Agenda Report

2725 Judge Fran Jamieson Way
Viera, FL 32940

Public Hearing

H.7. 5/21/2024

Subject:
Consideration of Proposed Vested Rights Order in the Matter of Air Liquide Large Industries, US, LP, Subject Property: 7007 N. Courtenay Parkway, Merritt Island, FL 32955

Fiscal Impact:
N/A

Dept/Office:
County Attorney's Office

Requested Action:
In the matter of the Petition for Vested Rights by Air Liquide Large Industries, US, LP:

(1) Consider the proposed vested rights order issued by the Special Magistrate, the record before the Special Magistrate, timely submitted written argument, and the oral argument of the parties to the proceeding;

(2) Based upon the record, Section 62-507 of the Brevard County Code of Ordinances, and the findings of fact set forth in the Special Magistrate's proposed order, either (a) grant vested rights; (b) grant vested rights with conditions; or (c) deny vested rights; and

(3) Either (a) adopt the Special Magistrate's Proposed Order or (b) direct the County Attorney to prepare an order for the Board to enter within 30 days of the date the motion is voted upon.

As explained further below, Air Liquide Large Industries, US, LP has requested that the Board continue consideration of the Proposed Order to a future meeting to allow time for stakeholders to consider a potential resolution.

Summary Explanation and Background:
Air Liquide Large Industries, US, LP ("Air Liquide") is pursuing a vested rights determination regarding noise created by the business operation located at 7007 North Courtenay Parkway, Merritt Island, Florida, which is alleged to exceed the allowable limits permitted under the Brevard County Code of Ordinances. Air Liquide has been served with both a Notice of Hearing and Statement of Violation as issued by Brevard County Code Enforcement on September 2, 2020 and September 1, 2020, respectively. In response to the County's Code Enforcement action, Air Liquide submitted a petition for a vested rights determination pursuant to Section 62-507 of the Brevard County Code of Ordinances.

In the vested rights proceedings, Air Liquide is represented by the law firm of Akerman LLP. Cliff Repperger,

Esq., of the White Bird law firm advocated the County Planning and Development Department staff's position at the Special Magistrate vested rights hearing. Attorney Repperger's limited representation of the County was authorized by the Board because of Florida Bar rules and Florida Attorney General opinions holding that a conflict of interest results when an attorney serves as both a legal advisor and as an advocate before the same board. As such, the County Attorney's Office cannot serve as both legal advisor to the Board of County Commissioners and as an advocate on behalf of the Planning and Zoning Department in this matter.

The petition was heard by the Vested Rights Special Magistrate on November 30 and December 1, 2023, concluding with a public comment period. Closing arguments were held on January 19, 2024, and the parties were given time to submit written closing arguments. After the written closing arguments were submitted, the Special Magistrate issued the attached Proposed Order on April 8, 2024. The Proposed Order sets forth detailed findings of fact, analyzes the applicable ordinance and case law, and recommends proposed conclusions of law and that the vested rights petition be denied.

Under Section 62-507(d)(6), the Board of County Commissioners shall consider the Proposed Order as an agenda item at a meeting in accordance with the following procedures:

a. No evidence will be taken by the County Commission and the Board shall make its decision based solely upon the record, findings of fact, and the oral argument of parties to the proceeding, which shall be limited to ten minutes per party (Air Liquide and the County). If a party attempts to introduce new evidence, the Board shall remand the proceeding to the Special Magistrate for review of that evidence.

b. Any party, staff, or person wishing to submit written argument in support of or against the proposed order must submit written argument at least 14 days prior to the date upon which the proposed order will be considered.

c. Based upon the record, the ordinance, and the findings of fact set forth in the Proposed Order, the Board shall either move to grant vested rights; grant vested rights with conditions; or deny vested rights. In so doing, the Board shall either adopt the Special Magistrate's Proposed Order or enter its own order within 30 days of rendition of the date the motion is voted upon.

Due to the quasi-judicial nature of this item and the public comment permitted during the Special Magistrate hearing, oral comments will not be accepted by the Board except from Air Liquide and the County. Planning and Development Department staff provided a notice to citizens who previously participated in this proceeding or otherwise indicated an interest in the matter. That notice made clear that they would not be able to make public comment on this matter at the Board meeting, and that written comment was the only remaining avenue for the Board to consider an argument made by a non-party citizen. All written arguments timely received from non-parties are attached.

It should be noted that Air Liquide has requested that the Board continue its consideration of the Proposed Order to a future meeting to allow time for stakeholders to consider its proposal to construct a 14-foot high, 400-foot long noise barrier along the north side of Courtenay Parkway in an effort to resolve the noise complaints that resulted in this vested rights proceeding. The Board may wish to consider the request to continue prior to receiving argument from the parties.

If Air Liquide disagrees with the Board's vested rights decision, it may appeal that decision by petition for writ of certiorari to the circuit court filed within 30 days of rendition of the Board's order.

In addition to the attached Special Magistrate Proposed Order and Air Liquide's written argument, the County Attorney's Office will make available to Commissioners the entire record submitted for the Special Magistrate proceeding, as well as the transcript of the proceeding. Both the record below and the transcript shall be included in the record for the Board meeting and are available to the public upon request.

Attachments:

1. Special Magistrate Proposed Order
2. Air Liquide Vested Rights Written Argument
3. Sheriff Ivey Letter in Support of Proposed Order
4. Brian Bauer Letter in Support of Proposed Order
5. Martin Boyd Letter in Support of Proposed Order
6. Mary Slowinski Letter in Support of Proposed Order
7. Douglas and Theresa Waller Letter in Support of Proposed Order
8. Air Liquide Noise Barrier Proposal

Clerk to the Board Instructions:

Please return a memo of the Board's action to the County Attorney's Office and Planning and Development Department Director.

BREVARD County
BOARD OF COUNTY COMMISSIONERS

FLORIDA'S SPACE COAST

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May 22, 2024

M E M O R A N D U M

TO: Morris Richardson, County Attorney

RE: Item H.7., Consideration of Proposed Vested Rights Order in the Matter of Air Liquide Large Industries, US, LP - Subject Property: 7007 N. Courtenay Parkway, Merritt Island, FL 32955

The Board of County Commissioners, in regular session on May 21, 2024, adopted the Special Magistrate's proposed Order denying the vested rights in matter of Air Liquide Large Industries, US, LP; and directed staff to immediately proceed with its Code Enforcement investigation of the noise complaint from subject property: 7007 N. Courtenay Parkway, Merritt Island, FL 32955, treating the case as a health and safety violation to the extent permitted by law and, should a violation be substantiated, to seek the maximum fine permitted by law under the circumstances.

Your continued cooperation is always appreciated.

Sincerely,

BOARD OF COUNTY COMMISSIONERS
RACHEL M. SADOFF, CLERK

Kimberly Powell

Kimberly Powell, Clerk to the Board

cc: Planning and Development

BREVARD COUNTY BOARD OF COUNTY COMMISSIONERS

VESTED RIGHTS SPECIAL MAGISTRATE

IN RE: PETTION FOR VESTED RIGHTS

BY AIR LIQUIDE LARGE INDUSTRIES, US, LP

SUBJECT PROPERTY:

7007 N. Courtney Parkway

Merritt Island, FL 32955

PROPOSED ORDER

This cause came to be heard before the Brevard County Special Magistrate upon the submission of a request, dated October 2, 2020, by the Petitioner Air Liquide Large Industries, US, LP ("Petitioner") for a vested rights determination pursuant to Section 62-507, Brevard County Code ("County Code").

In Brevard County, Petitioner's business supports numerous vital activities, including the U.S space program by supplying high pressure nitrogen and oxygen, hospitals by selling medical oxygen, and municipalities by supplying oxygen for water purification. On September 1, 2020, Code Enforcement filed a Notice of Hearing and Statement of Violation(s) against Petitioner. Petitioner Exhibit 02 pp. 003- 006. In response, Petitioner filed a petition seeking to be vested from the application Section 62-2271 of the County Code. The hearing of the Code Enforcement case has been stayed pending the resolution of this vested rights petition ("Petition").

The Petition was initially set for a hearing on April 19, 2023, but was postponed and rescheduled several times by agreement of the parties. The Petition was ultimately heard on November 30 and December 1, 2023, concluding with a public comment period. Closing arguments were held on January 19, 2024, and the parties were given time to submit written closing arguments.

Having heard testimony of the parties and other witnesses and the opening and closing arguments by counsel, having reviewed the Joint Stipulated Facts, the pleadings, and PowerPoint presentations, and being otherwise fully advised in the premises, the Special Magistrate hereby FINDS and RECOMMENDS as follows:

Findings of Fact

1) The subject property is located at 7007 N. Courtenay Parkway, Merritt Island, FL 32953 (the "Property"). Joint Stipulated Facts ("JSF") Paragraph 1.

2) The Property is located in unincorporated Brevard County, FL and is subject to the County's Comprehensive Plan and Land Development Regulations ("LDR"). JSF Paragraph 2.

3) The use of the Property is properly categorized under the NAICS as 325-Chemical Manufacturing. JSF Paragraph 19.

4) The Property was rezoned from Agricultural Use ("AU") to Industrial Use ("IU") on February 29, 1968, per Resolution Z-2238. JSF Paragraph 3. In 1968, IU was the most intense industrial zoning in the LDR existing at that time. JSF Paragraph 4.

5) The purpose of this 1968 Rezoning was to establish an atmospheric gas manufacturing facility (the "Facility"). The Facility began gas production in 1968. JSF Paragraphs 5 and 6.

6) In 1971, a more intense industrial zoning classification, IU-1, was adopted in the LDRs. JSF Paragraph 7.

7) In 1971, "Atmospheric Gases, Manufacture and Storage" use was included as a permitted use under the IU-1 zoning district, and in 2000, revised from a permitted use to a conditional use under the IU-1 zoning district. JSF Paragraph 9.

8) The 1971 County-initiated revisions to the LDRs resulted in the existing Facility becoming a nonconforming use that was not consistent with the IU zoning district. JSF Paragraph 10.

9) The County adopted the relevant Comprehensive Plan in 1988, providing the Property with a future land use designation of Planned Industrial ("PI"). IU and IU-1 are not zoning designations within the PI future land use designation. JSF Paragraph 13.

10) Effective November 18, 2002, Petitioner's application for a Small Scale Land Amendment changing the Future Land Use Map (FLUM) designation from Planned Industrial to Heavy/Light Industrial, change of classification from IU to IU-1, and a Conditional Use Permit ("CUP") for Heavy Industry, were Approved, pursuant to Resolution Z-10752. JSF Paragraph 14.

11) The County initially adopted the "loud and raucous" noise ordinance, Section 46-131, in 1993, approximately twenty-five (25) years after the Facility commenced operation. JSF Paragraph 11.

12) Section 46-131 is found within the County's Code of Ordinances ("Code"). JSF Paragraph 12.

13) The County adopted the relevant Comprehensive Plan in 1988, providing the Property with a future land use designation of Planned Industrial ("PI"). IU and IU-1 are not zoning designations within the PI future land use designation. JSF Paragraph 13.

14) In order to obtain the appropriate classifications and permits for its facilities, Petitioner needed to make applications for a FLUM amendment, a rezoning and a CUP. On or about May 10, 2002, Petitioner's predecessor in interest began these processes by submitting an application for a Small-Scale Map Amendment to amend the future land use designation for the Property from PI to Heavy/Light Industrial ("FLUM Amendment"), to rezone the Property from IU to IU-1 ("Rezoning"), and for a Conditional Use Permit ("CUP") that was required to substantially expand the existing Facility, that was considered a Heavy Industrial use (collectively," Applications"). JSF Paragraph 14.

