

STATE OF LOUISIANA
COURT OF APPEAL
FIRST CIRCUIT

2012 CA 1998

VANGUARD ENVIRONMENTAL, LLC

VERSUS

TERREBONNE PARISH CONSOLIDATED GOVERNMENT

Judgment Rendered: JUN 11 2013

On Appeal from the
32nd Judicial District Court,
In and for the Parish of Terrebonne,
State of Louisiana
Docket No. 166,406

The Honorable George J. Larke, Jr., Judge Presiding

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BEFORE: PARRO, WELCH, AND DRAKE, JJ.

DRAKE, J.

This appeal arises from a final judgment of the district court that granted summary judgment and a permanent injunction in favor of the Plaintiff/Appellee, Vanguard Environmental, LLC (“Vanguard”). Defendant/Appellant, Terrebonne Parish Consolidated Government (“TPCG”), now appeals the judgment of the district court. For the reasons stated herein, we affirm.

FACTS AND PROCEDURAL HISTORY

Vanguard submitted an application to the Louisiana Office of Conservation, of the Department of Natural Resources, seeking a permit to locate, construct, and operate a saltwater injection waste disposal facility in Terrebonne Parish, near Houma, Louisiana. Vanguard’s proposed facility is a commercial, non-hazardous, Class II, Type B, deep-well injection waste disposal facility. The proposed facility would dispose of oil and gas exploration and production waste fluids, such as saltwater, which are commonly known as “E and P” waste fluids.¹ Vanguard’s proposed facility would receive and store E and P waste fluids, generated from the drilling and production of oil and gas, for subsurface disposal by means of deep-well injection.

Vanguard published the appropriate notices of intention to apply to the Commissioner of Conservation for a permit to locate, construct, and operate its facility. The Office of Conservation opened a written comment period, seeking feedback concerning Vanguard’s permit application. Public hearings were also held in Terrebonne Parish, during which participating members of the public were allowed to submit questions and voice concerns regarding Vanguard’s permit

¹ A Type B facility is a commercial E and P waste disposal facility within the state that utilizes underground injection technology for the receipt, storage, treatment, and disposal of only saltwater or other E and P waste fluids (liquids). La. Admin Code tit. 43, pt. XIX, § 501. A Class II disposal well injects fluids, which are brought to the surface in connection with conventional oil or natural gas production and may be commingled with waste waters from gas plants, which are an integral part of production operations. La. Admin Code tit. 43, pt. XIX, § 403.

application.² During the comment period, the TPCG president sent a letter to the Office of Conservation, informing it that TPCG's preliminary review of Vanguard's permit application revealed that the proposed site of the facility did not comply with a Terrebonne Parish ordinance that requires all waste disposal facilities, such as Vanguard's, to be set back one mile from any structure used as a residence or business.³ The letter further indicated that Vanguard had not submitted any parish permit application for such a facility to TPCG, and that TPCG would "hold any permit application [issued by the Commissioner] to the letter of the law."

After the conclusion of the public hearings and written comment period, the Commissioner of Conservation issued Conservation Order No. ENV 2011-02 CFB, on May 25, 2011, which authorized Vanguard to locate, construct, and operate its commercial, non-hazardous waste injection facility in Terrebonne Parish, in accordance with the Office of Conservation's permitting process.⁴ Seven days after the Commissioner issued the order granting Vanguard's permit, Vanguard received a letter from TPCG, informing Vanguard that its proposed facility fell under the parish's jurisdiction and that the location of the facility would be subject to the one-mile set-back parish ordinance.

Vanguard notified the Commissioner of Conservation that TPCG required that Vanguard comply with the parish ordinances, specifically the one-mile set-back rule, in order to locate, construct, and operate its facility in Terrebonne Parish. Vanguard requested, in writing, that the Commissioner bring suit to enjoin potential actions that TPCG may take in derogation of the Commissioner's

² See La. R.S. 30:4(C)(16)(b) and 4(I); La. Admin. Code tit. 43, pt. XIX, § 409; La. Admin. Code tit. 43, pt. XIX, §§ 519 and 529.

³ See Terrebonne Parish Code, pt. II, ch. 11, art. III, § 11-56 ("Section 11-56").

