity." A supervisor is not required to recuse himself from voting on a matter where he has expressed an opinion which creates merely the appearance of impropriety. Instead, the test is whether or not the facts show that the official is biased, prejudiced, or has a capricious disbelief or prejudgment about a matter. It is the defendant's contention that this provision does not protect Stearn from having to recuse because he has expressed far more than a mere opinion about the project.

Another question before the court is whether Stearn may vote on modifications to the Township Ordinance which affect or might affect the defendant in a similar manner as it would affect other quarries and like projects seeking approval from the Board. In other words, Stearn may be in a position to vote on amendments to the ordinance which might have ramifications for the project as it proceeds to completion and in its day-to-day operations. In this sense, Stearn would be acting in a legislative, rather than an adjudicative, capacity, and his actions would be governed by the following standard: "There is a general rule of law that no member of a governing body shall vote on any question involving...his pecuniary interest, if that be immediate, particular and distinct from the public interest...It is against public policy for a representative of a municipality to vote in its legislative body on any matters which affect him individually." Levitt & Sons, Inc. v. Kane et al, 285 A.2d 917 at 920 (Pa.Cmwlth. 1972) [citations omitted]; Amerikohl Mining, Inc. v. Zoning Hearing Board of Wharton Township, 597 A.2d 219 (Pa.Cmwlth. 1991). Under this standard, if the defendant proves that Stearn has personal views or pecuniary interests which are so immediate and compelling that he cannot be objective in deciding whether to grant final approval to the project or that he cannot be impartial on related matters, Stearn must recuse.

During these proceedings, we have also kept in mind the fundamentals, namely, the common meaning of the words "bias," "prejudice," and "opinion." Webster's defines "bias" as "a highly personal and unreasoned distortion of judgment." "Prejudice" is defined as "injury or damage resulting from some judgment or action of another in disregard of one's rights, especially, a detriment to one's legal rights or claims; a preconceived judgment or opinion; an opinion or leaning adverse to anything without just grounds or before sufficient knowledge." An "opinion" is "a view, judgment, or appraisal formed in the mind about a particular matter."

Evidence Presented at Trial

At the start of the trial, counsel agreed that the plaintiffs would move forward first with the presentation of evidence, even though the burden of proving Stearn's bias lies with the defendant.

Mr. Stearn and his wife are residents of Saint Thomas Township and have owned and operated a computer and electronics business in Chambersburg for approximately 32 years. Mr. Stearn became aware of the defendant's project in the spring of 2003 and attended a public Board of Supervisors meeting because he was concerned about the project's potentially adverse effects on water and air quality, as well as increased traffic and noise in the vicinity of a nearby elementary school. After he heard a Board member comment that it would be unable to prevent the project from proceeding to final approval, Stearn decided to become more actively involved in the matter.

Stearn joined a local citizens' group called F.R.O.S.T -- Friends and Residents of Saint Thomas, Inc., a non-profit corporation established on September 3, 2003. Its purpose was "to maintain the rural quality of life in Saint Thomas Township and to educate the public about projects that threaten that quality of life." (Stearn exhibit #3; Articles of Incorporation.) Stearn acknowledged that F.R.O.S.T. was formed to oppose the quarry and its related operations. He knew its president, Francis Calverase, and met with him and

other members of F.R.O.S.T. in the late summer and early fall of 2003. Toward the end of September, Stearn placed an announcement in the Public Opinion newspaper, notifying readers of a community meeting to be hosted by F.R.O.S.T. on October 2, 2003 at the Saint Thomas Assembly of God Church for the purpose of discussing the project. The notice reflected Stearn's worries about having the project located several hundred yards from a school, specifically, increased noise from sirens and blasting. He urged residents to come to the meeting to learn more about the project: "I encourage everyone to take advantage of this opportunity to see democracy in action." (Defendant's exhibit #4.) It was at that October 2nd meeting that Stearn announced his candidacy for a seat on the Board of Supervisors. Stearn had not previously been deeply involved in politics, nor had he ever run for public office.