15) Altogether, Petitioner went through three (3) separate public hearings before (3) three separate Brevard County Boards: Brevard County Planning and Zoning Board/Land Planning Agency (July 8, 2002), North Merritt Island Dependent Special District (July 18, 2002) and the

Brevard County Board of County Commissioners (September 5, 2002). See, Meeting Minutes contained in County Exhibit 2E.

16) In addition, a Binding Development Plan (BDP) was entered by Petitioner and the Board of County Commissioners on October 29, 2002. Petitioner Exhibit 50. Petitioner also sought and received a CUP. JSF Paragraph 14.

The Conditional Use Permit- Application and Hearing

17) To receive the CUP for the Heavy Industrial Use in IU-1 zoning, Petitioner submitted a CUP Application Worksheet ID #NMI2070. (The "worksheet"). County Exhibit 2D pp 6-9.

a) The 4 page worksheet was submitted by Kimley-Horn and Associates, Inc. on behalf of Petitioner on May 10, 2002. By applying for the CUP that included the submission of the site plan, the Petitioner, was informed of and agreed to the performance standard contained therein. County Exhibit 2D pp. 1-9.

18) The worksheet states, "Section 62-1901 governing Conditional Use Permits (CUP) requires that the standards below be upheld by the Board of County Commissioners."

19) On the worksheet, Petitioned indicated that changes at the Facility were undertaken to allow for the replacement of older equipment "with newer, more efficient equipment" that "would allow for increased production as well as increased efficiency." 2002 Application Cover Letter and Conditional Use Permit Worksheet in County Exhibit 2D, page 3.

a) Under the heading of specific standards, Section 62-1901(c) (2) (b), the worksheet states: "The noise, glare, odor, particulates, smoke, fumes or other emissions from the conditional use shall not substantially interfere with the use or enjoyment of the adjacent and nearby properties." Applicant's submission responded beneath this: "No increase in noise, glare, odor, particulates, smoke, fumes or other emissions is anticipated."

b) Under the Section 62-1901(c)(2)(c), the worksheet states: "At no time shall the predicted or actual noise level emitted by the proposed

conditional use exceed the sound pressure levels specified below, at the closest property line of the below specified uses, by more than 10 (d)B(A) for more than two minutes in any one hour period with the time periods specified." Following this, there is a Table labeled "Maximum Allowable Noise Sound Pressure Levels for Receiving Uses". At the time of the application, Sec. 19-1901(c)(2)(c) of the County Code required the same maximum allowable decibels on property with industrial land as those currently found in Sec 62-2271, County Code. County Exhibit 2D, p. 7.

20) On July 8, 2002, the Brevard County Planning and Zoning Board (P and Z Board), sitting as the Local Planning Agency, heard Petitioner's request for a Small Scale Plan Amendment to the FLUM designation from Planned Industrial to Heavy/Light Industrial. Scott Doscher, of Kimley-Horn and Associates, was present on behalf of Petitioner. The vote was unanimous to approve the request. County Exhibit 2E, p. 2.

21) The minutes of the July 8, 2002 hearing indicate that Kim Zarillo, P and Z Board Member, asked if the Facility would be governed by performance standards. Rick Enos, Zoning Manager, said, on the record, it would. County Exhibit 2E, page 2.

22) The minutes of the hearing also indicate that P and Z Board Member, Suzanne Valencia asked staff if it was necessary to change the Comprehensive Plan for the expansion of the building. Rick Enos, explained that it was, because the property is currently designated as Planned Industrial, and the current zoning is IU, which is not consistent with that Planned Industrial Designation, and they have a use that is not consistent with the IU zoning. To receive approval to expand the non-conforming use on the property, both the Comprehensive Plan and the Zoning both needed to be changed. County Exhibit 2E p. 2.

23) Prior to the July 18, 2002 North Merritt Island Dependent Special District Board ("NMIB") Meeting, the NMIB members received "staff comments" from the P and Z staff that contain general standards of review and an analysis of the specific facts of each proposal and their relationship to the policies of Comprehensive Plan. The report contains a "Rezoning Review Worksheet" analyzing Petitioner's application. Petitioner's Exhibit pp. 04-001-04-021.

a) The staff comments note: "This use requires a Conditional Use Permit (CUP) pursuant to Section 62-1102 (Definitions) of the Zoning Regulations. The activity falls within the North American Industrial Classification System (NAICS) as a chemical manufacturing plant, which by definition, is a heavy industrial use requiring a CUP in the IU-1 classification. Nonetheless, the use will be required to comply with performance standards." Petitioner Exhibit 04-019.

b) The performance standards for Maximum Allowable Noise Sound Pressure Levels for Receiving Uses are found under the "general standards of review" section. Petitioner Exhibit pp. 04-007-04-008.

24) The minutes of the July 18, 2002 North Merritt Island Dependent Special District Board ("NMIB") Meeting state that Scott Doscher, of Kimley-Horn, requested the zoning change on behalf of Petitioner. County Exhibit 2E p. 3.

a) Robin Sobrino, Brevard County, Assistant Zoning Manager, addressed Petitioner's current status and what would result from their efforts to changes their status. Ms. Sobrino explained stated that "it was correct that the existing plant is operating as a non-conforming use." Ms. Sobrino continued "[h]owever, once they wanted to make some expansions, they would have to meet today's regulations." County Exhibit 2E p. 7.

This meant that Petitioner would lose its present ability to operate as a non-conforming use, colloquially known as being "grandfathered." By deliberately choosing this course of events, to expand their plant and operations, and make the required legal changes to accommodate their new status, the non-conforming use was lost.

25) Ms. Sobrino clarified that "today's regulations say that you need to have the right zoning in place, and this use requires both the right zoning, and a conditional use permit. County Exhibit 2E p. 7. Ms. Sobrino further clarified that the existing plant is not subject to performance standards. The expanded use would need to meet standards for such factors as noise, smoke, emissions, vibrations, etc. County Exhibit 2E p. 11.

a) Petitioner's Noise Expert, John Dolehanty, testified that the primary noise from the plant comes from the location of the expander "directly behind [the] wall." Testimony, December 1, 2023 p. 112,114.

b) Mr. Maupin confirmed that the expander was located in an area of the plant expanded in 2002 after the CUP was granted Testimony, December 1, 2023, pp. 148-150; Petitioner's Exhibit 8 Site Plan.

c) Ms. Sobrino said if the site plan is approved, it will dictate what they can do. (County Exhibit 2E p. 11).

26) Petitioner submitted Site Plan AD0212001 to the County on May 10, 2002. Petitioner Exhibit 8.

a) The Site Plan states on page 2: "This project will adhere to the performance standards set forth in Brevard County Subdivision 3 Manual Sections 62-2251 through 62-2272."

b) According to Section 62-1901, it states that the site plan submitted with the CUP application "shall be binding on the use of the property if the conditional use permit is approved."

This also contradicts Petitioner's assertion that the site plan governs the development of the property, not the use.

Approval of the Site Plan and issuance of a Certificate of Occupancy do not create any vested rights.

27) On September 5, 2002, the Brevard County Board of County Commissioners ("BCCC") adopted Ordinance 2002-47, amending the future land use designation for the Property from Planned Industrial to Heavy/Light Industrial and Resolution Z-10752 to rezone a portion of the Property (approximately 9.9 acres) rezoned IU-1. The Facility is located on the IU-1 portion of the Property. JSF Paragraph 16 ; Petitioner's Exhibit 08-02.

The Binding Development Plan

28) On October 29, 2002, the Board of County Commissioners and Petitioner entered into a Binding Development Plan (BDP). County Exhibit 1G.

a) Paragraph 6 of this voluntary agreement provides:

"Developer/Owner shall comply with all regulations and ordinances of Brevard County Florida. This agreement constitutes Developer/Owner Agreement to meet additional standards or restrictions in developing the property. This agreement provides no vested rights against changes to the comprehensive plan or land development regulations that may apply to this property."

b) The BDP was recorded and further states in Paragraph 8:

"This Agreement shall be binding and shall inure to the benefit of the successors or assigns of the parities (sic) and shall run with the subject property unless or until rezoned and be binding upon any person, firm or corporation who may become the successor in interest directly or indirectly to the subject property."

During the hearing, Petitioner specified that its claim to vested rights were not based in the BDP. Transcript, November 30, 2023 p. 130.

The CUP Application

29) Mr. Tad Caulkins, Director of Planning and Development and Interim County Manager testified in reference to the CUP application, that the Petitioner/applicant had subjected themselves to the "10 plus dba" performance standards for the use of the property. Testimony, December 1, 2023, p. 8.

"Q. So, again, just to be clear, the 10 dB (A)table standards in 62-1901 and these decibel standards in 62-2771 were both in adoption and in the code at the time that the CUP application was filed by the Petitioner in this case?

A. Yes."

Testimony, December 1, 2023, p. 14.

a) Underneath the dba table, Petitioner/applicant had typed: "The new facility is expected to emit lower maximum sound pressure than the existing facility." County Exhibit 2D, page 8.

When asked if these words meant that the property owner did not agree to be governed by these performance standards, Mr. Caulkins testified that he believed the Code required compliance with the

decibel standards, and that the CUP requirements could not be waived by an applicant's reply in the CUP worksheet. Testimony, December 1, 2023 p. 57.

b) The improvements identified in the site plan were completed sometime between 2002 to 2004. The improvements, as physically constructed, were consistent with the requirements of the site plan (AD 02-12-001). JSF Paragraph 20.

c) There was no evidence that the Petitioner (nor predecessor to Petitioner) applied for verification of non-conforming status (Sec. 62-1189, Brevard County Code of Ordinances) or Pre-existing Use (62-1839.7, Brevard County Code of Ordinances) prior to any expansion or expenditure.

The Applicable Ordinance

30) Section 62-507 of the County Code contains the requirements for consideration of vested rights claims. The Petitioner must demonstrate compliance with the criteria by a preponderance of substantial competent evidence All criteria must be met to make a successful claim of vested rights including demonstration that granting the vested right will not create imminent peril to public health, safety or general welfare of the residents of the county. The vested rights criteria to be considered and determined by the Special Magistrate are as follows:

a) There is an act or omission of the county provided, a zoning or rezoning action in and of itself does not guarantee or vest any specific development rights.

b) The property owner acted in good faith reliance on the county's act or omission, provided failure to act within the time requirements of this chapter may negate a claim that the owner acted in good faith upon some act or omission of the county or that the development has continued in good faith under F.S. § 163.3167(8).

c) The property owner substantially changed position in reliance upon the act or omission of the county to the extent that the obligation and expense of the change of position would be highly unjust or inequitable so as to destroy the right acquired provided the following

are not considered development expenditures or obligations that would qualify an applicant for vested rights: legal expenses, expenditures not related to design or construction, taxes or expenditures for acquisition of the land, and whether

d) Petitioner has shown that granting the vested right will not create imminent peril to public health, safety or general welfare of the residents of the county.