⁴ See La. Admin Code tit. 43, pt. XIX, subpt. 1, ch. 5 (Statewide Order No. 29-B).

authority, or actions that may potentially limit Vanguard's rights under its permit, which was issued pursuant to Conservation Order No. ENV 2011-02 CFB.⁵ The Commissioner of Conservation did not bring suit, so Vanguard brought suit on the Commissioner's behalf by filing a petition for declaratory judgment and permanent injunction.⁶ Vanguard sought a declaration that the Terrebonne Parish ordinance regarding the siting of oilfield waste disposal sites was unconstitutional. Vanguard also sought a permanent injunction to prevent TPCG from enforcing its ordinances against Vanguard's permit to build its waste disposal facility.

TPCG filed an answer and exceptions to Vanguard's petition, specifically, the declinatory exception raising the objection of lack of jurisdiction over the subject matter of the action and the dilatory exception raising the objections of vagueness or ambiguity of the petition and prematurity. Thereafter, Vanguard filed a motion for summary judgment and sought a permanent injunction. Following a hearing on the exceptions filed by TPCG and the motion and injunction request filed by Vanguard, the district court denied the exceptions of vagueness and lack of subject matter jurisdiction.⁷ On August 1, 2012, the district court granted summary judgment and a permanent injunction in Vanguard's favor, enjoining TPCG from applying any of its local regulatory ordinances to Vanguard or compelling Vanguard to comply with those ordinances, including, but not limited to, Section 11-56. TPCG now appeals.

LAW AND DISCUSSION

We note that this court has not ordered this appeal transferred to the Louisiana Supreme Court, even though the judgment appealed from decreed certain Terrebonne Parish ordinances unconstitutional as applied to the appellee.

⁵ See La. R.S. 30:14.

⁶ See La. R.S. 30:16.

⁷ TPCG withdrew its exception of vagueness or ambiguity of the petition.

See La. Const. art. V, § 5(D). The Louisiana Supreme Court has held that it lacks jurisdiction over a direct appeal when a district court finds that an ordinance has been preempted by a federal or state law. See *City of Baton Rouge v. Goings*, 95-2542 (La. 12/13/96), 684 So. 2d 396, 397; *Twin Parish Port Commission v. Berry Bros., Inc.*, 94-2594 (La. 2/20/95), 650 So.2d 748, 749; *Desormeaux Enterprises, Inc. v. Village of Mermentau*, 568 So. 2d 213 (La. App. 3d Cir. 1990) (after remand by the supreme court upon a finding of lack of subject matter jurisdiction). Accordingly, we proceed to consider and decide this matter.

I. Exceptions

In its first assignment of error, TPCG contends that the district court lacked subject matter jurisdiction to declare that Vanguard's permit is valid. It contends that the validity of the state permit was not at issue in this lawsuit, which sought declaratory review of a Terrebonne Parish ordinance. TPCG maintains that the validity of Vanguard's permit was not disputed, and that the district court lacked jurisdiction to review and declare a Terrebonne Parish ordinance unconstitutional.

In its second assignment of error, TPCG argues the district court erred in overruling the TPCG's exception of prematurity relative to Vanguard's request for injunctive relief. TPCG contends that Vanguard's action was premature because it never applied to TPCG for a permit under the Terrebonne Parish Code of Ordinances. Without applying for a permit or requesting a variance from the waste siting provision, TPCG argues that Vanguard had no way of knowing whether or not a permit for its facility would be denied.

The district court overruled TPCG's exceptions in a ruling separate from the judgment appealed from; however, when an unrestricted appeal is taken from a final judgment, the appellant is entitled to seek review of all adverse interlocutory rulings, in addition to review of the final judgment. *Landry v. Leonard J. Chabert*

Med. Ctr., 02-1559 (La. App. 1 Cir. 5/14/03), 858 So. 2d 454, 461 n.4, *writs denied*, 03-1748, 03-1752 (La. 10/17/03), 855 So. 2d 761.

