

IN THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY, MARYLAND

DOMINION COVE POINT
LNG, L.P.
Plaintiff

vs.

THE SIERRA CLUB, et al.
Defendant

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Case No. 04-C-12-000598

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CIRCUIT COURT
FOR CALVERT COUNTY
D.V.

OPINION AND ORDER

This opinion concerns a declaratory judgment action filed by Dominion Cove Point LNG, L.P. ("Dominion") against the Sierra Club, a California non-profit corporation, the Sierra Club Maryland Chapter (collectively the Sierra Club) and the Maryland Conservation Counsel, Inc. (MCC). In its complaint, Dominion asked this court to resolve a dispute between it and the Sierra Club regarding Dominion's rights under a 34 page contract, signed by Dominion, the Sierra Club, and MCC on March 1, 2005 ("The 2005, Agreement"). More specifically, in its complaint Dominion asked this court to declare that: 1) the 2005 Agreement permits Dominion to construct, operate and maintain additional facilities for the liquefaction of natural gas within the "Fenced Area" of Dominion's liquified natural gas terminal site located at Cove Point in Calvert County, Maryland and, 2) the 2005 Agreement permits Dominion to export liquid natural gas (LNG) from Dominion's terminal site.

The MCC filed an answer in which it stated that it did not object to the declaratory relief sought by Dominion.

The Sierra Club, although it did not object to Dominion's first request for declaratory relief, strenuously objected to the second. In other words, the Sierra Club takes the position that under the 2005 Agreement, Dominion does not have the right to use the Cove Point facility to export LNG. Dominion filed a motion for summary judgment and the Sierra Club filed a cross motion for summary judgment.

There are no material facts in dispute and, as will be seen, the dispute mainly concerns how one sentence in the 2005 Agreement should be interpreted. Dominion takes the position that in the sentence at issue it is granted permission to use the facility to export LNG; the Sierra Club contends that the sentence does not grant such permission.

I. BACKGROUND

Natural gas in its gaseous state takes up 600 times as much space as LNG. Natural gas is liquified by reducing its temperatures to roughly minus 260° Fahrenheit. One of the benefits of liquefaction of natural gas is that it allows the gas to be shipped by tanker.

Currently, Dominion owns a 1,017 acre parcel of land located at Cove Point. The land is next to the large Baltimore Gas & Electric nuclear facility. In 1972, Dominion's predecessor in title, Columbia Gas, began plans to construct a LNG import terminal on a portion of the subject property. In 1978, to avoid litigation, Columbia Gas and the Sierra Club along with the MCC entered into an agreement spelling out how the subject property could be used.

Columbia Gas commenced importing natural gas at the Cove Point facility in 1978 but it ceased operations in 1980. Thereafter, for a period of about 14 years, import of LNG was suspended.

In 1994, Columbia Gas sought to reopen the Cove Point facility and to add liquefaction capacity to it. In order to accomplish this goal, Columbia Gas negotiated a new agreement with the Sierra Club and the MCC. In a 1994 Agreement with the Sierra Club and MCC, Columbia Gas obtained, *inter alia*, permission to provide peaking services at the Cove Point facility, which meant that Columbia Gas was allowed to maintain facilities to liquify natural gas, store it, and then regasify the LNG in order to provide gas for utilities during periods of peak use. The 1994 Agreement defined what would be permissible LNG Terminal Operations in the same way as the 2005 Agreement. That definition will be discussed *infra*.

Dominion acquired the Cove Point property from Columbia Gas in 2002. Since then, tankers that bring in natural gas to the facility dock at a pier located about 1.2 miles off shore. Dominion's LNG facility is connected to the pier by an underground tunnel. Gas is delivered from tankers by a pipeline that runs through the tunnel.

About three years after it acquired the property, Dominion applied to the federal government for permission to expand its capabilities at the Cove Point LNG terminal site. It included a request for permission to construct two additional storage tanks and other associated facilities. Prior to seeking federal permission, however, Dominion entered into a new agreement with the Sierra Club and the MCC (the 2005 Agreement), which provided

that the new Agreement would replace in its entirety all previous arrangements and understandings regarding the use of the Cove Point Terminal Site.