Applicable Case Law

31) Florida courts have looked at vested rights cases through the lens of "equitable estoppel." Equitable estoppel ordinarily turns on issues of fairness, based on specific factual circumstances. The elements in the ordinance on vested rights are virtually the same as equitable estoppel which requires a misrepresentation of a material fact, reasonable reliance and a detrimental change in position. *City of Miami Beach v. Clevelander Ocean, L.P.,* 338 So. 3d 16 (Fla. 3rd DCA 2022).

a) Equitable estoppel is to be applied against the state only in rare instances and under exceptional circumstances. To sustain a claim of estoppel against the state or one of its subdivisions, there must be (1) a representation as to some material fact by the party estopped to the party claiming estoppel; (2) reliance upon the representation by the party claiming estoppel; and (3) a change in such party's position caused by his reliance on the representation to his detriment. Furthermore, the act on which the aggrieved party relied must be one on which he had a right to rely. *Monroe County v. Hemisphere Equity Realty, Inc.,* 634 So.2d 745 (Fla. 3rd DCA 1994), Rehearing Denied May 3, 1994.

b) In describing the appropriately situation to apply equitable estoppel, the District Court of Appeals in Town of Largo framed it this way: "One party will not be permitted to invite another onto the welcome mat and then be permitted to snatch the mat away to the detriment of the party induced or permitted to stand thereon." *Town of Largo v. Imperial Homes Corp.,* 309 So. 2d 571, 573 (Fla. 2d DCA 1975).

A review of the relevant facts does not support the conclusion that the County invited the Petitioner to the welcome mat "only to snatch that mat away." Petitioner applied for and received numerous zoning changes,

land use amendments, site plans approvals and CUP applications. During these processes, Petitioner actively sought the permissions necessary to expand its business, and in doing so, it agreed to abide by the current performance standards. There was alignment between the representations that Petitioner made and the contemporaneous public discussions pertaining to the Petitioner's future obligations.

c) *In Hernando County Board of County Commissioners v S.A. Williams Corp*, 630 So. 2d (Fl 5th DCA 1993), Rev. Denied, 630 So. 2nd 111 (S CT FL 1994), the Williams Corporation (Williams) received preliminary approval in 1988 to operate a landfill, with several preconditions to be met before operations could begin. Four years later, the county zoning staff began enforcement proceeding when it discovered that the Williams had begun operations without meeting all required preconditions. After a hearing, Board revoked its approval. The circuit court found that Williams had spent approximately $150,000 in reliance on the preliminary approval and that the county itself was one of the users of the landfill. The circuit court gave Williams six (6) months to comply with the preconditions required by the Board.

The appellate court found that where Williams had failed to submit engineering site plans and state permits as required for approval as well as fail to pay $6000 fee, Williams did not act in good faith. The fact that the County used the landfill and delayed bringing an enforcement action would not provide basis for equitable estoppel where Williams did not act in good faith and the Board never changed its conditions of approval.

This case supports a conclusion that any delay by the County in pursuing the enforcement action against Petitioner is legally insignificant. In this case, Hernando County let a landfill operate for years before it pursued an enforcement proceeding.

Any lack of complaints or relative increase in complaints could be explained by Petitioner's admitted increase in production to meet the expanding needs of the Space Program.

Proposed Conclusions of Law

This section will go through the requirements of the Section 62-507 in order.

32) Petitioner cites the following "acts" as basis of its entitlement to vested rights.

a) The first act cited by the Petitioner is a single page, undated internal document titled "NOTE FOR YOUR FILE ON PERFORMANCE STANDARDS." ("NOTE FOR YOUR FILE") County Exhibit 1-C; Petitioner Exhibit 37-014.

b) NOTE FOR YOUR FILE immortalizes a short conversation between Planning and Zoning Director Mel Scott and Assistant County Attorney Terri Jones. The dialogue quoted in NOTE FOR YOUR FILE (Jones/Scott exchange) reads as follows:

> "(Terri Jones) Are performance standards grandfathered?" Say a business is older than the enactment of the noise performance standards. Is the standard just "loud and raucous" or do the db (sic) standards apply?
>
> The Zoning Officials answered:

(Mel Scott): Yes, per Scott Knox. They are grandfathered and we now have two standards for old and new properties.

c) NOTE FOR YOUR FILE does NOT state WHEN or WHERE the Jones/Scott exchange took place or WHO was present during the conversation. NOTE FOR YOUR FILE does not provide any context of Jones/Scott exchange. Scott Knox, the County Attorney, was seemingly not present, since Mel Scott was speaking for Mr. Knox. What is written is general in nature and does not make any reference to Petitioner, Petitioner's property or business. NOTE FOR YOUR FILE does not in fact refer to any particular case.

Tad Caulkins, Director of Planning and Development and Interim Assistant County Manager, testified that NOTE FOR YOUR FILE was not a formal zoning interpretation, not an official policy, not adopted by the Board of County Commissioners, and not made in reference to Petitioner. Testimony, December 1, pp. 32-34. NOTE FOR YOUR FILE was created by the Code Enforcement

Manager at the time, Bobby Bowen, regarding the development of a different property, Mac Asphalt. Testimony, December 1, 2023 pp. 32-35.

33) The second act identified by Petitioner is a letter dated December 20, 2018, from Mr. Denny Long, Code Enforcement Officer, to Mr. Justin Youney. ("YOUNEY LETTER"). Petitioner Exhibit 37-013; Justin Youney filed a complaint dated December 8, 2018 regarding the "loud compressor noise coming from the Factory." ("Initial Complaint Information") Petitioner Exhibit 37-003.

a) In the YOUNEY LETTER, Mr. Long wrote that "Research found note in record on Performance Standards for Noise." Long then referred to the Jones/Scott exchange.

b) Mr. Long testified at the hearing, that when he had referred to NOTE FOR YOUR FILE, it was early in the process, before he understood the full scope of the agreement between Petitioner and the County. For example, he stated that, in December 2018, he did not know about the CUP. Testimony, December 1, 2023 pp. 40-47.

34) The third act are the working notes made by Denny Long on a copy of "Property Details" sheet printed form the Brevard County Property Appraiser's Website. ("LONG'S NOTES") Petitioner Exhibit 37- 00. These were informal notes, clearly not intended to be official or seen by any members of the public. It was not established how this Act was seen by Petitioner outside of discovery.

35) The fourth act that Petitioner alleges is that the County's continued granting of development permits without telling the Petitioner that the County changed its position regarding Petitioner being grandfathered. This Act presumes that the County changed its position, which was not proven, and therefore had a duty to so inform Petitioner, and did not inform the Petitioner. This series of events was not proven.

36) The last acts consist of Petitioner's assertion that there were "repeated communications" by "Code" to Petitioner stating that it was "grandfathered" combined with the fact that there was never an enforcement action filed until the 2020 enforcement action. ("LACK OF ENFORCEMENT")

a) George Maupin, Zone Ops manager for LI (Large Industries) Onsites, stated:

Q. · Okay. What have all the other plant managers that you've spoken with, what have they told you with respect to County's position?

A. So I know Jim Haines, the plant manager back in 2013 when I was coming here; then we got Stacy Michaels (phonetic 00:48:16) that was there after he retired; and every one of them, that's what they -- every time that I've been here, everything that I've always been told is we're under the grandfather clause; that we don't have to worry about the DVB or the noise.

And Code would come out and tell us every time, they would come up, they would tell us that we got another complaint; somebody's complaining across the road that you all are too loud. Is there anything you all can do? We understand you're under the grandfather, but is there anything you could do to help us out?
And we'd tell them, you know, the only thing we could do is what we're doing now. We can't quiet the plant on a -- where the plant's running.

Testimony, December 1, 2023 pp. 127-128.

37) Hearsay can be admissible in a vested rights hearing before the Special Magistrate. However, in many places, Mr. Maupin's testimony was vague, uncorroborated or contradicted.

a) Mr. Maupin most emphatically identified Brian Lock was one of the Zoning Officers who came out for a noise complaint and spoke to him personally, where the others spoke to his reports. Testimony, December 1, 2023 p 129.
b) When asked again, he was 99% sure it was Brian Lock. Testimony December 1, 2023 p. 145.
c) Current Assistant Director for Planning and Development, Brian Lock testified he was involved in the investigation of noise complaints against Petitioner in 2013 and again in 2018. Lock testified that he never told Mr. Maupin that Petitioner was "grandfathered" from any Brevard County Code requirement. Testimony December 1, 2023 pp. 158

d) Maupin was Petitioner's sole employee to testify at the hearing and served as Petitioner's corporate representative. He is not a corporate officer, and he testified that all of the improvements or expansions discussed at the hearing, would have needed approval by people that are higher Mr. Maupin; only a VP or higher would have authority to expand plant. Testimony December 1, 2023 p 140.
e) Although Maupin has worked for Petitioner for 28 years, he only started working at the Merritt Island facility in 2012. Maupin said he happened to be at the plant in September, 2013 when "they come up to us and said there was a complaint about our noise. And they ask us if we could quiet it down." He stated they were told that "we had nothing to worry about and just can we do it because we was under the grandfather clock of the loud and noxious noise."
f) For the reasons in this section, Maupin's testimony alleging repeated communications was not supported by a preponderance of the evidence. Much of Mr. Maupin's testimony was unconfirmed and/or hearsay and the most specific parts were refuted by the testimony of Zoning Official Brian Lock, whom Maupin identified as coming out to the Facility. Maupin did not specify who told to him what and when he was told.

To summarize, Petitioner bases its claim for vested rights on the following acts:

1. NOTE FOR YOUR FILE ON PERFORMANCE STANDARDS drafted by Bobby Bowen
2. YOUNEY LETTER written by Code Officer Denny Long
3. LONG'S NOTES to himself made during investigation of Youney's Complaint
4. CONTINUED PERMITTING
5. LACK OF ENFORCEMENT BY COUNTY

Common sense dictates that every word that was ever spoken or written by every government employee cannot constitute an act. But even assuming that all of the substantiated allegations constitute "acts," Petitioner must demonstrate that it actually relied on these acts and relied in good faith. It is common sense that reliance cannot be retroactive.

Was there good faith reliance on the County's acts or omissions?

ACTUAL RELIANCE

38) Petitioner presented no evidence that it had knowledge of the YOUNEY LETTER. Nor was there evidence of awareness of the internal NOTE FOR YOUR FILE regarding the Jones/Scott exchange prior the exchange of discovery documents related to this Petition For Vested Rights filed in 2020. Therefore, Petitioner could not have relied on the YOUNEY LETTER or NOTE FOR YOUR FILE, in the years before this litigation was initiated.

a) George Maupin, Zone Ops manager, was the only employee of Petitioner who testified at the hearing. Mr. Maupin testified that the first time he saw Youney Letter (Petitioner's Exhibit 37-013) was at the first day of testimony of the Petition for Vested Rights hearing held on 11/30/23. Testimony December 1, 2023 p 155. Mr. Maupin had no personal knowledge that it had been seen by anyone else employed by the Petitioner. Testimony December 1, 2023 p 155-156.

b) Petitioner did not explain how an undated memorandum reviewing a conversation (the Jones/Scott exchange) that occurred in 2003 could be relied on, when Petitioner did not learn of their existence until after 2020. Logically, these could not have impacted decisions Petitioner made prior to 2002 to purchase the develop the Property and subsequently seek changes to the legal status of the site to allow for future upgrades and expansion. There were also numerous other business decisions made to replace, repair, improve the Facility from the time of zoning changes until it learned of the NOTE FOR YOUR FILE and YOUNEY LETTER in the discovery connected to the vested rights claim.

WAS THE RELIANCE IN GOOD FAITH?

39) Petitioner has the burden of demonstrating both actual reliance and that the reliance was in good faith. To rely on something in good faith, there must be a reasonable, rational basis to do so. When there is well-documented history of communications, applications, hearings that all demonstrate that Petitioner agreed to be bound by current and future noise performance standards, reliance on the "acts" cited by Petitioner is not plausible.