A party is entitled to relief by declaratory judgment when his rights are uncertain or disputed in an immediate and genuine situation and the declaratory judgment will remove the uncertainty or terminate the dispute. *Louisiana Dep't of Agric. & Forestry v. Louisiana State Licensing Bd. for Contractors*, 36,694 (La. App. 2 Cir. 1/29/03), 837 So. 2d 726, 731-32. Louisiana Code of Civil Procedure article 1872 provides, in pertinent part:

A person ... whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status, or other legal relations thereunder.

Thus, a suit for declaratory judgment is an appropriate means of testing the constitutionality or applicability of an ordinance over which there is an actual controversy between the parties. *Vonderhaar v. Parish of St. Tammany*, 633 So. 2d 217, 225 (La. App. 1st Cir. 1993).

Here, TPCG expressed its intention to bar Vanguard from locating, constructing, and operating its facility in Terrebonne Parish unless Vanguard complied with provisions of the Terrebonne Parish Code, which Vanguard maintains are unconstitutional as applied to the permit issued to Vanguard by the Commissioner of Conservation. Under circumstances such as these, the legislature expressly gave entities, such as Vanguard, resort to injunctive relief to prohibit local governments from threatening their lawfully granted permit interests. Specifically, Louisiana Revised Statutes 30:14 authorizes the Commissioner to file suit to restrain the violation or threat of violation of any oil and gas regulation or any "rule, regulation, or order made thereunder." Moreover, any entity that is adversely affected by a violation or threat of violation, such as Vanguard, has the authority to bring suit in the Commissioner's place and similarly seek an injunction

when the Commissioner fails to bring suit. La. R.S. 30:16. Thus, Vanguard properly and timely filed a suit for declaratory and injunctive relief before it was cited or assessed civil or criminal penalties by TPCG for acting in accordance with its permit issued by the Commissioner.

II. Summary Judgment

In its remaining assignments of error, TPCG contends the district court erred in granting Vanguard's motion for summary judgment. TPCG maintains that the district court erred in holding that there were no genuine issues of material fact, because the statement of uncontested facts Vanguard attached in support of its motion for summary judgment was not supported by proper documents – affidavits, answers to interrogatories, depositions, or admissions – and contained unsupported legal conclusions. TPCG also argues that the district court legally erred in holding that the Office of Conservation has exclusive and pervasive authority to regulate oil and gas waste disposal facilities. Finally, TPCG maintains the district court erred in holding that the ordinances found in Part II, Chapter 11, Article III of the Terrebonne Parish Code, including but not limited to Section 11-56, are unconstitutional as applied to Vanguard's proposed facility. TPCG argues the district court should have evaluated the parish ordinances on a non-constitutional basis, specifically, whether they were arbitrary or capricious, and could have upheld the ordinance as an exercise of local police power regulating land use.

Appellate courts review summary judgments *de novo* under the same criteria that govern the district court's consideration of whether summary judgment is appropriate. *Schroeder v. Bd. of Sup'rs of Louisiana State Univ.*, 591 So. 2d 342, 345 (La. 1991). The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with supporting affidavits, if any, show that there is no genuine issue as to material fact,

and that the mover is entitled to judgment as a matter of law. La. Code Civ. Proc. art. 966(B); *Bridges v. Nat'l Fin. Sys., Inc.*, 06-0957 (La. App. 1 Cir. 3/23/07), 960 So. 2d 202, 205, *writ denied*, 07-1600 (La. 11/2/07), 966 So. 2d 602. Because the mover has the burden of establishing that no genuine material factual issue exists, inferences to be drawn from the underlying facts contained in the materials before the court must be viewed in the light most favorable to the party opposing the motion. *Vermilion Corp. v. Vaughn*, 397 So. 2d 490, 493 (La. 1981).

A. Evidence in Support of Motion for Summary Judgment

TPCG alleges that Vanguard's statement of uncontested facts, which references Exhibits A, B, C, and D, attached in support of Vanguard's motion for summary judgment, were not properly before the district court, as these exhibits were not presented by an affidavit, answer to interrogatory, or admission, as required by Louisiana Code of Civil Procedure articles 966 and 967. Additionally, TPCG contends that some of the "uncontested facts" were merely assertions or conclusions with no reference to supporting documents.

