COMMONWEALTH OF KENTUCKY

BEFORE THE KENTUCKY STATE BOARD ON
ELECTRIC GENERATION AND TRANSMISSION SITING

In the Matter of:

ESTILL COUNTY ENERGY PARTNERS, LLC, FOR A CERTIFICATE OF CONVENIENCE AND NECESSITY TO CONSTRUCT A COAL COMBUSTION FACILITY IN ESTILL COUNTY, KENTUCKY	)	CASE NO. 2002-00172

DLX'S AND HARRY LAVIERS, JR., TRUSTEE'S
HEARING BRIEF AND AMENDED DISMISS AND
MOTION TO STRIKE TESTIMONY

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Come DLX, Inc. ("DLX"), and Harry LaViers, Jr., as Trustee of a Trust established for the benefit of Donald G. LaViers, Stephen D. LaViers, Henry LaViers, IV, and Elizabeth LaViers Owen, all under the Will of Maxie LaViers, deceased (the "Trust")[1], by counsel, having moved the Siting Board (a) to dismiss so much of ECEP's application for a construction certificate (the "Application") as pertains to property and property rights held by DLX and the Trust; or (b) to dismiss ECEP's application in its entirety because almost all of the land required for the proposed plant and the best refuse coal is owned by DLX, rendering the Application meritless, now assert those arguments and others in opposition to ECEP's application and request that it be dismissed without prejudice. Their position is supported by the record, by the responses (or non-responses to various data requests, filed testimony and by the following memorandum. They also amend their Motion to Dismiss to include

[1] The Trust was created under the will of Maxie LaViers, deceased, which is of record in Will Book J, Page 375, in the Estill County Clerk's Office.

all of the grounds set forth herein and move to strike those portions or the record wherein representatives of ECEP testified as to boundaries and their opinions regarding the same because they refused to testify as to the reasons for their opinions or submit all of the instruments that they examined as the basis for their testimony.

FACTS[2]

DLX received a letter dated May 18, 2004, from Gerard B. Mack, ECEP's project manager, which revealed that ECEP wants to build a merchant power plant on certain real estate in which it claims an interest north on Irvine, Kentucky, on the east side of the Kentucky River (the "Plant Property"). After reciting that the letter had been sent "[i]n accordance with KRS 278.706(2)(c)(1)[3] and 807 KAR 5:110E Section 9" concluded:

"It is the position of ECEP that DLX, Inc. is not a landowner entitled to the notice

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[2] All abbreviations and references to the properties in DLX's and the Trust's Motion to Intervene as to the Refuse Pile Tract, the Calla Subdivision, the Sand Hill Properties, the Adverse Tracts (the property and rights owned by DLX and the Trust), the Trust Deed (the tract in the Calla Subdivision that the Trust conveyed to KPC) and to the Plant Property, the Bankruptcy Case (the Kentucky Processing bankruptcy action), KPC (for Kentucky Processing Company), FTP (for Fox Trot Properties, LLC), and Calla (for Calla Energy Partners, LLC). All references to the transcript of the August 24, 2004, hearing shall be as follows: T:[page number or numbers].

[3] KRS § 278.706 Application for certificate to construct merchant electric generating facility; fees; replacement or repair does not constitute construction

(1) Any person seeking to obtain a construction certificate from the board to construct a merchant electric generating facility shall file an application at the office of the Public Service Commission.

(2) A completed application shall include the following:

....

(b) A full description of the proposed site, including a map showing the distance of the proposed site from residential neighborhoods, the nearest residential structures, schools, and public and private parks that are located within a two (2) mile radius of the proposed facility;

(c) Evidence of public notice that shall include the location of the proposed site and a general description of the project, state that the proposed construction is subject to approval by the board, and provide the telephone number and address of the Public Service Commission. Public notice shall be given within thirty (30) days immediately preceding the application filing to:

1. Landowners whose property borders the proposed site....

required by the above referenced statute and regulation."

ECEP apparently did not take adequate steps to apprise itself of who its adjoining landowners are and failed to notify the Trust by letter. In fact, DLX and the Trust own several tracts of land (the "Adverse Tracts") on the east and west sides of the Kentucky River, north of Irvine, Kentucky, in the vicinity of the proposed merchant power plant, which properties fall into three groups:

a. The Refuse Pile Tract and Right-Of-Way

Fox Trot Properties, LLC, an entity that is related by contract or ownership to ECEP[4], is presently engaged in an adversary action that is pending before the Hon. Joe Lee in the United States Bankruptcy Court for the Eastern District of Kentucky, Lexington Division, styled *DLX, Inc. v. Kentucky Processing Company, and Fox Trot Properties, LLC*, Adversary Proceeding No. 01-5199 (the "Bankruptcy Case"), which is within Chapter 11 Case No. 98-52437, *In the Matter Of: Kentucky Processing Company, fdba Fox Mining Corporation, Fox Processing Corporation, Fox Trucking Corporation, Fox Leasing Corporation, G & Y Coal Co., Inc., Adena Fuels, Inc., Adena Processing, Inc., Clemons Coal Company, and Kentucky Mineral Processing, Inc*. DLX filed the Bankruptcy Case against the debtor and FTP to, among other things, DLX wanted to resolve a question about a boundary line between the Refuse Pile Tract and other property that the debtor, Kentucky Processing Company ("KPC"), claimed to own, and to declare rights concerning a road to the Refuse Pile Tract. To further protect its interest in these parcels and the right-of-way, DLX lodged and recorded a notice of lis pendens in

[4] The Movants have learned that ECEP is a Kentucky limited liability company that has as its only member another Kentucky limited liability, Calla Energy Partners, LLC ("Calla"). Jacquelyn Yates is the sole member of Calla and is the sole officer and shareholder of Fox Trot Corporation, a Kentucky corporation ("Fox Trot"). Fox Trot Corporation is, in turn, the manager of Fox Trot Properties, LLC, another Kentucky limited liability company ("FTP"). ECEP, Calla and Fox Trot have the same principal place of business and registered agent. Mr. Charles E. Yates, the husband of Jacquelyn Yates, is the CEO of FTP.

Encumbrance Book 10, Page 740, in the Office of the Clerk of Estill County (the "Lis Pendens") at 9:46 a.m. on July 20, 2001, prior to the auction by the Trustee in bankruptcy, Tom Bunch. FTP now claims to own the Refuse Pile Tract even though **neither it nor the debtor has a deed placing tile in them**. The case has been submitted to Judge Lee for decision.

DLX owns these two parcels and the appurtenant right-of-way (the "Refuse Pile Tract") by virtue of two orders of the United States bankruptcy Court and two deeds executed in furtherance of said orders: (a) an Order Authorizing Sale Of Substantially All Of Debtor's Assets Outside The Ordinary Course Of Business, filed on January 19, 1993, in the United States Bankruptcy Court, Eastern District of Kentucky, Lexington Division, styled *In Re: South-East Coal Company*, Case No. 90-2183. March 14, 1993, the deed being of record in Deed Book 202, Page 426, in the Estill County Clerk's Office; and (b) an order supplementing the previous order entered in December, 2002, for which a deed has not yet been prepared or recorded.

Interestingly, because FTP chose to contest DLX's efforts to straighten out the boundary line issue, it is possible that DLX might end up owning property that might underlying part of the Plant Property. A copy of a the affidavit of DLX's surveyor showing these two parcels and explaining the problem is attached hereto and marked as Exhibit A. The approximate outline of the Refuse Pile Tract and its appurtenant Right-Of-Way are marked in yellow on Exhibit D; however, DLX incorporates herein by reference the record in the Bankruptcy Case for a more complete description of the various interests, claims and defenses. DLX reserves the right to correct these observations after further review and proceedings are had.

b. The Calla Subdivision[5]

The tracts comprising the Calla Subdivision are located on Kentucky Route 1840 on the eastern side of the old South East Coal Company property and are described as Tract N and the Watertank Property in a deed dated December 29, 1995, from DLX to the Trust that is of record in Deed Book 215, Page 740, in the Estill County Clerk's Office, subject to the exceptions contained therein (the "Trust Deed"). A plat of Block 1 of the Calla Subdivision is of record in Plat Cabinet 1, Slide 60, in the Estill County Clerk's Office. A copy of the foregoing deed is attached hereto and marked as Exhibit B, a portion of the preliminary plat is attached hereto and marked as Exhibit C, and a larger map showing the location of the Calla Subdivision in relation to the area in question is attached hereto and marked as Exhibit D and the approximate outline of the Calla Subdivision is marked in yellow on Exhibits C and D. At present, it appears that ECEP is claiming an interest in Blocks 1 and 2 of the Calla Subdivision and the appurtenant rights-of-way, but the Trust reserves the right to correct this observation after further review and proceedings are had.

c. The Sand Hill Property[6]

The tracts comprising the Sand Hill Property lie across the Kentucky River, almost due

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[5] All references to the Calla Subdivision shall be to all of the parcels and appurtenances thereunto belonging, including, but not limited to, easements and the right of access thereto such as Kentucky Route 89, Kentucky Route 1840, Coal Wash Road, Stump Road, Whitt Road and those rights-of-way shown on the plats attached hereto. The term Calla Subdivision shall not include any utility easements, the exceptions and reservations contained in the Trust Deed nor the outconveyances to Eldon Hughes and Ron Wiley in Block 1, to Stan Nicola in Block 2, and to Jack Jenkins and the Irvine Municipal Utilities in Block 3, and their successors and assigns, as their interests may appear of record. The Calla Subdivision is further subject to the subdivision restrictions of record in the Estill County Clerk's Office.