40) The timeline and context of all the "acts" is that they occurred after Petitioner was informed, multiple times at multiple stages of the Rezoning, FLUM Amendments, CUP application, BDP, Site Plan, Zoning prep that the changes they sought would result in the loss in their non-conforming status. Petitioner agreed that, going forward, by seeking rezoning, entering the BDP, obtaining the CUP, filing the site plan, that it would be subject to current noise performance standards. Below is a review of official documents and events in the record, that Petitioner did not appear to factor seriously when coming to the conclusion that it was grandfathered.

a) In the CUP application worksheet, underneath the dba table, Petitioner/applicant had typed: "The new facility is expected to emit lower maximum sound pressure than the existing facility." County Exhibit 2D, page 8.

b) When asked if these words meant that the property owner did not agree to be governed by these performance standards, Mr. Caulkins testified that he believed the Code required compliance with the decibel standards, and that the CUP requirements could not be waived by an applicant's reply in the CUP worksheet.

Testimony, December 1, 2023 p. 57.

c) At a minimum, this form demonstrates that Petitioner was aware of the relevant legal standards. There is no mention of grandfathering, vested rights or other exemption to the requirements of the application.

There was no testimony at the hearing that an applicant could exempt itself from the requirements stated in the worksheet or that Petitioner received any exemptions from the standard CUP process.

b) Mr. Caulkins also testified in reference to the BDP: paragraph 6 says that the owner and developer will comply with all regulations and ordinances of Brevard County. Testimony, December 1, 2023 p. 57.

Petitioner argued that compliance with "all regulations and ordinances of Brevard County Florida" means compliance only with "applicable" regulations and ordinances.

Petitioner's novel interpretation posits that conformity with the requirements of the CUP is left to the discretion of an applicant to determine what is "applicable." This reading of the paragraph 6 of the BDP would allow applicants to set their own rules for compliance and lead to regulatory chaos.

c) Petitioner was also notified that it would have to comply with the noise performance standards in the future on statements made at separate public hearings by Zoning Manager Rick Enos at the Planning and Zoning Board and Assistant Zoning Manager Robin Sobrino at the NMIB Meeting.

1) On July 8, 2002, the Planning and Zoning Board, sitting as the Local Planning Agency, heard Petitioner's request for a Small Scale Plan Amendment to the FLUM designation from Planned Industrial to Heavy/Light Industrial. Scott Doscher, Kimley-Horn and Associates was present on behalf of Petitioner.

County Exhibit 2E, p. 2.

The minutes of the July 8, 2002 hearing indicate that Kim Zarillo, Zoning Board Member, asked if the Facility would be governed by performance standards.
Rick Enos, Zoning Manager, said, on the record, it would. County Exhibit 2E, p. 2.

2) Robin Sobrino, Brevard County, Assistant Zoning Manager, spoke multiple times at the July 18, 2002 NMIB Meeting about Air Liquide's current status and the effect of their efforts to changes their status. County Exhibit 2E pp. 7 and 11.

Scott Doscher, with Kimley-Horn and Associates, was recorded in the minutes as attending on behalf of Petitioner.

d) Petitioner did not explain why it can rely in good faith on the exchange referenced in the NOTE FOR YOUR FILE, when it was put on notice 16 years prior, via its agent Scott Doscher in his handling of the CUP application, Zoning Changes, Site Plan, and statements made at the North Merritt Island Dependent Special District Board Meeting July 18, 2002, the July 8th Planning and Zoning Meeting all served to inform and notify Petitioner that it would lose its "grandfathered" status.

e) Mr. Caulkins testimony confirmed this view of the proceedings that applicable standards at the time were the performance standards. Testimony December 1, 2023, pp 89

Q: We are agreed that the way the code works is the new standards apply only to the new stuff that's added on there. The old stuff stays as it was, right?
A: I believe that the code is implemented where when they come in for compliance and the grandfathering is removed, then they are complying with the standard in place. Testimony December 1, 2023, pp 67-68

Mr. Caulkins elaborated:

"So, with Mack Asphalt, we don't know that they've expanded. We don't know that they didn't expand..... I believe it was 2002 or 2000 -- the public hearing -- there was testimony by the Rick Enos that said that Air Liquide would have to comply with all the performance standards in place at the time.

And then there is testimony also by Robin Sobrino, that says that Petitioner was considered nonconforming and then they needed that application to become conforming and that – so it is my opinion and when Air Liquide came in and made their property conforming, that they lost their, what would be considered to be grandfathered because at that time the performance standards in place would apply. · By the agreement here in this binding development plan and by the code."

Testimony, November 30, 2023, pp 132.

> "I don't think that we're saying that you don't have the right to seek vested rights. That's why we're here today. What I believe that this provision says is that Air Liquide along with any other binding development plan, is subject to future code requirements as they come into place, and it does not -- it does not provide a

vesting to be static with the existing code that was in place at the time."

Testimony, November 30, 2023, p. 142.

f) Petitioner presented no evidence that its decision makers ever knew of the NOTE FOR YOUR FILE containing the Jones/Scott exchange or considered it relevant to their business. There was no evidence that Petitioner was aware of this document until this Vested Rights Petition was filed. If NOTE FOR YOUR FILE can be relied on to mean that County Attorney Scott Knox and Planning and Zoning Director Mel Scott believed that Petitioner should be grandfathered from performance standards, then why did Zoning Officials Robin Sobrino and Rick Enos state the opposite when the issue came up? Petitioner did not address why the internal NOTE FOR YOUR FILE could be relied on, but the public, contemporaneous statements of the Zoning Officials carry no weight.

g) Relying on the absence of prior enforcement proceedings against Petitioner does not support a claim of vested rights. The logical extension of Petitioner's argument would support a claim of vested rights by all first time recipients of a Notice of Violation. In *Hernando County Board of County Commissioners v S.A. Williams Corp*, 630 So. 2d (Fla 5th DCA 1993), Rev Denied, 630 So. 2nd 111 (S CT FL 1994), the County itself was one of the users of a landfill that began operations without satisfying the preconditions of its approval to operate. These violations were not detected until 4 years later. This delay was found to be legally insignificant.

To summarize, Petitioner's reliance does not encompass the fuller picture of all the relevant acts demonstrated at the hearings. This selectivity means its reliance was not in good faith, because it fails to incorporate the numerous official acts that make its reliance unreasonable.

Has Petitioner shown how it substantially changed its position in reliance upon the act or omission?

41) A retired manager employed by Petitioner, James Haines, signed an affidavit stating that it was "our understanding that the plant was allowed to operate under the pre-2003 noise standards which only prohibited 'loud and raucous' noises, and we never would have violated that as the

sound coming out of the facility was smooth, uniform and continuous. Not loud and raucous." Haines stated: "We spent money in reliance on our ability to operate the plant under the prior noise standard. If we had known a higher noise standard applied, I am not sure Air Liquide would have spent the money the way that it did. "

The Haines' affidavit stated only that he was "not sure" Petitioner would have spent the money the way it did. Mr. Haines did not specify how much was money was spent, when it was spent and what it was spent for.

Mr. Maupin did not clearly establish a change in position by Petitioner. Maupin mentioned that over one hundred million dollars was expended by Petitioner since learning they were grandfathered in 2013. But he also stated that Petitioner spent $75 million. He said they spent over $20 on maintenance last year and planning to spend $20 million more.

Maupin did not explain how he knew what management had spent in reliance on the grandfathered status or how much less they might have spent if they knew they were obligated to follow noise performance standards. Testimony December 1, 2023, pp 131-134.

Mr. Maupin was asked to explain the large expenditures:

Q. Because we have serious commitments to both NASA and the community, right?

A: Right.

Q. And we take those seriously, don't we?

A. Yes.

Testimony, December 1, 2023, p. 133.

Did Petitioner demonstrate that granting the vested right will not create imminent peril to public health, safety or general welfare of the residents of the county?

42) The burden is on Petitioner to prove by a preponderance of substantial competent evidence that granting the vested right will not create imminent peril to public health, safety or general welfare of the residents of the county.

43) Petitioner introduced evidence from its noise expert John Dolehanty. He stated: "The sound present to the south of the residential receivers. There is no health safety impact." He also stated the sound is not "loud and raucous." Testimony, December 1, 2023 pp. 101-102. Mr. Dolehanty did not indicate if he had spoken to any of the neighbors.

44) During the public comment portion of the hearing, seven individuals who lived near the Facility testified how the sound emanating from the plant has serious negative effects on their health and welfare and the health and welfare of their families.

45) The sound levels were described as excruciating, unbearable, stressful, horrendous and unnatural. The noise levels and frequency interfered with the residents' use and enjoyment of their homes and property. As a result of the noise, the neighbor's testified to experiencing hearing loss, stress, loss of sleep, anxiety and depression. One man said that the sound is so loud in his home that he and his wife can only watch television outdoors on the patio because the sound is too loud to watch in the house. Other individuals testified that they cannot use their yards to garden, play with their children or pets. A man whose daughter has epilepsy stated she cannot be outdoors when the plant is running.

In considering public health, safety or general welfare of the residents, the ordinance does not ask when the affected residents purchased their property, whether the residents ever participated in efforts to rezone their property, or if they had knowledge of the noise levels emanating from the Facility prior to purchasing their property.

Petitioner's immense importance and value to the community is not in dispute, but it is not a factor in the ordinance criteria for the granting of vested rights. There is no evidence that the County is trying to shut down the Facility.

46) The record reflects that negative health effects are already occurring, so that if vested rights were granted, further negative effects would be imminent.

47) Petitioner has not shown by a preponderance of evidence that there are not public health, safety and welfare concerns sufficient to justify the denial of this petition of vested rights.

CONCLUSION

Petitioner oversimplifies the historic record and legal issues by asserting that this case is about "fairness." Vested rights are an equitable concept, but there are specific criteria for vested rights detailed in the Brevard County Code of Ordinances.

Petitioner has not met its burden of showing that it acted in good faith reliance on any acts or omissions of the County or shown how it substantially changed its position based on this reliance. Finally, Petitioner has not demonstrated that granting the vested right will not create imminent peril to public health, safety and welfare.

RECOMMENDATION

Based upon the foregoing factual circumstances of this case and the conclusion that Petitioner has not met its burden of proof under Section 62-507 of the Brevard County Code , it is hereby RECOMMENDED THAT the Petition for Vested Rights be DENIED.

DONE AND ORDERED on this 8th day of April, 2024.

VESTED RIGHTS SPECIAL MAGISTRATE
BREVARD COUNTY, FLORIDA

Julie Harrison

Special Magistrate

CC: Counsel of Record

akerman

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Suite 2300
Houston, TX 77056

T: 713 623 0887
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May 7, 2024

Hon. Jason Steele
Brevard County, Florida
Board of County Commissioners
2725 Judge Fran Jamieson Way
Viera, FL 32940

VIA E-MAIL (morris.richardson@brevardfl.gov)

Re: Air Liquide Vested Rights Petition Hearing

Dear Chairman and Commissioners:

We represent Air Liquide Industries, Inc. ("Air Liquide"), in its Vested Rights Petition (the "Petition") relating to its nitrogen and oxygen production plant (the "Facility") located at 7007 N Courtenay Pkwy, Merritt Island, Florida 32953 (the "Property"). We write to provide support for granting the Petition, and to also formally request that the Board of County Commissioners ("BCC") consider tabling this matter under Rule III.A.(6) pending an agreement between all interested parties to allow Air Liquide to construct a proposed 400-foot long, by 14-foot tall, noise barrier (the "Barrier")[1] along the north side of Courtenay Parkway to resolve this issue to the benefit of all interested parties.