Stearn testified that his motive for becoming a member of F.R.O.S.T. and running for office was to educate himself as much as possible about the nature of the project and its possible negative effects on the surrounding rural environment. At that time, he hoped to inspire residents to participate in public discussion so as to bring a closer level of scrutiny to the project's potential problems for the community. Uppermost in his mind in September and October of 2003 was a desire to ensure that residents would be given enough time to learn about the land development plan, to have engineering studies undertaken and to encourage the Board to examine all options before granting the project final approval.

Stearn acknowledged at trial that he did more than simply express an opinion about the wisdom of locating a quarry and related operations within the Township. As a member of F.R.O.S.T. since its formation, he based his campaign on opposing the project. The campaign included visiting residents door-to-door and handing out copies of a flyer which he produced titled in large bold-faced type: "**Vote NO Quarry: You CAN make a difference! Frank Stearn** for St. Thomas Township Supervisor." The flyer listed the names, addresses and phone numbers of the Township Supervisors, as well as state governmental officials. It urged people to vote for Stearn on election day, November 4th, and to attend the next supervisors' meeting on November 5th. The flyer also featured a section called "Quarry Quick Facts" containing the following statements:

- The quarry site is only a few hundred yards away from St. Thomas Elementary School.
- The quarry will NOT lower your property taxes or school taxes -- get the facts on this rumor!
- Quarries deplete groundwater supplies -- wells often become unusable.
- Hundreds of dump trucks will travel on our roads daily.
- Noise from quarries; sirens blasting, and rock crushing, can be heard for miles.
- Exposure to dust and cancer causing asphalt fumes will impact the health of our community for many generations.

(Defendant's exhibit #7.) Stearn acknowledged that he obtained this information from F.R.O.S.T.'s website and did not independently verify each fact before printing up the flyer. He also acknowledged that he now knows asphalt does not cause cancer. He maintained, however, that the other bulleted facts were accurate.

Other materials which Stearn developed for his campaign were signs stating the following: "**NO QUARRY. STEARN for SUPERVISOR.**" These signs were placed on the front yards of residents throughout the Township and in surrounding communities where residents would see them. (Stearn exhibit #1.) Stearn also printed up and passed out stickers which could be peeled off a backer and placed on ballots on election day. The stickers stated: "**Vote NO Quarry. You CAN Make a Difference. Frank Stearn** for St. Thomas Township Supervisor. Use this sticker to vote for Frank Stearn." (Stearn exhibit #2.) Stearn testified that he designed these materials to convey a clear, straightforward message to voters preparing to go to the polls on November 4, 2003. That message was that residents should vote for him if they wanted to stop the project. His intent was to create an image which could be readily communicated, given space and cost concerns.

During his one-month campaign, Stearn received monetary contributions from individuals who were members of F.R.O.S.T. He received \$100 each from Mr. and Mrs. Michael Urban (Mr. Urban was vice-president of the group) and Mr. and Mrs. Francis Calverase (Mr. Calverase was the group's president). Other contributing F.R.O.S.T. members were Mr. and Mrs. Pierre Turchi who donated \$500 and Mr. and Mrs. Jack Gale who donated \$75. (Defendant's exhibit #6.)

Stearn sent a letter dated October 14, 2003 to each of the three incumbent supervisors, urging them not to approve the preliminary plan because, in his view, neither the Board nor Township residents had as yet sufficient information at their disposal about the potential negative effects of the project.

(Defendant's exhibit #3.) He asked the Board to either reject the plan or ask the defendant for an extension so as to gain more time to examine the issue more closely. Stearn knew when he sent the letter that the law required the Board to either approve or deny the defendant's application within a specific 90-day window unless the defendant were to grant an extension. In this connection, section 10508 of the Municipalities Planning Code states:

All applications for approval of a plat...whether preliminary or final, shall be acted upon by the governing body or the planning agency within such time limits as may be fixed in the subdivision and land ordinance, but the governing body or the planning agency shall render its decision and communicate it to the applicant not later than 90 days following the date of the regular meeting of the governing body or planning agency...next following the date the application is filed...provided that the said next regular meeting occur more than 30 days following the filing of the application..., the said 90-day period shall be measured from the 30th day following the day the application has been filed.

...(2) When the application is not approved in terms as filed, the decision shall specify the defects found in the application and describe the requirements which have not been met and shall, in each case, cite to the provisions of the statute or ordinance relied upon.