[6] All references to the Sand Hill Property shall be to all of the parcels and appurtenances thereunto belonging, including, but not limited to, easements and the right of access thereto. The term Sand Hill Property shall not include any utility easements nor the exceptions and reservations contained in the Trust Deed and the Sand Hill Property is subject to a pending right to purchase the same.

south of the old South East Coal Company property. These properties are described as Tracts M and P in a deed dated December 29, 1995, from DLX to the Trust that is of record in Deed Book 215, Page 740, in the Estill County Clerk's Office, subject to the exceptions contained therein. Mr. Charles Yates stated during the trial in the Bankruptcy Case that FTP did not claim any interest in the Sand Hill Property. At present, it appears that ECEP is not claiming an interest in the Sand Hill Property and the appurtenant rights-of-way, but the Trust reserves the right to correct this observation after further review and proceedings are had.

None of the maps that ECEP filed are signed and certified surveys, they include the Refuse Pile Tract and Blocks 1 and 2 of the Calla Subdivision within the boundaries of the Plant Property. In fact, they all contain an exception that renders them unreliable and worthless for the purpose of the Application. T:167-170. Mr. Jaggers admitted that the lines shown on ECEP's "maps" were not a survey and constituted no more than a representation, T:167, 170, and that a real survey would contain a description in courses and distances as required by law, T:165 and 171, something that the Act requires to be in the Application. Neither DLX nor the Trust have found any deeds or leases that purport to give ECEP an interest in the Plant Property.

This brief is predicated upon the following irrefutable facts:

1. ECEP's alleged predecessor in title, Fox Trot Properties, LLC, does not and cannot have any interest in the Refuse Pile Tract nor the Calla Subdivision because:

   a. DLX's deeds to Kentucky Processing Company's deeds do not convey the Refuse Pile Tract nor the Calla Subdivision;

   b. before the auction in KPC's bankruptcy, DLX filed the bankruptcy case and a lis pendens, and a brief synopsis fo DLX's claim was announced prior to the auction, thereby placing any purchaser, such as Fox Trot, on notice;

c. Fox Trot does not have a deed to the Adverse Tracts[7], in particular:

i. as to the Refuse Pile Tract, unless the Bankruptcy Court rules in Fox Trot's favor *and* such a judgment becomes final and unappealable; and

ii. as to the Calla Subdivision, because no action is pending and these tracts are specifically excepted and not conveyed in the deeds to Fox Trot's would-be grantor, Kentucky Processing Company.

d. If ECEP's alleged predecessor in title does not have sufficient title in the Refuse Pile Tract and in the Calla Subdivision, then it has nothing to convey or lease to ECEP.

2. ECEP has admitted in its application and in its responses to the Staff's and DLX's Data Requests that it does not have a lease or option from Fox Trot. What is more, it admitted that it does not have *any* interest in the property.[8]

3. Neither DLX nor the Trust have authorized ECEP or Fox Trot to subject their property to the Application and construction certificate.

ECEP has not and cannot now establish that it (or Fox Trot, for that matter) has any interest in the Adverse Tracts.

ARGUMENT[9]

ECEP filed its application without a lease or any other grant from Fox Trot, which does not have any interest in the Adverse Tracts. Despite this exceptional admission, ECEP continues to ask the Siting Board to issue a construction certificate to it, even if it contains an exception as to the Adverse Tracts. DLX and the Trust believe that the Board cannot act unless ECEP has a verifiable interest in the property sufficient to allow it to undertake the acts authorized by a construction

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[7] ECEP admitted this at T:82.

[8] T:47-49, 54 and 81-82.

[9] Copies of cited cases from other jurisdictions are attached to DLX's Motion to Dismiss.

certificate. There are several reasons why this is so.

I. THE PUBLIC SERVICE COMMISSION AND THE KENTUCKY STATE BOARD ON ELECTRIC GENERATION AND TRANSMISSION SITING BOARD ARE ADMINISTRATIVE AGENCIES AND CANNOT DECIDE ISSUES PERTAINING TO THE PROPERTY OWNED BY DLX AND THE TRUST.

The Siting Board has already reached this conclusion, as set forth in the July 23, 2004, order to that effect. However, the question remains as to whether it can issue a construction certificate to someone who does not have any interest in the property where the plant is to be constructed nor in a substantial portion of the fuel to be burned therein. *See* Argument II hereinbelow.