1. **The Air Liquide Facility is Essential to the Safety, Welfare and Prosperity of the Local Community, Brevard County Economy and the Space Coast.**

First, it is important to understand that the Facility has been in operation for almost 60 years, working in the same fashion and producing the same products since 1968. It uses compressors and cryogenic processes (essentially, very cold pipes) to produce both nitrogen and oxygen out of the ambient air. That's it – there are no hazardous chemical processes, no reactor or explosive oriented elements, nothing that could harm the environment. The feedstock at the Facility is just air, and the end product is just liquified nitrogen and oxygen that is pulled out of that air.

Air Liquide is the sole source for high pressure nitrogen to NASA at the Kennedy Space Center *via* a direct pipeline system pumped from the Facility. Nitrogen is one of the few totally inert gases known to man (which means that it prevents and inhibits explosions). Thus, NASA uses Air Liquide's nitrogen to blanket both launch pads and rocket vessels prior to launch to prevent them from inadvertently exploding. To put it bluntly, Air Liquide's nitrogen keeps the launch pads and rockets from going "boom," exploding prematurely and potentially causing catastrophic damage and loss of life. Air Liquide's nitrogen is therefore a critical and essential safety tool at the Kennedy Space Center.

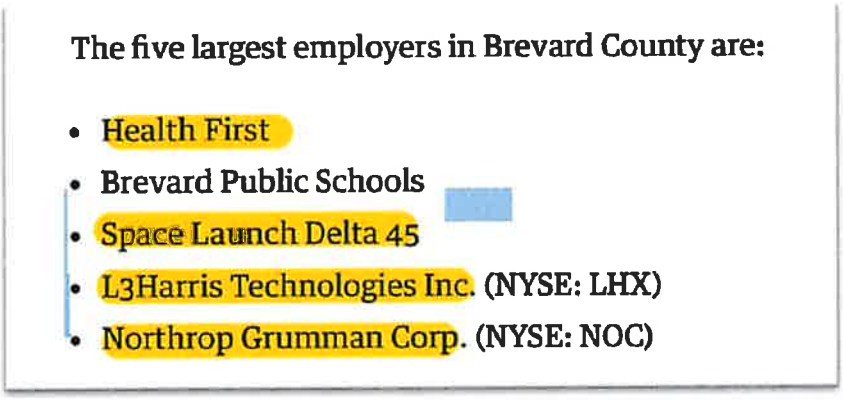
[1] A copy of the Preliminary Noise Barrier Proposal is attached as **Exhibit 1**.

Again, Air Liquide is the sole source for that nitrogen– without Air Liquide's Facility, the rockets simply cannot launch; and, if they did, then they could accidentally explode causing massive damage and injury.[2] In fact, NASA has awarded Air Liquide numerous laurels memorializing just how essential the Facility is to their launch program over the last 50 years.[3]

Air Liquide is also the main source for purified oxygen to the Brevard County hospitals and health systems.[4] During the COVID pandemic, Air Liquide provided almost 90% of the oxygen that kept patients in Brevard County alive – Air Liquide even curtailed its other customers so that it could supply the local hospitals as a top priority. Without a steady, local supply of purified liquid oxygen, the Brevard County Health System could not operate and, if it did, it would be unreasonably dependent on the shipment of medical grade oxygen from air separation facilities hundreds of miles away.

To summarize, without the Facility NASA cannot launch at the Kennedy Space Center, and Brevard County hospitals cannot function. People could die, the economy would be damaged and rockets could explode without the nitrogen and oxygen that Air Liquide produces at the Facility.

Finally, in providing those products, Air Liquide also supports four out of the five largest listed employers in Brevard County: Health First, Space Launch Delta 45, L3 Harris Technologies and Northrop Grumman Corp.[5]:



The five largest employers in Brevard County are:

- Health First
- Brevard Public Schools
- Space Launch Delta 45
- L3Harris Technologies Inc. (NYSE: LHX)
- Northrop Grumman Corp. (NYSE: NOC)

The Special Magistrate noted how essential and critical Air Liquide's Facility is to Brevard

[2] Hearing Transcript (vol. 1 & 2) Excerpts, attached as Exhibit 2, vol. 2 at p. 171.

[3] Pictures of NASA awards, attached as Exhibit 3.

[4] The oxygen is produced as a by-product of the nitrogen production process, not as part of an independent manufacturing process resulting in any additional noise.

[5] List of top Employers in Brevard County, attached as Exhibit 4. Health First relies on the Facility for all of its oxygen needs. The following businesses purchase nitrogen from the Facility to operate spaceship launch operations: Space Launch Delta, L3Harris Technologies, Inc., Northrup Gruman, NASA Kennedy Space Center, and Lockheed Martin. *See also*, Hearing Transcript, vol.2, p. 121.

County and the community as a whole. And to be certain, Air Liquide's Facility operated almost 30 years before anyone ever moved to the area and built a house (right next to the Kennedy Space Center, mind you, where no one should reasonably expect peace and quiet while rockets are exploding into space).

There is, also, no dispute here that each of those houses moved to the Facility – neither Air Liquide nor the Facility moved to them. Those residents, in fact, testified that the noise level from the Facility **is quieter** than normal traffic coming down Courtenay Parkway.[6] The Facility, therefore, is less disruptive than a semi-truck coming down the road.

In sum, to be absolutely certain, the Facility has not gotten any louder since 1968.[7] The issue here is the frequency of Kennedy Space Center launches in the last several years. For fifteen years (around when residents started purchasing their property and building houses), there were almost no launches from the Kennedy Space Center – then, in the last decade, all that reversed course and the Space Coast is literally and figuratively booming.[8] That is important because the Facility maintains a strict NASA "on demand" protocol called the Launch Safety System (the "LSS"). Essentially, if NASA schedules a launch, the Facility must run at full capacity in LSS mode for several days in a row (with backup pumper trucks in case of an emergency explosion requiring extra nitrogen to put the fire out) to keep constant high pressure on the pipeline to meet all NASA needs. That is when the Facility is allegedly "loud." Air Liquide lacks any control whatsoever over that operation: when NASA calls, Air Liquide must run the LSS – there is no choice.[9]

Thus, nothing has changed at the Facility except that NASA is requiring Air Liquide to run the LSS more often. That is it. Air Liquide cannot control NASA's requirements, and if it could, there are serious health safety and welfare risks (setting aside the fact that federal preemption would likely tie Air Liquide's hands) in doing so. Rockets would not launch, or even worse they could explode. The Space Coast economy could not operate. Local hospitals could not keep patients alive without purified oxygen. In short, the Facility is essential to Brevard County, and it has been since 1968.

2. <u>Air Liquide Satisfied the Vested Rights Elements.</u>

Legally speaking, the elements for a vested right are: (1) an act or omission by the County; (2) Air Liquide relied upon that act or omission to change positions or expend money; and, (3) the vesting will not create imminent peril to public health, safety or general welfare of the residents of the county.[10] Each of those elements were satisfied in this situation. Here, the County took at least three actions and

[6] *See* Exhibit 2, Hearing Transcript, vol.2, p.99, l.16-l.21; vol.2, p.101, l.25-p.102, l.2.

[7] *See* Exhibit 2, Hearing Transcript, vol.2, p. 124-5 (Q.· ·Okay.· Do any of those improvements emit any sound that is appreciable in relation to the normal operations? A.· ·No.· No.· If anything, we have made it quieter because of the upgrades and how we have modified the pumps and those things).

[8] Hearing Transcript vol. 2, p. 183 -- Ms. Elliot, attached as Exhibit 2.

[9] Hearing Transcript vol. 2, p. 123 – Mr. Maupin, attached as Exhibit 2.

[10] Section 62-507(d), Brevard County Land Development Code.

omissions, which Air Liquide relied on to change its position such that it would be highly unjust or inequitable to now destroy Air Liquide's rights.

a. First Act or Omission/Reliance: The County's official position was that Air Liquide was vested or grandfathered under the loud and raucous standard:

In late 2002, Air Liquide's neighbors at the Facility pursued a future land use map amendment and rezoning of their properties to change from industrial land use and zoning designations to residential. According to the State, that was a bad idea.[11] Air Liquide submitted formal objections to the neighbors' request to the State, including a letter dated November 22, 2002.[12] In short, both the State and Air Liquide stated that residential next to the Facility would be incompatible.

It is no coincidence then that just three months later, on February 27, 2003, the Zoning Official for the County, Scott Knox, advised Terri Jones, Assistant County Attorney, that businesses that are older than the enactment of the noise performance standards are grandfathered. "In other words, loud and raucous applies to properties prior to the enactment of the noise performance standards. Properties that came into existence after that date fall under the db meter readings."[13] That Zoning Official Action was "filed in the record [for] the business named Air Liquide, tax account number 2315322" and that property was therefore "considered under the old standard of loud and raucous noise **not** db meter readings:"

On Tuesday 12/11/18 at 6:35 AM, CEO Long arrived at property to perform noise test. From the road (traffic) in front of property line officer took twelve readings to average; average reading noted was 69.88 dba. Twelve readings in front of gate property line averaged reading was 65.97 dba. Brevard County Code Section 62-2271 maximum allowable sound pressure level for Industrial Use zone classification from 10 PM to 7AM is 65 dba. At 6:50 AM officer also averaged six readings from inside the community at D'albora Rd. and Margo Ln. average reading 54.2 dba. Research found note in record on Performance Standards for Noise was passed by the Brevard Board of Commissioners dated back to February 27, 2003 where the question was asked by then Assistant County Attorney Terri Jones "are performance standards grandfathered?" " say a business is older than the enactment of the noise performance standards. Is the standard just "loud and raucous" or do the db standards apply?" The Zoning Officials answered "Yes they are grandfathered and now we have two standards for old and new properties. According to note filed in record the business named Air Liquide, tax account number 2315322, property zoned IU (Industrial Use) would be considered under the old standard of loud and raucous noise not db meter readings. Case had already been discussed with management prior to the initial inspection. Since this is a case from the same complainant, officer will make call to named complainant to inform of findings (reference case 18CE-00916). Case pending.

Denny L. Long Sr.
Code Enforcement Officer I
Planning & Development Department
Brevard County Government Center

[11] *See* Exhibit 5, Letter dated January 17, 2003, from the Florida Department of Community Affairs to County; and, Memorandum from the East Central Florida Regional Planning Council, dated February 10, 2003.

[12] *See* Exhibit 5.

[13] *See* Exhibit 5.

Shortly after that note went into Air Liquide's file, the BCC approved the future land use map amendment for Air Liquide's neighboring properties from industrial to residential (based on assurances by the neighbors that they were aware of the Facility). Each of those neighboring residential properties stated that they had no problems with the noise at that time.[14]

That "note filed in the record" above – as put into action by the County's dismissal of noise complaint,[15] after noise complaint,[16] after noise complaint[17] – are the first "acts and omissions" at issue here. Based on the County's official position, the County systematically represented to the State, to Air Liquide and to the neighbors that Air Liquide is vested from the noise performance standard and the noise emanating from the Facility is not an issue. Code enforcement actions were terminated at the direction of the Chief Zoning Official, Robin Sobrino, based on the County's official position. For decades, the County took no action to put Air Liquide on notice that the performance standards applied to it or that the constant noise emanating from the Facility is "loud and raucous." The County's action - official position - was affirmatively communicated to Air Liquide by numerous County Officials over twenty (20) plus years.[18] And, Air Liquide reasonably relied upon that action in spending "hundreds of millions of dollars" at the facility "upgrading the LSS, [adding] new vaporizers [and] a new roof... pushing two and a half million into a C50 nitrogen compressor" and numerous other upgrades.[19] Air Liquide should be allowed to reasonably rely upon the County's action in placing that "grandfathered" note in its tax file stating that the "loud and raucous" noise standard applied.