The district court ruled that the exhibits attached to Vanguard's motion for summary judgment were proper summary judgment evidence. Vanguard's Exhibits A⁸ and B⁹ are comprised of official state documents of the Office of Conservation and were accompanied by verification and a certification of

⁸ Vanguard's Exhibit A is a certified copy of the Office of Conservation's official records applicable to Vanguard's permit application, Docket No. ENV 2011-02 (Volume I of II), which consists of: (i) a transcript of the public hearing regarding its permit application that was held on March 2, 2011, in Houma, Louisiana; and (ii) copies of notices of intent to apply for a permit that were published in the Advocate and the Courier.

⁹ Vanguard's Exhibit B is a certified copy of the Office of Conservation's official records applicable to Vanguard's permit application, Docket No. ENV 2011-02 (Volume II of II), which consists of: (i) a letter from the Office of Conservation to Vanguard regarding the public hearing and related notice requirements; (ii) legal notice of the public hearing on Vanguard's permit application; (iii) copy of notices of the public hearing that were published in the Advocate and the Courier; (iv) a letter from TPCG president to the Office of Conservation regarding Vanguard's permit application; and (v) a letter from TPCG attorney to a TPCG council member.

authenticity from the official custodian of the documents. Exhibits D¹⁰ and E¹¹ were supported by the affidavit of a member of Vanguard (Exhibit F). In fact, TPCG provided Vanguard and the court with a copy of the same letter that is Vanguard's Exhibit D. The district court held that the documents were properly authenticated, certified copies of official state documents. The district court also held that the veracity of the affidavits supporting the exhibits was not in question. We agree with the district court's conclusion that the evidence submitted by Vanguard in connection with its motion for summary judgment was properly before the court.

B. Regulation of Non-Hazardous Oil and Gas Waste Disposal Facilities

The Louisiana Constitution establishes environmental preservation as the public policy of the state. It directs that the "natural resources of the state" are to "be protected, conserved, and replenished." Moreover, it mandates that the legislature "enact laws to implement this policy." La. Const. art. IX, § 1. Pursuant to this constitutional mandate, the desire to protect the health and safety of the State's citizens, the growth of the State's industrial activity, and the need to coordinate environmental control regulations with the federal program have prompted the legislature to act in a number of significant ways in the field of environmental regulation at the state level. *See Rollins Env'tl. Services of Louisiana, Inc. v. Iberville Parish Police Jury*, 371 So. 2d 1127, 1133 (La. 1979). The legislature has created an extensive body of law that addresses every phase of the oil and gas exploration process, from the initial exploration and drilling phases to cleanup and disposal of wastes. The state entity responsible for the regulation of

¹⁰ Vanguard's Exhibit D is a copy of a letter sent by TPCG to Vanguard, informing Vanguard that its facility must comply with the parish's one-mile set-back hazardous waste ordinance.

¹¹ Vanguard's Exhibit E is the letter Vanguard sent to the Commissioner, requesting that the Commissioner take legal action against TPCG to prevent a violation of state law regarding Vanguard's permit.

the oil and gas resources of the state, including underground injection and disposal practices, is the Office of Conservation, which is directed and controlled by the Commissioner of Conservation. La. R.S. 30:1 *et seq.*

The disposal of any waste product into the subsurface by means of a disposal well and the regulation of all surface and subsurface waste facilities incidental to oil and gas exploration and production are virtually entirely vested in the Office of Conservation. See La. R.S. 30:1(D), as modified by La. R.S. 36:359(D); La. R.S. 30:4(C); *Hunt Oil Co. v. Batchelor*, 93-3144 (La. 10/17/94), 644 So. 2d 191, 197.

The Commissioner's authority includes, but is not limited to, the power to:

...regulate by rules, the drilling, casing, cementing, disposal interval, monitoring, plugging and permitting of disposal wells which are used to inject waste products in the subsurface and to regulate all surface and storage waste facilities incidental to oil and gas exploration and production[.]

La. R.S. 30:4(C)(16)(a); and to:

...make...any reasonable rules, regulations, and orders that are necessary to control the offsite disposal at commercial facilities of drilling mud, saltwater and other related nonhazardous wastes generated by the drilling and production of oil and gas wells...Such regulations shall at a minimum require...[c]riteria for the location, design and operation of commercial offsite disposal facilities.