A. THE UNITED STATES BANKRUPTCY COURT HAS EXCLUSIVE JURISDICTION TO DECIDE ALL MATTERS PERTAINING TO THE REFUSE PILE TRACT AND, POSSIBLY, AS TO THE CALLA SUBDIVISION.

The United States Bankruptcy Court for the Eastern District of Kentucky has already exercised jurisdiction over the Refuse Pile Tract in the Bankruptcy case. Even if the Board could act to adjudicate DLX's property rights therein, it would have to abate in favor of the Bankruptcy Court, whose jurisdiction as to the affairs of the debtor, KPC, which has not yet transferred any interest in the Refuse Pile Tract to FTP, is exclusive according to federal law.

B. THE KENTUCKY COURTS HAVE EXCLUSIVE JURISDICTION TO DECIDE ISSUES PERTAINING TO REAL ESTATE AND THE TITLE AND ACCESS THERETO.

According to Sections 109, *et seq*., of the Kentucky Constitution and the statutes enacted pursuant thereto, the judicial power of the Commonwealth is vested exclusively in the judicial branch. It is well known that the powers of government in Kentucky have long been "divided into three distinct departments": executive, legislative and judicial, Ky. Const. § 27, and that none of

them can exercise the powers of the other except as set forth in Kentucky's Constitution. Ky. Const. § 28. The judicial power may only be exercised by the courts, Ky. Const. § 109, *et seq*., with the circuit courts operating primarily as courts of general jurisdiction. Ky. Const. § 112(5). When coupled with the right to a judicial remedy for injury, Ky. Const. § 14, the outcome is clear, particularly when all other provisions of the Constitution and the laws enacted by the Legislature are subordinate to the Bill of Rights. Ky. Const. § 26.

The power to "determine substantive issues of law," such as mineral and property rights, "is solely within the power of the judiciary." *Akers v. Baldwin*, Ky., 736 S.W.2d 294, 309 (1987). That is the situation here. EPEC, if it really wants to claim land that it does not own, cannot bring those issues before the Board as it has no jurisdiction over them.

C. The Public Service Commission and the Kentucky State Board on Electric Generation and Transmission Siting Board Are Administrative Agencies and Cannot Exercise the Judicial Power Invested in the Courts.

Sections 27, 28 and 29 of the Kentucky Constitution define the various branches of state government and the manner in which the powers of government are distributed. The PSC and the Board are administrative agencies and do not possess the powers allotted to the judiciary, as noted above. Accordingly, they are not authorized to consider any issues concerning the Adverse Tracts.

D. The Proceedings Regarding the Application Do Not Afford DLX and the Trust Due Process of Law and Other Rights Guaranteed by the Constitutions of Kentucky and the United States.

Any aspect of this proceeding which affects, in any way, the Movants' interests in real estate, any attempts to do so will violate various provisions of the Constitutions of Kentucky and the United States. Because this is not a court and because DLX and the Trust have not been given such notice as is required to affect their rights to due process of law, to deprive them of contractual rights, the

right to a trial by jury, Ky. Const. § 7, nor to invade the jurisdiction of the courts and deprive them of the procedures, remedies, defenses, evidentiary rules and other safeguards available in the courts. *See* other arguments on these subjects, *infra*.

II. THE SITING BOARD DOES NOT HAVE JURISDICTION NOR AUTHORITY TO GRANT ECEP A CONSTRUCTION CERTIFICATE UNDER KRS § 278.700, ET SEQ.

Aside from the foregoing arguments and those pertaining to the separation of powers required by the Kentucky Constitution, the Siting Board can only act to issue a construction certificate concerning specific property if the applicant actually has the property rights necessary to undertake the acts authorized by the construction certificate (the "Requisite Interest"). It may be argued that KRS § 278.010 and §.700, *et seq*., does not require any such showing, but that is incorrect and is much different than adjudicating title issues between litigants.

A. KRS § 278.700, ET SEQ., DOES NOT AUTHORIZE THE SITING BOARD TO ISSUE A CONSTRUCTION CERTIFICATE TO A MERCHANT POWER PLANT TO AN APPLICANT THAT DOES NOT HAVE THE PROPERTY RIGHTS NECESSARY TO UNDERTAKE THE ACTS AUTHORIZED BY THE CONSTRUCTION CERTIFICATE.

It seems that it ought to be axiomatic that someone who seeks a construction or building permit ought to demonstrate that they have the right to build the structure if they obtain the permit. Otherwise, the Board could act without any showing that the affected property is actually before it and subject to its jurisdiction.

1. KRS § 278.700, et seq. (the "Act"), recognizes that participants in the permitting process have certain property rights before they have standing to participate.