For decades, the County continued to process permit applications, knowing Air Liquide was pouring hundreds of millions of dollars into the Facility to install improvements and to maintain the Facility. Based on this, Air Liquide has, since 2003, spent hundreds of millions of dollars to maintain and make improvements to the Facility; paid tens of thousands of dollars to the County for taxes and fees; spent tens of thousands of dollars on consultants to pursue permits to make improvements to the Facility; and entered into binding contracts with third parties such as NASA.[20]

[14] *See* Exhibits 6.

[15] *See* Exhibit 7.

[16] *See* Exhibit 8.

[17] *See* Exhibit 9 & 10.

[18] *See* Exhibit 2, Hearing Transcript, vol.2, p. 127 – 129 (Q. What else did they tell you? A. That we had nothing to worry about and just can we do it because we was under the grandfather of the loud and noxious noise. Q. Let's be very clear here. Code officials came out to the plant and talked to you, right? A. Right. Q. And what did they tell you with respect to not worrying about it? A. We was under the grandfather noise, that we did not have to worry about the complaint.).

[19] Exhibit 2, Hearing Transcript, vol.2, p. 132-33.

[20] It is important to note that decisions made by Air Liquide upper management was based on the understanding the Facility was operating in compliance with the law, *i.e.,* vested based on the "loud and raucous" standard. Had operational level staff been put on notice, that notice would have made it to upper management.

b. Second Act or Omission/Reliance: The County issued the CUP and site plan which Air Liquide's predecessor relied on to spend millions of dollars to construct permanent improvements on the Property:

Next, as noted above, the Facility has been in operation since 1968, doing the same thing it has been doing for almost 60 years: producing nitrogen and oxygen for 4 of the top 5 employers in the County.[21] The Facility received a Conditional Use Permit (the "CUP") in 2002 to allow for the expansion of certain building improvements (none of which make noise) in order to replace older equipment with more modern, updated equipment (which all testimony noted is, in fact, quieter).[22]

Based upon that CUP – and the County's position regarding the Noise Standards – Air Liquide spent millions to replace older equipment that was permanently affixed to the real property consistent with the approved site plan. In approving the CUP, the County represented (consistent with clear language in the County's Code): (i) the Noise Standards will not apply to pre-existing improvements; and (ii) the Noise Standards will apply to the expanded portion of the improvements, which in Air Liquide's case, did not consist of any new noise producing improvements. Air Liquide relied upon those acts and omissions in spending those funds to improve the Facility.

c. Third Act or Omission/Reliance: The County issued the Certificate of Occupancy as a confirmation that the permanent improvements were approved:

Third, all of the additions to the Facility were constructed consistent with the County approved site plan (which was approved by the County as consistent or in compliance with the CUP), as confirmed by the County through the issuance of a Certificate of Occupancy. Air Liquide relied on the CUP, approved site plan, and Certificate of Occupancy to value the Facility at $17M, the majority of which was based on the business operation resulting from the new or replaced improvements and which were well in excess of the true value for the Property.

d. There is no Imminent Peril to Public Health, Safety, or Welfare from the Facility:

Finally, the Facility does not cause any peril to the public health, safety or welfare – it has been in operation in the same manner for almost 60 years. The noise emanating from the Facility has existed in the same capacity since at least 2003, and that same noise cannot, overnight, cause imminent peril to the public health, safety or welfare. Further, per testimony during the hearing by County staff, Air Liquide's expert, and members of the community, the noise from cars coming down Courtenay Parkway

[21] *See* Exhibit 4. Health First relies on the Facility for all of its oxygen needs. The following businesses purchase nitrogen from the Facility to operate spaceship launch operations: Space Launch Delta, L3 Harris Technologies, Inc., Northrup Gruman, NASA Kennedy Space Center and Lockheed Martin. *See also*, Hearing Transcript, vol.2, p.121.

[22] *See* Exhibit 2, Hearing Transcript, vol.2, p. 124-5 (Q.· ·Okay.· Do any of those improvements emit any sound that is appreciable in relation to the normal operations? A.· ·No.· No.· If anything, we have made it quieter because of the upgrades and how we have modified the pumps and those things.

is louder than the noise emanating from the Facility. Therefore, the Facility cannot possibly cause any imminent peril.

The Facility's operation is consistent with operations expected for an industrial area. As noted above, in 2002 Air Liquide's neighbors pursued a future land use map amendment and rezoning of their properties to change from industrial land use and zoning designations to residential. According to the State, that was a bad idea as the proposed residential use was "incompatible" with the Facility's industrial use.[23] Air Liquide submitted formal objections to the neighbors' request to the State, including a letter dated November 22, 2002.[24] At the time the BCC approved the future land use designation amendment and rezoning to residential, Commissioner Pritchard analogized future purchasers of the adjacent residential property to purchasers "buying next to an airport and complaining about airplanes." Everyone knew what they were getting and cannot now be heard to complain too loudly.

In any event, it is the possibility of shutting the Facility down that will cause imminent public health, safety, or welfare. The Facility produces nitrogen for the space industry to ensure safe launches – as the witnesses testified, without Air Liquide, the rockets will go "boom" and kill people[25] – and the facility produces purified oxygen for hospitals to treat the most vulnerable members of the community. It is an integral business for 4 of the top 5 employers for the County. Shutting the Facility down will not only create safety issues for space launches and leave vulnerable members of the community without proper oxygen but would result in tremendous negative economic impact for the County.

3. Air Liquide's Request to Table the Issue and Install a Noise Barrier.

All of that said, Air Liquide has always desired to be a good neighbor and citizen of Brevard County. It values this community and wants to continue providing essential nitrogen to the Space Coast and purified oxygen to the local hospitals. Air Liquide is eager to find a solution that makes all interested parties happy.

Thus, even though Air Liquide believes that it has more than satisfied the elements for a Vested Right as to the Noise Standards, it would prefer to avoid continued litigation, formal takings claims, more code enforcement actions and the various other proceedings that will drive up costs and fees for both Air Liquide and the County. Truth be told, none of that will ever make all the parties happy at the end of the day – and that is the goal of compromise.

Air Liquide, therefore, commissioned and is proposing the attached rendering for the construction of an additional barrier wall at Air Liquide's expense. Air Liquide requests the BCC temporarily table this matter under Rule III.A.(6) to allow Air Liquide and any interested parties to negotiate an agreement for the construction of the wall, and to construct that wall, in order to avoid continued and protracted

[23] *See* Exhibit 11, p. 44, Letter dated January 17, 2003, from the Florida Department of Community Affairs to County; and Exhibit 58-048, Memorandum from the East Central Florida Regional Planning Council, dated February 10, 2003

[24] *See* Exhibit 11.

[25] Exhibit 2, vol. 2, at 171.

litigation on these issues. The Facility is integral to the community and discontinuing its operation would not be in the best interest of Air Liquide, the County, or the community. Neither, for that matter, will continued litigation.

Thus, it would be better for all stakeholders to sit down and work out a compromise to build a noise barrier that will satisfy the County and the residents in the area. Air Liquide requests that this issue be tabled for a brief period to work out that agreement, construct the noise barrier and attempt to resolve this issue to everyone's benefit without the need for further litigation.

Finally, just as a house keeping matter, Air Liquide is requesting the entire record submitted for the Special Magistrate proceeding be included in the record for the BCC May 21, 2024, proceeding.

Respectfully submitted,

James E. Rogers
Carolyn R. Haslam
Thu Pham
AKERMAN LLP
420 S. Orange Avenue, Suite 1200
Orlando, FL 32801
Phone: (407) 423-4000
Fax: (407) 843-6610

cc: Air Liquide
Commissioner Hon. Rita Pritchett (Vice Chair), via email D1.Commissioner@BrevardFL.gov
Commissioner Hon. Tom Goodson, via email D2.Commissioner@BrevardFL.gov
Commissioner Hon. John Tobia, via email D3.Commissioner@BrevardFL.gov
Commissioner Hon, Rob Feltner, via email D4.Commissioner@BrevardFl.gov

SHERIFF WAYNE IVEY

BREVARD COUNTY SHERIFF'S OFFICE

May 6, 2024

Brevard County Board of Commissioners
Via email to: hearingoffice@brevardfl.gov

RE: Support for Special Magistrate Julie Harrison's Proposed Vested Rights Order

Dear Commissioners.

On behalf of the citizens of Brevard County who look to the Sheriff's Office to enforce the laws, ordinances, and rules that the Commission and Legislature have determined are essential for order and peace within the community, I write to voice support for your adoption of the Proposed Order that Special Magistrate Julie Harrison issued on April 8, 2024, regarding the Petition for Vested Rights filed by Air Liquide Large Industries, US, lP.

The Sheriff's Office is responsible for receiving and investigating complaints regarding the facility at issue in this decision. As Special Magistrate Harrison noted in paragraphs 44-47, the sound emanating from the plant "**has serious negative effects**" on the health and welfare of the families in our community. The sound levels are in fact "**excruciating, unbearable, stressful, horrendous and unnatural.**" *Proposed Order* pg. 22. Our deputy sheriffs have been unable to take any enforcement action while this matter has been pending for a vested rights determination.

To empower impacted Brevard citizens and BCSO deputies to address this issue should it continue to violate the noise ordinance, I support your adoption of the Order denying vested rights.

Thank you for your consideration of this concerning matter.

Sincerely,

Wayne Ivey

WAYNE IVEY
Sheriff of Brevard County

Air Liquide Noise Issue

Bbauerktm <bbauerktm@aol.com>
Fri 19-Apr-24 7:36 AM
To:HearingOffice <hearingoffice@brevardfl.gov>

1 attachments (14 KB)
Air Liquide Doc.docx;

Good Morning,

Please see attached letter/comments regarding Air Liquide noise issue.

Thank you,

Respectfully,

Brian Bauer
6488 Nunzio Lane,
Merritt Island, FL 32953

TO: Board of County Commissioners of Brevard County

FROM: Brian Bauer

SUBJECT: Air Liquide, Merritt Island, FL. Noise

DATE: 18 APR. 2024

The purpose of my writing at this time is to point out the excessive noise created by Air Liquide located at 7007 N. Courtenay Pkwy, Merritt Island, FL 32953. I am a home owner at 6488 Nunzio Lane Merritt Island, approximately .8 mile from the Air Liquide facility. I purchased the home in 2011, nine years before the major expansion to Air Liquide in 2020/2021.

The noise from Air Liquide has increased dramatically when the plant expanded in 2020/2021. The noise duration is constant at 24 hours per day, 7 days a week, to include holidays. The excessive noise also effects our ability to sleep. As an employee in the aviation industry serving our country, I am expected to work and travel at various times of the day/night. The noise violates this right to sleep, because the noise ordinance created by our local governments are not adhered to or complied with by Air Liquide.

Currently, the excessive noise has also placed an enormous strain on our family, friends, and overall quality of life. Our house used to be a gathering place for holidays, special occasions, and family gatherings. Due to the noise, this is no longer a consideration. The family and friends chose other options because of the noise.