...(4)(i) Changes in the ordinance shall affect plats as follows: From the time an application for approval of a plat, whether preliminary or final, is duly filed as provided in the subdivision and land development ordinance, and while such application is pending approval or disapproval, no change or amendment of the zoning, subdivision or other governing ordinance or plan shall affect the decision on such application adversely to the applicant and the applicant shall be entitled to a decision in accordance with the provisions of the governing ordinances or plans as they stood at the time the application was duly filed. In addition, when a preliminary application has been duly approved, the applicant shall be entitled to final approval in accordance with the terms of the approved preliminary application as hereinafter provided...

Stearn presented the testimony of three witnesses -- Jeanette Eddleman, Anne Gale, and Kenneth Franklin -- for the purpose of showing that the tenor of his campaign was restrained and reasonable and that he did not engage in inflammatory rhetoric against the defendant or the project. Rather, he was simply opposed to what he perceived would be its hasty approval. Mrs. Eddleman has been a neighbor and friend of the Stearn family for 27 years and is a member of F.R.O.S.T. She saw Stearn during his one-month campaign and assisted him at the polls on election day. Mrs. Gale has known Stearn for 25 years through church and saw him occasionally during the campaign. She testified that Stearn was concerned about obtaining as much information about the project's impact as possible and to educate Township residents so that the Board could be in a position to make the best decision about the matter. Mr. Franklin first became acquainted with Stearn on the night of October 2nd when he announced his candidacy. He placed one of Stearn's campaign posters in his yard and understood that he opposed the project. Aside from that one meeting, he was not present when Stearn discussed the matter with other persons and he himself is not and was not a member of F.R.O.S.T..

Stearn was elected to the Board of Supervisors on November 4, 2003. A regularly scheduled public Board meeting was held at the township building the next day. This was the November 5th meeting mentioned in the flyers which Stearn had distributed to residents during his campaign. Stearn attended the meeting and asked the Board as it was still then constituted not to approve the preliminary plan. Citing the election results from the previous day, he urged the Board and the defendant (whose representatives and counsel were in attendance) to take more time to examine the project's potentially harmful effects, such as decreased air and water quality and increased traffic. Stearn was still a member of F.R.O.S.T. as of the time of this meeting. (Defendant's exhibit #2; excerpt from transcript of the proceedings of the supervisors' meeting.)

The election results were challenged in this court by David C. Ramer, the ousted incumbent. As the court and counsel prepared the case for trial, the Board as it was then constituted voted on November 19, 2003 to approve the preliminary plan. We infer from the record (and there appears to be no dispute on this point) that when the Board approved the plan, this was done within the 90-day period as required by §10508. By letter dated December 2, 2003, the Township Secretary, Katrina Hawk, notified Mr. Anthony DePaul of St. Thomas Development Corporation that the supervisors had granted preliminary approval to the plan. She advised Mr. DePaul that the approval was made subject to 15 specific conditions under the Second Class Township Code, the Township Ordinance, and DEP regulations. Those conditions pertained to public sewer facilities, storm water management and erosion regulations, vegetation preservation and screening, location of a road and driveway connector, payment of the costs of engineering, attorney and other professional fees, liability insurance, bonding, licensing for surface mining operations, and related issues. (Defendant's exhibit #9.)

Stearn attended a meeting before the Tuscarora School Board which was convened to discuss the defendant's project. F.R.O.S.T. president Fran Calverase made a presentation on behalf of the group and Stearn answered a few questions as well. Although we infer that this meeting took place sometime between November 5, 2003 and early February 2004, its exact date is not clear from the record, nor could Stearn say with certainty whether he was still a member of F.R.O.S.T. at the time. What is clear, however, is that the election results were then the subject of litigation before this court, which did not rule until February 6, 2004.