KRS 278.700, *et seq*., makes several references to property owners and ownership (emphasis added by bolding):

- KRS § 278.700(3) "'Person' means any individual, corporation, public corporation, political subdivision, governmental agency, municipality, partnership, cooperative association, trust, estate, two (2) or more persons **having a joint or common interest**...." KRS § 278.706(1) then allows "[a]ny **person** seeking to obtain a construction certificate from the board to construct a merchant electric generating facility shall file an application at the office of the Public Service Commission." A joint or common interest in what? Real property that they own, not in that which they do not.
- KRS § 278.704(2) provides that "[e]xcept as provided in subsections (3), (4), and (5) of this section, no **person** shall commence to construct a merchant electric generating facility unless the exhaust stack of the proposed facility is at least one thousand (1,000) feet from **the property boundary** of any **adjoining property owner** and two thousand (2,000) feet from any residential neighborhood, school, hospital, or nursing home facility. How will anyone really know where a property boundary is until it is surveyed and signed according to law? Once completed, will it not be some evidence of a claim to title by the applicant? The title requirements for adjoining owners cannot be more stringent than those for the applicant lest the enactment fail to equally protect citizens of the Commonwealth.
- KRS § 278.707(2)(c)(1) requires that an applicant give notice to all"**[l]andowners whose property borders the proposed site**." If one must own land to be entitled to notice, what of the applicant?
- Many of the tests and reports that the applicant must prepare and file pursuant to KRS § 278.700, *et seq.,* require that the applicant go upon the property. If the applicant does not have the necessary property rights to do so, then it is a trespasser. Surely the Act does not authorize

an applicant to trespass on someone else's property. The Board must infer that the Act requires the applicant have the necessary property rights and, if not, should dismiss the Application. If the Board issues a construction certificate, then it has authorized and encouraged ECEP to trespass on DLX's and the Trust's land.

- Finally, KRS § 278.710 requires the Board to consider the aforesaid property rights and issues prior to deciding whether to grant an application.

The definition of "person" is, by itself, sufficient to require an applicant to produce evidence that it holds title to the necessary property rights and the remaining sections confirm that. Should it be determined that this is insufficient, then the requirement exists by implication.

One other related statute is worth mentioning, particularly because ECEP has *not* filed an application regarding any power lines. Under KRS § 278.714(2)(b), an application to construct an unregulated power line must include:

> (b) A **full description of the proposed route** of the transmission line and its appurtenances. The description shall include a map or maps showing:
>
> 1. The location of the proposed line and all proposed structures that will support it;
>
> 2. The **proposed right-of-way limits**;
>
> 3. Existing property lines and the names of **persons who own the property over which the line will cross**....

Title *is* an issue in such an application as are the boundaries and locations, which would require a survey.

ECEP cannot seriously contend that it does not make any difference who owns the property or that it can merely state that its prospective lessor, Fox Trot, owns the property without producing legal instruments establishing those claims. KRS § 278.700, *et seq*., requires otherwise.

2. To the extent that KRS § 278.700, et seq., does not explicitly require an applicant to have the property rights necessary to undertake the acts authorized by the construction certificate, then they are implied by law.

Sometimes the basis for agency action is supported by legal inferences that are presumed. Were it not so, then many statutes and regulations would not pass constitutional muster. If the Siting Board should conclude that KRS § 278.700, *et seq*., does not require that an applicant prove that it has the Requite Interest, then it is possible to save KRS § 278.700, *et seq*., from being declared unconstitutional by recognizing that said requirements are implicit within the Act.

For example, in *Walsh v. City of Brewer*, 315 A.2d 200 (Me. 1974), an individual filed an application for a license or permit to develop a mobile home park on property that was owned by his mother and his wife. His standing to do so was challenged on the basis that he did not own the land in question. Although the zoning ordinances did not contain any express conditions concerning his eligibility. Nevertheless, the Supreme Court of Maine concluded that:

> [W]hen ... there is lacking a clear, affirmative and express provision to the contrary, such 'title, right or interest' in the land is implicitly a valid precondition of 'standing' to be a proper 'applicant' under the ordinances.
>
> This interpretation appears highly desirable, policy-wise, to ensure that, absent clear and unquestionable legislative expression manifesting a different legislative attitude, governmental officials and agencies should not be required to dissipate their time and energies in dealing with persons who are 'strangers' to the particular governmental regulation and control to be undertaken.

Id. at 207. The court then determined whether the plaintiff had the requisite "title, right or interest" - and held that he did not.

The Board must, if necessary, read the act in the same manner and require ECEP to demonstrate whether it has the requisite "title, right or interest" in the Refuse Pile Tract or in the

Calla Subdivision to allow it to construct a merchant power plant, burn refuse located on the property and to use the property in connection with these purposes. Construction of a plant and burning the on-site coal will result in significant changes to the realty and will deplete the resources on the property. For those reasons alone ECEP's application must be examined closely, particularly since administrative processes such as zoning are in derogation of the common law and must be strictly construed. *Hamner v. Best*, Ky. App., 656 S.W.2d 253, 255 (1983).