La. R.S. 30:4(I)(7).

Pursuant to this authority, the Commissioner issued Statewide Order 29-B, which enacted a comprehensive set of regulations establishing the criteria to be met in order to obtain a disposal well permit. See La. Admin. Code tit. 43, pt. XIX, § 501 *et seq.* Among these regulations are the location criteria for commercial, Class II disposal wells, such as Vanguard's, found at Title 43, Part XIX, § 507 in the Louisiana Administrative Code, which states, in pertinent part:

Commercial facilities...may not be located in any area...where...Class II disposal wells...are located within **500 feet** of a residential, commercial, or public building, church, school or hospital. (Emphasis added.)

During the permit process, TPCG objected, through written comments and public hearings, to certain differences between the Commissioner's regulations and local ordinances, specifically Section 11-56. Section 11-56 prohibits the storage or disposal of waste in:

Any area within a **one-mile radius** of any house, mobile home, apartment, condominium, commercial structure or other structure used as a residence or business, unless the structure is located and used on the site where the hazardous waste or other waste is stored or disposed of. (Emphasis added.)

Other ordinances found in Part II, Chapter 11, Article III of the Terrebonne Parish Code authorize TPCG to “permit, monitor, and oversee the construction and use of all facilities designed to store or dispose of any type of waste.”¹² The ordinances outline the process for applying for and receiving a permit to operate a waste disposal facility.¹³ Vanguard maintains that these parish ordinances are unconstitutional, as they purport to regulate the permitting, location, and operation of waste disposal facilities, which Vanguard argues is unauthorized, inconsistent with, and preempted by the laws of this State that vest this authority in the Commissioner of Conservation. *See* La. Const. art. VI, § 7(a); La. R.S. 30:1 *et seq.*; La. Admin. Code, title 43, part XIX, § 507.

We affirm the district court's grant of summary judgment, agreeing with the court's conclusion that the application of the ordinances found in Part II, Chapter 11, Article III of the Terrebonne Parish Code are unconstitutional as applied to Vanguard's permit, because the regulation of the disposal of non-hazardous waste products into the subsurface by means of a commercial offsite disposal facility, including the siting of such facilities, is preempted by state law. This case does not present a matter of the regulation of solid or hazardous waste, but rather the regulation of non-hazardous oil and gas waste, specifically the authority over the

¹² *See* Terrebonne Parish Code, pt. II, ch. 11, art. III, § 11-53.

¹³ *See* Terrebonne Parish Code, pt. II, ch. 11, art. III, §§ 11-58 – 61.

location, design, and operation of commercial waste disposal facilities. Local government bodies have been denied the power to adopt local ordinances independently regulating or prohibiting the disposal of oil and gas waste. A governmental body, such as TPCG, is authorized to exercise any power and perform any function necessary for the management of its affairs, unless that authority is denied by the constitution, its charter, or by the general law of the State. La. Const. art. VI, § 7; La. R.S. 33:361.

As discussed above, the legislature has given authority over the location, design, and operation of non-hazardous waste disposal facilities, such as Vanguard's, to the Office of Conservation, through the Commissioner of Conservation. La. R.S. 30:4(I)(7). We conclude that the regulation of the disposal of any waste product into the subsurface by means of a disposal well, including siting, is within the exclusive jurisdiction of the Office of Conservation. *Desormeaux Enterprises, Inc.*, 568 So. 2d at 215. The express terms of our pertinent statutory law and the regulations adopted pursuant thereto are pervasive and clearly manifest a legislative intention to preempt the field in its entirety. *Id.*

We therefore affirm the district court's ruling that the application of the ordinances found in Part II, Chapter 11, Article III of the Terrebonne Parish Code, including, but not limited to, Section 11-56, are unconstitutional as applied to Vanguard's proposed facility.

DECREE

For the foregoing reasons, the judgment granting the motion for summary judgment and the permanent injunction is affirmed. All costs of this appeal, in the amount of \$1,467, are cast to Defendant/Appellant, Terrebonne Parish Consolidated Government.

AFFIRMED.