F.R.O.S.T. filed a lawsuit in federal court against St. Thomas Development, Inc. on March 24, 2004. One of the plaintiffs was Michael Urban, vice-president of F.R.O.S.T. Stearn provided an affidavit dated May 10, 2004 which became part of the record in that case. This was after he had taken office as a supervisor. The affidavit stated that he was then unable to vote on matters before the Board for decision because he had recused in response to the defendant's February 18, 2004 letter and that this declaratory judgment action remained pending. He also wrote in the affidavit that if it were not for that letter, he would have been able to vote on related matters which came before the Board in April. (Defendant's exhibit #8.) Stearn did not consult the Township Solicitor before providing the affidavit. He testified that he did not believe at the time that signing the affidavit would reflect adversely on his ability to be impartial because his eligibility to vote on project-related matters remained in limbo. The F.R.O.S.T. lawsuit was dismissed on March 31, 2005, one year after it was filed, while this declaratory judgment action was being prepared for trial.

Stearn has remained friends with several members of F.R.O.S.T. since he resigned his membership sometime before his first supervisors' meeting on February 18, 2004. His wife is still an active member and donated more than \$500 to the group in early October 2004, after this declaratory judgment action was filed. (Defendant's exhibit #1.) Stearn has also been seen in public in the company of F.R.O.S.T. members, several of whom he has known personally for many years. Stearn received an email from Fran Calverase on January 9, 2005 which was also sent by mass electronic mail to members of F.R.O.S.T. as well, notifying them of the next meeting set for January 10, 2005 at the Edenville community center to discuss "our game plan for the DEP meeting in February, as well as a discussion I had with...Senator Punt's administrative assistant regarding the quarry, among other things." (Defendant's exhibit #5.) Stearn did not attend the meeting because he was no longer a member of F.R.O.S.T., and wanted to avoid the appearance of impropriety and bias. Stearn testified that it is difficult to completely insulate himself from all discussion about the project because of these long-standing relationships.

The defendant presented the testimony of Donald Helfrick, Harry Meyers, Gloria Hartman, David C. Ramer, Timothy Sollenberger and Lance Kegerreis. Mr. Helfrick is a Township resident and its auditor, an elected though unpaid position. Stearn approached Helfrick at the polls on election day and had a brief conversation with him about the project. Based on this brief encounter and Stearn's membership in F.R.O.S.T., Helfrick concluded that Stearn's opposition to the project made him biased against the defendant.

Harry Meyers is a Township resident and has served on the Planning Commission for 35 years. Stearn, whom Meyers knew was a member of F.R.O.S.T., attended several planning commission meetings. The commission recommended that the Board of Supervisors approve the defendant's project because it satisfied the Township Ordinance. Meyers testified that a development plan fails to receive the commission's recommendation only if it does not satisfy the provisions of the ordinance.

David Ramer was the incumbent supervisor who lost his seat on the Board to Stearn at the November 4, 2003 election and whose court challenge to the election results was unsuccessful. He has been the Township roadmaster since that time and has attended supervisors' meetings in that capacity where Stearn has sat as a Board member on matters unrelated to the defendant's project. Ramer testified based on his years as a supervisor that Stearn's anti-quarry platform during the campaign was unrealistic. Specifically, when Stearn admonished the Board that they should be doing more to stop the quarry, Ramer and the other supervisors knew that the preliminary plan met all the criteria of the Township Ordinance and therefore they had no choice but to approve the plan, even if the majority of residents opposed it.

Ramer also testified to his belief that Stearn cannot be objective in considering the defendant's project. This is because he saw Stearn at a local restaurant with members of F.R.O.S.T. during the time this declaratory judgment action has been pending, and Stearn is often in the company of that group at supervisors' meetings since he became a member of the Board. Ramer testified that it is unethical for a supervisor to meet with members of a citizens group outside a public meeting to discuss a matter of concern to that group. Ramer conceded, however, that when he has seen Stearn participate in votes on other matters before the Board, including other subdivision plans, Stearn has followed the relevant rules, regulations and the ordinance governing such matters.

Finally, Ramer testified that he believes Stearn had or has a personal or pecuniary interest in the

land at issue now owned by the defendant insofar as Stearn and his wife once expressed a desire to buy it. Stearn acknowledged that before he became a supervisor -- sometime in the 2001-2002 time frame -- he met with the then-owner and walked the land because he considered purchasing it. However, the credible evidence shows that he did not pursue the matter and has displayed no interest in buying the land since 2002.