B. ECEP Does Not Have Any Interest in the Refuse Pile Tract or the Calla Subdivision Sufficient to Undertake the Acts Authorized Thereon by a Construction Certificate.[10]

In Kentucky, one must have an interest in the subject property to change the zone, obtain building permits, etc. The leading case is *Hatch v. Fiscal Court of Fayette County*, Ky., 242 S.W.2d 1018 (1951). There, the applicant for a zone change had an option to purchase the property for the erection of a shopping center, and it was argued that this was insufficient to initiate a zone change. The Court held, however, that "courts have recognized the right of an option holder to make an application for a zoning change..." *citing Dunham v. Zoning Board of Westerly*, 26 A.2d 614 (R.I. 1942), and *Wilson v. Township Committee of Union Township*, 9 A.2d 771 (N.J. 1939). 242 S.W.2d at 1022.[11] A key distinction in *Hatch* is that the option was for the express purpose of building the shopping center. Absent that, the developer would not have had the right to begin development until after exercising the option. Otherwise, the option would have expired and with it, rendering the zoning board's action hypothetical - somewhat akin to asking a court to render an advisory opini0n

[10] Since many of the cases discuss the adequacy of interests in realty concurrently with standing, they will be presented together.

[11] Often, as in *Hatch*, those who wish to purchase property for development include clauses which make the sale contingent on obtaining the change and frequently grant the optionee the authority to pursue it.

on matter that is not yet ripe or justiciable. For that reason, the cases cited in *Hatch* are illuminating.

In *Dunham v. Zoning Board of Westerly*, 26 A.2d 614 (R.I. 1942), a power company wished to build a public utility plant within a residential area and obtained an option to purchase from the owner of the site. The option, however, was not mutually binding. *Id*. at 615-616. Nevertheless, the utility and the landowner filed a petition for the necessary zone change. The opposing adjoining property owners maintained that the petition should be denied because the utility "did not have the required legal interest in the land to warrant its application...." *Id*. at 615. The Supreme Court of Rhode Island agreed, but affirmed solely because the owner had joined in the petition:

> **Conceding that Narragansett had no mutually binding contract for the sale and purchase of the land, and therefore had no such legal interest therein as would support an application, in its own right, for special exception under the zoning ordinance**, nevertheless that would not be decisive upon the board's authority in the instant case. The application in question was also made, signed and prosecuted personally before the board by the owner of the land whose right under the ordinance to apply for such an exception is not questioned.

Id. at 615-616 (emphasis added). The New Jersey case and the line of authority upon which it relies is of similar import.

Wilson v. Township Committee of Union Township, 9 A.2d 771 (N.J. 1939), concerned the question of whether one who did not possess an interest in the subject property could apply for a building permit if they offered sufficient proof of a grant of authority from the owner. In concluding that the applicant had established his authority, the New Jersey Supreme Court referred to several other cases, *Krieger v. Scott*, 134 A. 901 (N.J. 1926), *Malone v. Mayor and Aldermen of Jersey City*, 147 A. 571 (1929), and *Slamowitz v. Jelleme*, 130 A. 883 (N.J. 1925), and concluded that they did not conflict with their holding. *Id*. at 478. Since Kentucky's highest court cited *Wilson* as authoritative and, by implication, the underlying rationale, these cases bear further investigation.

In *Krieger v. Scott*, 134 A. 901 (N.J. 1926), several realtors applied for a zone change as to property that they did not own or have any interest in. In affirming the denial of the permit, the New Jersey Supreme Court stated that:

> It is hardly necessary to say that, unless they were the owners of the property, or had such an interest therein as would entitle them to erect the proposed building thereon, the inspector was justified in refusing to issue a permit....

Id. *Malone* and *Slamowitz* examine whether it is necessary for the optionee to have the owners consent to obtain a building permit prior to closing.

In *Malone v. Mayor and Aldermen of Jersey City*, 147 A. 571 (N.J. 1929), the optionee applied for a building permit, "but merely held an option for its purchase." *Id*. Consequently, his application was denied and he appealed. The New Jersey Supreme Court affirmed, observing:

> Normally no one but the owner or a person authorized by him to do so has a right to erect a building upon a plot of ground owned by the former. No such right vests in a person holding a contract for the purchase of the tract. He may default in the performance of his contract. So, too, the owner may for good cause refuse to perform it on his part. In order to entitle an applicant to the granting of a permit to erect a building upon the land of another, it is necessary for him to show that he had a present right to erect such a building on that land.