The noise from Air Liquide defined; it is unwanted, unpleasant and it causes disturbances. The continual exposure to noise can cause stress, anxiety, depression, high blood pressure, heart disease, hearing loss, and many other health problems to people, and wildlife.

The noise from Air Liquide requires mitigation for continued operation. The hours of operation should be that consistent with local government ordinances that everyone else must adhere to. The sounds of tractor trailers, reverse beepers, and air horns at 0500 hours is not acceptable. The continuous roar of Air Liquide during all hours of the day especially at 0200 hours is not acceptable.

I have contacted the Brevard County Sherriff's Office on numerous occasions for the complaint of excessive noise generated by Air Liquide. The time of day these calls were made violates the quiet hours every community should have protected, and not violated. Reference; U.S. EPA Clean Air Act Title IV-Noise Pollution.

Thank you for the opportunity to express and share my thoughts, and disappointments on the excessive noise issue generated by Air Liquide, and thank you to the Brevard County Sherriff's Office.

Question: Based on the construction, and expansion of Air Liquide; noise impacts to community, people, and wildlife; was an Environmental Impact Statement, and or feasibility study conducted?

Respectfully,

Brian J. Bauer Brian J. Bauer

6488 Nunzio Lane, Merritt Island, FL 32953

Re: COURTESY NOTICE

Martin & Sylvia Boyd <mjbsyb@gmail.com>
Fri 19-Apr-24 2:38 PM
To:HearingOffice <hearingoffice@brevardfl.gov>

To: Brevard County Commissioners,

In response to the notice of Air Liquide public hearing I am submitting a written response to the application of vested rights determination.

As a local resident who lives approximately 1,600 feet from the facility I can attest that Air Liquid no longer has a vested rights to the area. Over the past few years the facility has had significant modifications in order to provide services for the increased demand of the space center. The modifications include the addition of storage tanks and a new evaporation system. This equipment now produces excessive noise when venting gas and the operation of the evaporator system. This noise is well beyond the original capability of the facility exceeding 70 db(A) levels for extended periods of time. These noise levels are at nuisance levels well beyond the code and are conducted for continuous hours/days.

As the commissioners are well aware the code for residential areas is 60 db(A) from 7 am to 10 pm and 55 db(A) from 10 pm to 7 am. In reviewing the correspondence, many recorded violations have been taken from these areas exceeding these values. Documentation also reveals that Air Liquide is also in violation to the local (on property) industrial levels from 10 pm to 7 am at 65 db(A).

To my knowledge Air Liquide was notified of the violations and has done nothing to bring the facility into compliance, reference case number 18CE-02322 on August 22, 2019. Latest recorded violations were Oct 28, 2022 exceeding 73 db(A). This is 18 db(A) over the limit with an exposure time of 24 to 48 hours.

In addition I would also like to question the validity of the facility being classified as industrial. Air Liquide provides a commercial service to the space center. If it is classified as a commercial facility the noise restriction aligns more closely to the residential properties that surround the facility.

As a resident I request that the brevard county board of commissioners enforce the county regulations. As the launch rate increases and larger rockets are brought to the area for processing the violations will be more frequent for extended periods of time. Our neighborhood will be exposed to noise levels greater than 70 db(A) for multiple days/weeks depending on flight vehicle processing requirements. Air Liquide should make all efforts to contain the nose during all government and commercial support activities.

Sincerely,
Martin Boyd

On Mon, Apr 15, 2024 at 4:02 PM HearingOffice <hearingoffice@brevardfl.gov> wrote:

COURTESY NOTICE
PUBLIC HEARING RE: VESTED RIGHTS PETITION OF AIR LIQUIDE LARGE INDUSTRIES US, LP.

Dear Property Owner:

Please be advised the Board of County Commissioners of Brevard County, Florida, will be conducting a Public Hearing to consider the application for a vested rights determination filed by Air Liquide Large Industries US, LP. The Public Hearing will take place on May 21, 2024 at 9:00 a.m. at the Brevard County Government Complex, 2725 Judge Fran Jameson Way, Melbourne, FL, Building C, Commission Chambers (first floor).

Air Liquide Large Industries US, LP asserts that that the business operation(s) currently being conducted at 7007 N. Courtenay Parkway, Merritt Island, FL 32953 is vested from the application of County regulations governing noise standards.

You are being notified of this hearing because our records reflect you may have previously participated in this proceeding or a related matter. Pursuant to Section 62-507, Brevard County Code of Ordinances, "any party, staff, or person wishing to submit written argument in support of or against the proposed order must submit written argument at least 14 days prior to the date upon which the proposed order will be considered." As such, should you like to submit written arguments to be considered in this proceeding, please submit the comments no later than 5 p.m. on May 7, 2024. Arguments can be submitted by email to HearingOffice@BrevardFL.gov or by mailing to:

Hearing Office
Planning & Development Department
2725 Judge Fran Jamieson Way #A114
Viera, Florida 32940

If you are submitting arguments via mail, please be aware that we will be unable to accept it if received after May 7, 2024, so consider handling time by the postal carrier.

Please note that while the hearing on this application is open to the public, the Board of County Commissioners are not permitted to accept oral comments during the proceeding, except from the parties to the case. As such, the procedure for the submission for **written comment is the only remaining avenue for the Board to consider an argument made by a non-party citizen**.

For your convenience, a copy of Section 62-507, Brevard County Code of Ordinances is attached/enclosed.

Brevard County Enforcement Hearing Office
Planning and Development Department
2725 Judge Fran Jamieson Way, Bldg A114
Viera, FL 32940
(321) 409-9453
HearingOffice@brevardfl.gov

"Under Florida Law, email addresses are Public Records. If you do not want your e-mail address released in response to public record requests, do not send electronic mail to this entity. Instead, contact this office by phone or in writing."

Mary Slowinski
7020 N Courtenay Pkwy
Merritt Is, FL 32953

ORLANDO FL 328
25 APR 2024 PM 6 L

CODE ENFORCEMENT
APR 30 2024
RECEIVED

Hearing Office
Planning & Development Dept.
2725 Judge Fran Jamieson Way #A114
Viera, FL 32940

32940-660599

737

4/24/2024

To the Board of County Commissioners,

I received a letter from you concerning Air Liquide. It was addressed to my husband, Raymond Slowenski. He passed away over a year ago. I would attend the meeting but I will be recuperating from surgery at that time.

I live across the street from Air Liquide. I have lived here over 20 years. In the past there was noise but not nearly as loud as it is now. The sound coming from them is so loud a person can't hear another person talking. One night it was so loud a picture fell off the wall and a curtain rod fell off the bathroom window. I can feel vibrations on the floors in my house.

This is a residential area. there are many houses around here on streets like D'albora and Pine Island. Air Liquide needs to move onto the Kennedy Space Center property. Away from homes.

My husband had heart problems and I'm sure the noise from Air Liquide did not help. It's frustrating and aggravating.

Please do something about this problem and make it pleasant around here again.

Sincerely,
Mary Slowenski

CODE ENFORCEMENT

APR 30 2024

RECEIVED

Fw: Public Hearing RE: Vested Rights of Air Liquide

HearingOffice <hearingoffice@brevardfl.gov>
Tue 07-May-24 11:07 AM
To:Prasad, Billy <Billy.Prasad@brevardfl.gov>

1 attachments (411 KB)
Waller 05.07.2024.pdf;

Angela Damm-Martling
Brevard County Enforcement Hearing Office
Planning and Development Department
2725 Judge Fran Jamieson Way, Bldg A114
Viera, FL 32940
(321) 409-9453
HearingOffice@brevardfl.gov

From: lawrtw <lawrtw@gmail.com>
Sent: Tuesday, May 7, 2024 10:04 AM
To: HearingOffice <hearingoffice@brevardfl.gov>
Subject: Public Hearing RE: Vested Rights of Air Liquide

Respectfully submitted by Douglas & Theresa Waller and citizens of Merritt Island.

Thank you

Douglas & Theresa Waller
1420 D'Albora Road
Merritt Island, Brevard County

Douglas & Theresa Waller

May 3, 2024

Brevard County Board of County Commissioners
2725 Judge Fran Jamieson Way, Bldg. C
Viera, Florida 32940
HearingOffice@BrevardFL.gov

Dear Commissioners,

We write to express our deepest appreciation and support for the well-reasoned Proposed Order that Special Magistrate Julie Harrison issued on April 8, 2024, regarding the Petition for Vested Rights filed by Air Liquide Large Industries, US, lP. We now ask that you adopt the same and deny the request for vested rights during the public hearing on May 21, 2024.

As Special Magistrate Harrison noted, on October 29, 2002, the Board of County Commissioners and Petitioner entered into a Binding Development Plan that provided that **"Developer/Owner shall comply with all regulations and ordinance of Brevard County Florida**. This agreement constitutes Developer/Owner Agreement to meet additional standards or restrictions in developing the property. **This agreement provides no vested rights** against changes to the comprehensive plan or land development regulations that may apply to this property." *Proposed Order* at pp. 7-8 (emphasis added).

As residential neighbors of Air Liquide since our property purchase in 2001, we have witnessed the explosive expansion referenced in the Order. As Special Magistrate Harrison noted in paragraphs 44-47, the sound now emanating from the plant **"has serious negative effects"** on the health and welfare of the many families in our community. The sound levels are in fact **"excruciating, unbearable, stressful, horrendous and unnatural**." *Proposed Order* pg. 22.

We passionately join our community and would like to applaud the efforts of Code Enforcement and County Staff over the many years to finally reach this point. We join the following Merritt Island community in respectfully requesting your consideration in this very important matter. (Justin & Lillian Youney 1490 D'Albora Road, Rock and Brittany Contardi 1500 D'Albora Road, Brian Bauer 6488 Nunzio Lane, Theresa Huyen 1405 D'Albora Road, David & Judy Apple 6498 Nunzio Lane, Scott & Alice Denlinger 1385 D'Albora Road, Ed & Kristina Gonzalez 1360 D'Albora Road, Ron & Julie Rosenberg 1365 D'Albora Road, Rob Hill 1375 D'Albora Road, Wendy Elliott 1355 D'Albora Road, Ken & Kiela Frank 1380 D'Albora Road, Glenn Butts 1509 D'Albora Road.)

1420 D'ALBORA ROAD, MERRITT ISLAND, FLORIDA 32953
T 321.427.5773 LAWRTW@GMAIL.COM

Because the Petitioner did not meet its burden in showing good faith reliance on any act or omission of the County and they cannot demonstrate that granting vested rights will not create imminent peril to our community's health, safety, and welfare; ***we respectfully implore the Board to adopt the Proposed Order and deny Air Liquide's Petition for Vested Rights.***

Thank you for your consideration of this very important matter.

Sincerely,

Douglas & Theresa Waller

FIGURE 1. Acoustical model depiction of a 14 foot barrier along current fenceline. Barrier is approximately 400 feet long.

- The eight "decibel boxes" are at the same location on each Figure.
- The model only uses the 2 currently known/measured promanent noise sources.
    - LSS
    - Pumper Truck
- Barrier can be any material as long as it is not porous, no holes, and has a minumum mass of 4 lb/ft^2.
- A longer barrier will reduce sound propagation along flanking paths.
- A higher barrier, will be more effective, but at some point will not be technically feasible to construct.