Gloria Hartman is the Township clerk and code enforcement officer, managing the Township office and maintaining its records on land subdivision and development plans. She learned about F.R.O.S.T. and Stearn's membership sometime after the defendant filed its preliminary plan in mid-2003. Stearn came to the office during the campaign to view the plan as submitted to the DEP. He also came to meetings with a microphone and video camera. Stearn testified that he brought along his own electronics equipment because the Township lacks its own and the equipment enabled the large crowd of residents to better hear the proceedings.

Ms. Hartman initially testified to her belief that Stearn was biased against the defendant's project. Since his election to the Board, Ms. Hartman has seen Stearn in public with members of F.R.O.S.T. having dinner in a local restaurant. One of the individuals carried a briefcase and it appeared to Ms. Hartman that they were discussing the quarry, though she conceded that she could not hear the conversation. In addition, she was aware that Stearn attended a DEP meeting in February 2005, though she conceded that the meeting was open to the public. She also conceded that Stearn now has a better understanding of the constraints placed upon members of the Board under the law when it comes to approving or disapproving a developer's plans. She acknowledged that since he took office in February 2004, Stearn has followed the rules and regulations applicable to the decision-making process on other matters which have come before the Board and she believes that he would approve the defendant's project if it met the ordinance and all other regulations.

Timothy Sollenberger has been a Township Supervisor for approximately seven years. He testified that the defendant's project received preliminary approval because it met the requirements of the ordinance. He testified that if the defendant satisfies all 15 specific conditions set forth in secretary Katrina Hawk's December 2, 2003 letter to Mr. DePaul, the defendant's project must be granted final approval by the Board of Supervisors, and that his own personal beliefs about whether the project is a benefit or a detriment to the community are irrelevant.

The court has also considered the sworn deposition of Katrina Hawk, who was the secretary and treasurer for the Board of Supervisors up through early 2004. Stearn often came to the office to look at the preliminary plan. She knew then that he was a member of F.R.O.S.T., attended Township meetings, and that the focus of his campaign was opposition to the project. However, he never openly discussed his opinions on the subject with her and she never heard him say that under no circumstances should a quarry be permitted on the proposed site. (Defendant's exhibit #10: deposition of Katrina Hawk, January 21, 2005.)

The defendant also presented the testimony of Lance Kegerreis of Dennis E. Black Engineering, Inc., which was retained by the defendant to perform surveying work on the project. Kegerreis attended supervisors' meetings in the spring and summer of 2003 after the defendant had submitted its preliminary plan to the Board. Stearn also attended the monthly meetings held by the Planning Commission during that time period. Stearn was accompanied at the meeting by members of F.R.O.S.T. and brought along prepared statements in opposition to the project.

Kegerreis testified to his belief that Stearn is biased against the project. In support, he testified that he saw Stearn at the site of the proposed project in the summer of 2004, walking the perimeter with F.R.O.S.T. members and taking photographs. However, we accept Stearn's testimony that he did so at the request of Board chairman Ed Herald because there had been an unusually large fish kill in the vicinity. The incident attracted the attention of the public and the press, and DEP officials were also present to assess the situation.

Kegerreis also pointed to Stearn's attendance at a meeting at a local community center in October of 2004 where, according to Kegerreis, he was introduced by a F.R.O.S.T. member as "our candidate." This would have been after he recused himself and after this declaratory judgment action had been filed. Stearn did not make a presentation at that meeting, however, nor did he make any speeches in opposition to the project at other public meetings once he became a supervisor.

Kegerreis conceded that before Stearn took office in February 2004, Stearn and F.R.O.S.T. members raised several legitimate concerns about the preliminary plan, such as its failure to depict the location of certain sinkholes, and that the plan was revised accordingly. Although Kegerreis asserted that the revisions were made in response to the DEP's directives, he conceded the possibility that it was F.R.O.S.T. members who notified DEP about the omissions.

Stearn testified that, despite his personal reservations concerning the wisdom of locating the defendant's project as proposed, he has come to realize that his discretion as a supervisor is narrow under the law and he conceded that he would vote to grant final approval if the plan satisfies all 15 conditions outlined in Ms. Hawk's December 2, 2003 letter, and maintained that he could be impartial as to whether those conditions had indeed been satisfied. He testified that he understands that he is sworn to uphold and follow the law, whether it be the Municipalities Planning Code, the Township Ordinance or DEP regulations.