Id. at 571-572. In *Slamowitz*, on the other hand, the optionee had the owner's permission and was able to compel the grant of a building permit. 130 A. 883. The rules enunciated in these cases are the law in Kentucky. Accordingly, several rules can be gleaned from *Hatch* and the cases that it cited as authority:

- An optionee can apply for a building permit or zone change prior to closing so long as he or she has the owner's permission; and
- The option must be mutually binding; such that
- The optionee has a present right to undertake the acts contemplated by the permit.
- One who does not have an interest in the property sufficient to undertake the acts contemplated

by the permit has no standing.[12]

Other courts have held that void contracts for sale and options that expire before the permitting process is complete cannot serve as the basis for a building permit or zone change. *City of Madison*, 763 S.2d 162 (Miss. 2000)(void contract); *Murray v. Inhabitants of Town of Lincolnville*, 462 A.2d 1983 (Me. 1983)(expired option). Because ECEP continues to argue that it has the requisite interest or authority, a few additional cases will be of assistance.

ECEP contends that because Fox Trot is involved in litigation as to the Refuse Pile Tract that it can proceed as to those interests. That is insufficient. In *Batchelder v. Planning Board of Yarmouth*, 575 N.E.2d 366 (Mass. App. 1991), the applicant filed for permission to subdivide some land as to which they claimed to be the "owner of record." The problem was that the applicant only owned an undivided 7/28 interest in the subject property and claimed the rest by adverse possession. *Id*. at 367-368. Unfortunately, the adverse possession claim depended upon the outcome of litigation that was never finalized, which caused the Massachusetts Court of Appeals to deny the appeal:

> Therefore, the crucial issue is whether the trial judge erred in ruling that the mere filing of a complaint to register land, based solely upon a claim of title by adverse possession, is not sufficient to clothe the plaintiff with "owner of record" status (as required by the board's regulations, note 5, supra) for purposes of applying for subdivision approval.
> ....
> The effect of such a complaint, if allowed, is to vest title to the land in the petitioner, thereby making ownership certain and indefeasible. G.L. c. 185, § 1(a). *Deacy v. Berberian*, 344 Mass. 321, 328, 182 N.E.2d 514 (1962). **Contrary to the board's contention, however, the mere act of filing a complaint for registration does not, in itself, affect the state of title.** *See* G.L. c. 185, § 36. Here, the trust withdrew its registration complaint before the Land Court issued a final decree establishing title to the locus. Therefore, there was no sufficient basis upon which the trust could establish that it was the "record owner" of the locus at the time it submitted the preliminary and definitive plans. Accordingly, the trust had no standing to apply for

[12] *Ran court, infra*, at 965; *Murray* at 43.

subdivision approval as of the dates the plans were submitted.

Id. at 369 (emphasis added). Likewise, the mere existence of the Bankruptcy Case cannot serve as an interest in real property sufficient to support an application for a construction permit - it is, after all, an inchoate matter which may not be final for several years. There are also public policy reasons underlying this rule:

> Chief among the policy concerns underlying the enactment of the Subdivision Control Law was to ensure the provision of "adequate drainage, sewerage, and water facilities, without harmful effect to adjoining land and to the lots in the subdivision." *Meyer v. Planning Bd. of Westport*, 29 Mass.App.Ct. 167, 170, 558 N.E.2d 994 (1990). *See* G.L. c. 41, § 81M. One of the ways in which this objective is achieved by local planning boards is to secure a covenant from the "owner of record" which provides for the installation of adequate municipal services. G.L. c. 41, § 81U. If the owners of record are not fully identified or if the planning board has been misled as to the record owners, the public would not be protected because the board would be unable to ensure that it would receive a properly executed covenant, or in the event of a modification or amendment of a plan approval, a properly executed consent.

Id. The Siting Board has similar responsibilities to the public, all of which will be for naught if the true owner does not agree to the conditions imposed for the public's protection.

C. ECEP Has Neither Standing Nor the Requisite Authority to Obtain a Construction Certificate.

See the foregoing section.

D. ECEP Has Waived Any Right to Permit Any Portion of the Adverse Tracts.

The Staff, DLX and the Trust submitted data requests to ECEP seeking information about its alleged legal interest in the property and about any surveys that it conducted. *See* ECEP's objections to DLX and the Trust's Data Request Nos. 3 (supporting title instruments), 4 (similar request), 5 (copies of surveys) and 6 (names/addresses of those with knowledge). It also failed to provide adequate responses to the Staff's First Data Request Nos. 10 (deed descriptions and acreage for each

parcel) and 11 (deed for each parcel). The same problems exist for Will Herrick's Data Request Nos. 2(a and e)(ownership of the property and supporting documents. Instead, ECEP merely submitted deeds that do not describe the Refuse Pile Tract or the Calla Subdivision, a fact which Fox Trot admitted in the Bankruptcy Case.[13] The same is true of the Data Request that the Siting Board made for the map used by Mr. Jaggers when he overlaid it to determine that DLX did not claim the 28 acre site where ECEP proposes to build the plant. T:200. ECEP did not tender the map after all, claiming attorney-client privilege. ECEP's August 31, 2004, Data Request, Response No. 4.