Section 2: 01 of the 2005 Agreement provides that Dominion “shall use the LNG Terminal Site solely to conduct and carry on LNG Terminal Operations...”. Section 1: 01 of the 2005 Agreement defines “LNG Terminal Operations.” According to the Agreement:

“LNG Terminal Operations” means and is limited to any use or activity related to (i) the construction, operation or maintenance of facilities and equipment associated with the following activities (a) through (j): (a) marine operations involving the importing of LNG; (b) the liquefaction of natural gas; (c) the storage of LNG in tanks; (d) the regasification of LNG; (e) the delivery by pipeline of LNG, revaporized LNG or natural gas or from the LNG Terminal Site; (f) the treatment of LNG or revaporized LNG by nitrogen injection or the separation and removal of constituent parts; (g) the provisioning of LNG tankers with water and miscellaneous supplies, provided that the principal method of provisioning LNG tankers shall be by means of shipments of materials and supplies from locations other than the Cove Point Site to the off-shore pier for storage and transfer to LNG tankers docked at the off-shore pier; (h) the recovery and use on the LNG Terminal Site for other LNG Terminal Operations of the cryogenic properties of LNG; (i) the recovery and use on the LNG Terminal Site of waste heat for other LNG Terminal Operations; (j) the generation or cogeneration of electricity within the limitations prescribed herein; and (ii) the construction, operation or maintenance of facilities and equipment directly supporting the foregoing activities (a) through (j), including office buildings, warehouses, maintenance shops, firefighting equipment and utilities.

(Emphasis added).

As discussed more fully, *infra*, Dominion contends that subsection (e) of the definition just cited gave them permission to use the facility for exporting LNG.

There is no provision in the 2005 Agreement explicitly prohibiting use of the facility for exporting LNG. By contrast, other portions of the Agreement explicitly prohibit certain

activities. For example, Section 2.03 of the Agreement prohibits Dominion from “transport[ing] LNG from the LNG Terminal Site by means of trucks without the prior written consent of Sierra Club and MCC.” Section 2.05 of the Agreement forbids Dominion from “generat[ing] electricity for transmission and sale off of the Cove Point Site.”

Section 1.6 of the Agreement defines the “LNG Terminal Site” as a 323 acre parcel of land (within the 1,017 acre parcel). The “Fenced Area,” which is mentioned *supra*, is depicted on a map attached to the 2005 Agreement and is approximately 131 acres. Under the Agreement, this is the part of Dominion’s property where the LNG tanks and terminal facilities are located.

Since 2005, there has been a dramatic increase in the availability of natural gas in the United States. This increase has been brought about by a procedure known as hydraulic fracturing (“fracking”). Fracking allows gas producers to tap gas reserves trapped in layers of shale rock. Fracking in several states, including Pennsylvania, Texas and Louisiana has produced a great deal of natural gas and as a result natural gas prices in the United States are at an all-time low. Previously the United States had to import natural gas, but now this county is virtually awash in it. As a consequence, great profits can be made by exporting LNG to Japan and other countries where natural gas prices are more than double what they are in the United States.¹

¹A thorough discussion of this subject appears in a lengthy article, by Steven Mufson, in the Business Section of the December 9, 2012 edition of the Washington Post.

In late 2011, Dominion announced its plans for expansion of the Cove Point facility in order to enable it to export LNG to other countries. But to export natural gas, it will need permission from the United States government. Dominion has not yet obtained final approval from the government.

In accordance with provisions in the 2005 Agreement, Dominion approached the Sierra Club and the MCC with the goal of finding out whether they would give their approval for construction by Dominion of new liquification facilities outside the Fenced Area. The Sierra Club promptly advised Dominion that it would oppose any construction outside the Fenced Area. Dominion then revised its expansion plans to include only new facilities within the "Fenced Area." But, the Sierra Club also made it clear that it took the position that the Cove Point Facility could not be used for exporting LNG. Because of this justiciable controversy, Dominion filed the subject action asking for declaratory relief.

II.