Discussion

We have before us a well-developed record about Mr. Stearn's views and conduct concerning the defendant's project, including his attitudes and activities before, during, and after his campaign, and up through the time of trial. Clearly the defendant has presented sufficient evidence to at least trigger an inquiry into whether Stearn is capable of being objective and impartial concerning the project. However, the law requires more than simply a potential for bias or the appearance of impropriety. Rather, the defendant bears the burden of demonstrating that Stearn is biased, prejudiced, or has a capricious disbelief or prejudgment. After carefully considering all the evidence and the applicable legal standards, we find that the defendant has not met its burden and that Stearn is entitled to vote on whether to grant final approval to the defendant's project and on all matters which might relate, either directly or indirectly, to the project and related operations.

We must first state our agreement with the defendant that Stearn did more than simply express an opinion about the project before, during and after his campaign. 53 P.S. §65603. He did more than merely articulate a "view, judgment, or appraisal formed in [his] mind about a particular matter." He was an active member of F.R.O.S.T., which was formed not only to simply educate the public about the potential negative effects of the project, but was formed specifically to oppose what its members believed was the hasty approval of the defendant's preliminary plan. Stearn's membership in F.R.O.S.T. led him to speak at public meetings, write newspaper articles, accept campaign contributions from F.R.O.S.T. members, and devise a campaign strategy which consisted of communicating a clear anti-project position. Stearn also printed a campaign flyer containing one "Quarry Quick Fact" which turned out to be inaccurate -- that asphalt causes cancer.

Although Stearn resigned from F.R.O.S.T. before taking his seat on the Board of Supervisors, he remained opposed to the project even after recusing himself in response to the defendant's February 18, 2004 letter. On a personal level, he continued to associate with members of F.R.O.S.T., including his wife whom he consults on a variety of topics. In the public arena, he provided an affidavit which was utilized by F.R.O.S.T. in its federal lawsuit against the defendant. Stearn attended a meeting at a local community center in October of 2004, while this declaratory judgment action was being prepared for trial, where he was introduced by a member of F.R.O.S.T. as "our candidate." He remained on the email list of F.R.O.S.T. president, Fran Calverase, who urged him to attend a meeting on the defendant's project in January of 2005. This evidence as marshaled by the defendant certainly warrants our scrutiny and shows that Stearn's efforts to conduct himself in a manner totally above reproach were not entirely successful. Nevertheless, we conclude that when balanced against other facts in their proper context, the defendant has failed to prove capricious disbelief or bias as commonly defined: "a highly personal and unreasoned distortion of judgment."

The evidence shows that Mr. Stearn became concerned about the wisdom and legality of locating a quarry, concrete plant and asphalt plant in the Township's rural setting and in the vicinity of an elementary school. Although he had never been deeply involved in politics, he began attending Planning Commission meetings and Supervisors' meetings, which are open to the public, to learn more about the project. He went to the Township office to examine the preliminary plan which was available for inspection by the public. He spoke with other residents about the project, including neighbors and fellow church members whom he and his family had known for many years. After hearing a member of the Board of Supervisors express what Stearn perceived as resignation regarding the Board's ability to prevent the project from proceeding to final approval, he joined F.R.O.S.T. and decided to run for supervisor against an incumbent.

This was Stearn's first experience running for public office and his campaign was brief -- less than one month long. Although he designed his campaign materials to convey a clear anti-quarry message, the witness testimony and other evidence indicates that the overall tenor of his campaign was restrained and not inflammatory. He contacted several government agencies to obtain publicly-accessible information about the project's possible effects and testified that his efforts to bring the defendant and the community closer on matters such as water ways, sinkholes and blasting hours did bear some fruit. His letter dated October 14, 2003 to the Board and the statement he made at the November 5, 2003 supervisors' meeting urged the Board to take additional time to study the defendant's plan in greater detail before granting

approval. Neither the letter nor his statement were marked by excessive emotion or defamatory tones, and neither indicated that under no circumstances should the Board ever approve the project.

