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

Julie Harrison

Special Magistrate

CC: Counsel of Record