In its motion for summary judgment, the Sierra Club maintains the position that activities that are not permitted under the terms of the 2005 Agreement are prohibited and, according to the Sierra Club, "the text, structure, context of the Agreement, and the purpose it was intended to serve, all demonstrate that exports were not authorized and is therefore prohibited." The Sierra Club maintains that the 2005 Agreement is unambiguous in this regard.

Dominion argues that the Agreement unambiguously allows it to export LNG from

the Cove Point Facility. According to Dominion, permission to export LNG is provided by subsection (e) of Section 1.01 of the Agreement, which sets forth the definition of “LNG Terminal operations.” Dominion asserts that when the parties wanted to prohibit an activity, they knew how to do so, as demonstrated by the fact that transporting LNG from the facility was explicitly prohibited. Dominion, while it admits that it did not know in 2005 that it would use the Cove Point Property to export LNG, nevertheless asserts that it made sure it left open that possibility by including the definition of “LNG Terminal Operations” that had appeared in the 1994 Agreement signed by Columbia Gas, the MCC, and the Sierra Club. Dominion argues, in the alternative, that even if the 2005 Agreement is ambiguous as to whether exporting LNG was permissible, contractual provisions purporting to restrain the use of land should be strictly construed in its favor and against the Sierra Club. *See Lowden v. Bosley*, 395 Md. 58, 67 (2006) (“If an ambiguity is present, and if that ambiguity is not clearly resolved by resort to extrinsic evidence, the general rule in favor of the unrestricted use of property will prevail and the ambiguity in a restriction will be resolved against the party seeking its enforcement,” quoting *Bellevue v. Rugby Hall*, 321 Md. 152, 158 (1990)).

In my opinion, subsection (e) of Section 1.01 of the Agreement unambiguously does give Dominion the right to use the Cove Point Facility for the export of LNG. Excluding unnecessary words, subsection (e) of Section 1.1 allows Dominion to carry on activities related to (e) the receipt by tanker and the receipt or delivery by pipeline of LNG,

revaporized LNG, or natural gas at or from the LNG Terminal Site.... .

To export LNG, Dominion will be transferring the LNG produced by the new liquification facilities by pipeline from the LNG Terminal Site to tankers docked at the offshore pier. From there, the LNG will be shipped to customers in other countries. Subparagraph (e) expressly permits the facility to be used for “receipt by tanker of LNG... from the Terminal Site.” The Agreement specifically allows for “the delivery by pipeline of LNG from the LNG Terminal Site.” This plainly allows the tankers at the pier to receive LNG from the Terminal Site.

In its motion for summary judgment, the Sierra Club, in various ways, attempts to circumvent the plain language of subsection (e). For the reasons set forth in Dominion’s opposition to the Sierra Club’s motion, I do not find that any of those arguments are persuasive.

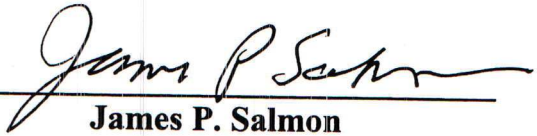
THEREFORE, for the reasons set forth above, together with the reasons advanced in the Memoranda filed by Dominion, it is this 2nd day of January, 2013, by the Circuit Court for Calvert County, Maryland,

ORDERED, that the Motion for Summary Judgment filed by the Sierra Club is denied and the Summary Judgment Motion made by Dominion is granted; and it is further,

ORDERED and DECLARED, that the 2005 Agreement permits the construction, operation and maintenance of additional facilities for the liquification of natural gas within the Fenced Area of the LNG Terminal Site; and it is further,

DECLARED, that the 2005 Agreement permits Dominion to export LNG from the LNG terminal site; and it is further,

ORDERED, that all other prayers for relief by Dominion are denied.²


James P. Salmon
JUDGE

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ENTERED 1-4-13 BY BC

COPIES OF ORDER SENT

PLT _____

DEF _____

PLT ATTY _____

DEF ATTY _____

²In its complaint, Dominion asked that reasonable attorney fees be awarded to it. But in its motion for summary judgment, Dominion made no mention of attorney's fees. Moreover, based on my review of the file, I can see no reason why attorney's fees should be granted.

Craig Segall
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