After he was elected as supervisor, Stearn attended a public meeting before a local school board to discuss the project with members of F.R.O.S.T. Stearn was uncertain about whether he was still a member of the group at the time, though he did answer some questions posed to him. Stearn's presence at the meeting with members of F.R.O.S.T. does at first blush lend support to the defendant's contention that Stearn was simply a mouthpiece for that one citizens' group, even after his election as a supervisor. However, we have taken into account that the school board meeting occurred during the pendency of Mr. Ramer's court challenge to the election results, placing Stearn in political limbo. Until this court had the opportunity to resolve that litigation, Stearn remained interested in quarry-related matters as discussed in a public forum. Again, there is insufficient evidence to show that his attendance and participation were marked by "a highly personal and unreasoned distortion of judgment."

In an ideal world, Stearn should have completely severed all ties with any person connected with F.R.O.S.T. in any way once he took office and once this declaratory judgment action was filed. However, that is a highly unrealistic standard to meet in a relatively small community where people have long-standing personal and professional relationships. As for the January 9, 2005 email which Stearn received from F.R.O.S.T. president, there was no credible evidence that Stearn knew he was still on Mr. Calverase's email list serve, or had encouraged Mr. Calverase to keep him informed of F.R.O.S.T.'s activities, and a person cannot completely eliminate the possibility of receiving an unsolicited email message from another person. In addition, despite Mr. Calverase's urging, Stearn did not attend the January 10, 2005 Edenville community center meeting concerning the project.

Perhaps Stearn's most questionable conduct was in signing the May 10, 2004 affidavit for use by F.R.O.S.T. and its representatives in the federal lawsuit against the defendant. Signing that affidavit (which he did without consulting the Township Solicitor) certainly fueled the defendant's concerns about his ability to evaluate the project and the defendant in an impartial manner. However, we have balanced that unwise conduct against his credible testimony about what he now understands are the limits of his discretion as a supervisor when voting on land development plans such as the one submitted by the defendant. We accept that he now fully appreciates that the quarry and related operations are a permitted use as of right under the Township Ordinance and that if the defendant satisfies all 15 conditions set forth in the Township's letter of December 2, 2003, the project is entitled to final approval by the Board.

As noted above, based on all the credible evidence of record and a careful review of the case law and statutory authority, we find that Stearn's personal opposition to the quarry project does not rise to the level which renders him unable to bring an impartial and objective mind to bear on the issue, and therefore his recusal is not necessary in order to ensure fairness and due process for the defendant.

Finally, as an alternate remedy should this court declare Stearn eligible to vote on all project-related matters which come before the Board of Supervisors, the defendant requests that we issue a directive **requiring** Stearn to vote to grant final approval to the project. This request is based on Stearn's testimony that he will so vote if the plan meets all relevant criteria, including DEP regulations, the Township Ordinance and the provisions of the Municipalities Planning Code, specifically, §10508(4)(i) which prevents additional conditions from being imposed where the plan is in substantial compliance with the preliminary plan. In this context, the defendant correctly reminds us that the preliminary plan was not appealed by anyone, including Stearn or F.R.O.S.T. Nevertheless, we decline to issue such a directive on Mr. Stearn. This is not an action for specific performance or injunctive relief; it is a declaratory judgment action brought for the narrow purpose of determining whether Stearn is legally eligible to vote on the defendant's project and related matters. To grant the defendant's request would be to exceed the limited role we have been asked to perform in this case.

ORDER OF COURT

Now this 13th day of February 2006, the court hereby declares that Frank M. Stearn, in his capacity as elected Supervisor for the Township of Saint Thomas, is legally entitled to vote on all matters which come before the Saint Thomas Township Board of Supervisors, including those matters which relate, either directly or indirectly, to the defendant's project, specifically, the quarry, concrete plant and asphalt plant proposed to be located within Saint Thomas Township.

¹Stearn also filed a motion for summary judgment, asking the court to declare him eligible to vote without the need for a hearing, based on the relevant law and the facts of record. The court denied his motion because the issues demanded that we take evidence in order to make a finding about the tenor of Stearn's campaign.