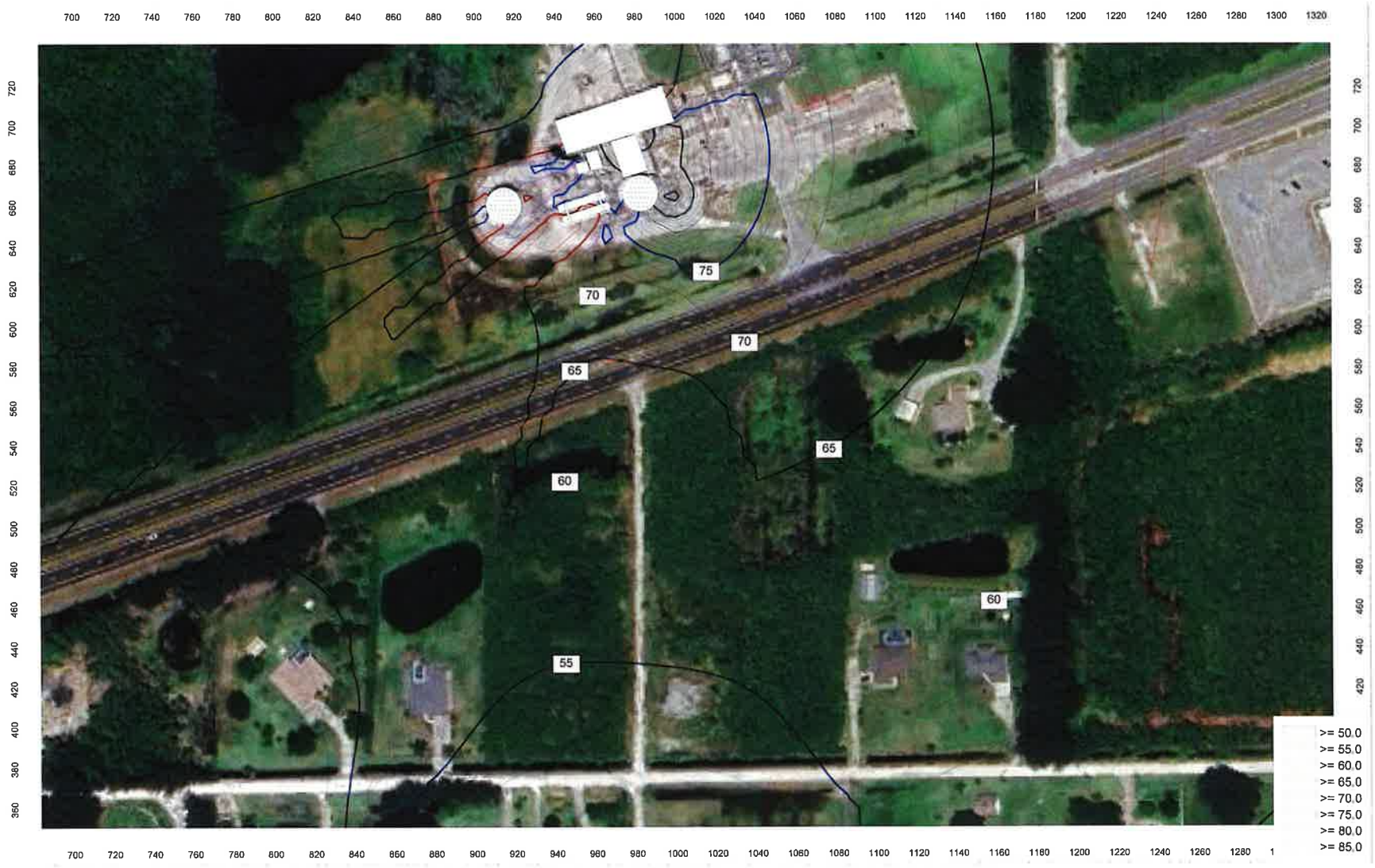


Figure 2. Modeled Noise Propagation from Two noise sources: LSS and Pump Truck.

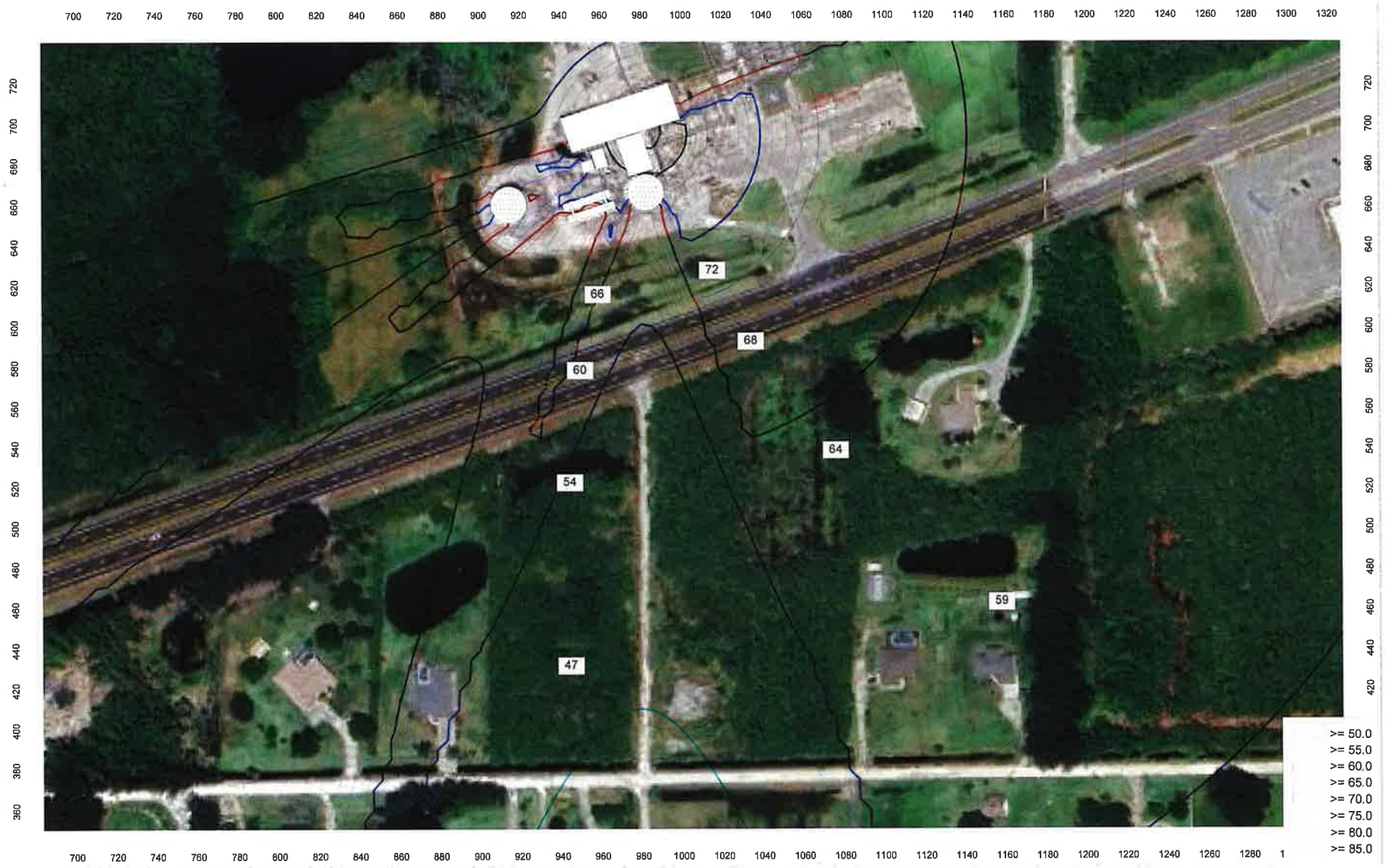


Figure 3. Modeled Noise Propagation from LSS noise source.

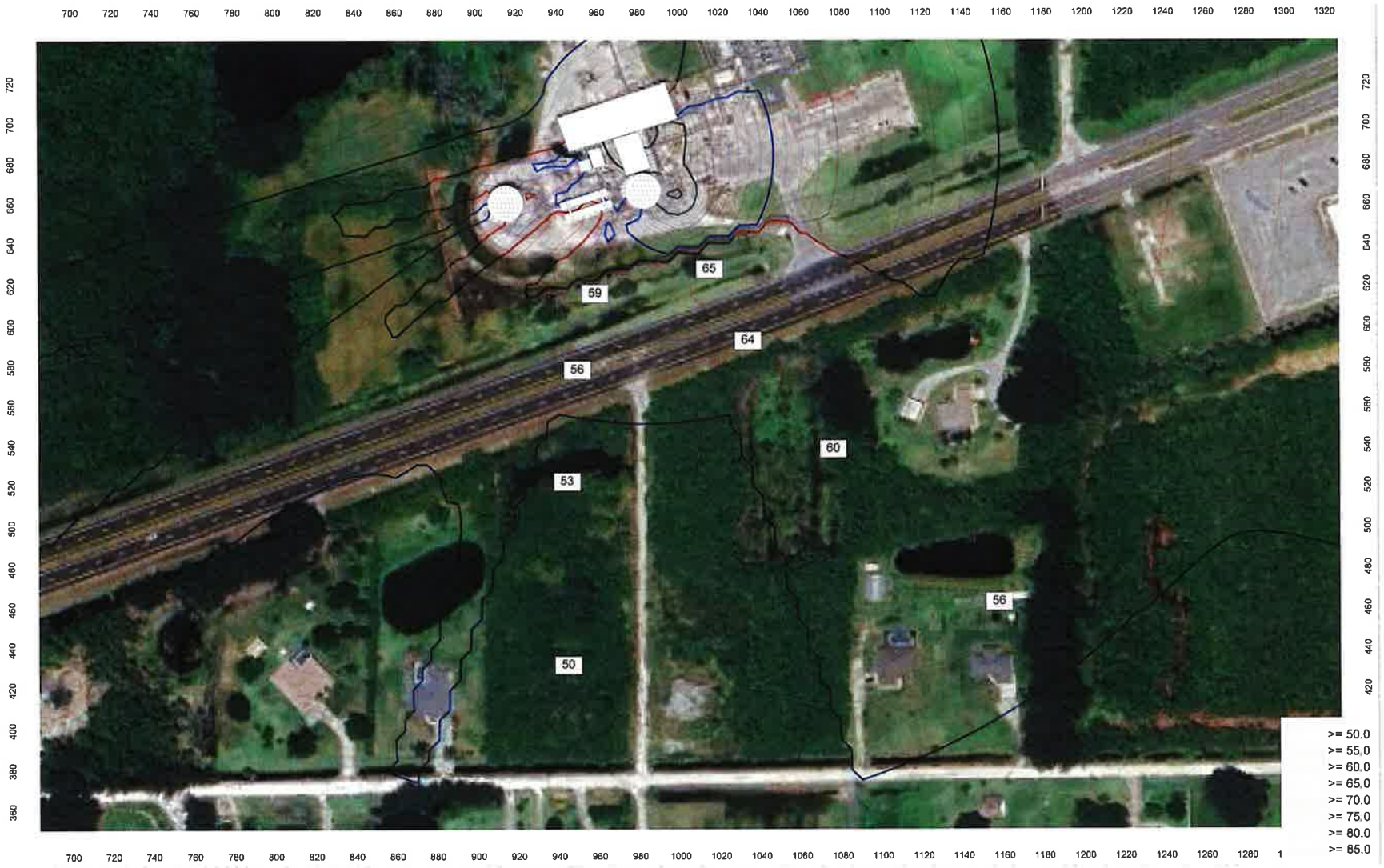


Figure 4. Noise Propoagation from Two noise sources: LSS and Pump Truck WITH a 400 foot long and 14 foot hight noise barrier