It has been held that administrative bodies such as the Siting Board can and should examine the legal instruments by which applicants claim the legal rights that would entitle them to the permits that they seek. In *Rancourt v. Town of Glenburn*, 635 A.2d 964 (Me. 1993), the board examined and interpreted the underlying deeds to see whether an applicant actually held the easement that would have allowed the applicant to construct a dock. The court concluded that "[t]he board correctly determined that Rancourt did not establish a sufficient legal interest in the right-of-way to entitle her to apply for a permit to place a dock thereon. Accordingly, the decision to revoke her permit should be affirmed." *Id*. at 966.

ECEP should not be rewarded for refusing to answer questions that are material to the Application and it should be dismissed. Conclusory statements as to ownership are meaningless. *See Walsh* at 208.

D. ECEP Has Neither Standing Nor the Requisite Authority to Obtain a Construction Certificate.

See the section IIB, *infra*.

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[13] Fox Trot's and DLX's counsel stipulated to the introduction of Richard Hall's affidavit and survey at the trial in the Bankruptcy Case. The affidavit and the attachments reveal that Kentucky Processing does not have record title to the Adverse tracts. Accordingly, since ECEP claims trough Fox Trot, it is bound thereby.

III. ECEP'S APPLICATION FAILED TO ADDRESS OR PROVIDE MITIGATION FOR ANY IMPACT THAT THE OPERATION OF THE MERCHANT PLANT AND MINING ACTIVITY WILL HAVE UPON THE PROPERTIES THAT DLX AND THE TRUST CLAIM TO OWN.

ECEP's application was supposed to contain studies regarding how the operation of the merchant power plant might harm adjoining landowners and others and to propose steps to ameliorate that harm. Because ECEP refused to even consider DLX's and the trust's property claims, it likewise refused to consider what might happen if it turns out that they are right in whole or in part. Consequently, the Application made *no* provisions for mitigating harm that is recognized by the setback restrictions contained in the Act, *see, e.g.*, KRS § 278.704, and the accompanying regulations. Therefore, the Application is fatally defective and must be denied, albeit without prejudice.

IV. KRS § 278.700, ET SEQ., IS UNCONSTITUTIONAL TO THE EXTENT THAT IT CONSTITUTES SPECIAL OR LOCAL LEGISLATION IN VIOLATION OF SECTIONS 59 AND 60 AND OF THE KENTUCKY CONSTITUTION.

Statutes must have a rational basis in fact. KRS § 278.704(2) appears to be based upon the assumption or finding that it would be injurious to adjoining landowners if merchant electric generating facilities are located within 1,000 feet of their property lines or if they are located within 2,000 feet of "any residential neighborhood, school, hospital or nursing home facility." Curiously, the Legislature permitted deviations from these setbacks as follows:

1. A local government has a more or less restrictive setback requirement; or
2. To the extent deemed permissible by the Siting Board if the proposed facility meets the

goals of KRS § 224.10-280 (coal-fired electric generation plants); § 278.010 (utilities subject to the PSC); §§ 278.212, .214, .216 and .218 (utilities, generation and transmission cooperatives); and §§ 278.700 to 278.716 (merchant power plants); or

3. Waiver of the 1,000 foot boundary restriction for exhaust stacks "[i]f the proposed electric generating facility is proposed to be located on a site of a former coal processing plant in the Commonwealth, where the electric generating facility will utilize on-site waste coal as a fuel source...."

The Legislature does have the right to create classifications "so long as [the] classification is not manifestly arbitrary and unjust...." *Manning v. Sims*, 308 Ky. 587, 213 S.W.2d 577, 604 (1948). Section 59(24) of the Kentucky Constitution goes even further:

> The Kentucky Constitution § 59(24) prohibits special legislation with regard to the regulation of labor, trade, mining, or manufacturing. In Kentucky Harlan Coal Co. v. Holmes, Ky., 872 S.W.2d 446 (1994), we noted that the purpose of § 59(24) was to prevent special privileges, favoritism, and discrimination, and to insure equality under the law. A general law must apply equally to all in a class, and there must be distinctive and natural reasons inducing and supporting a class distinction. A statutory classification must be based upon some reasonable and substantial difference in kind, situation, or circumstance which bears a reasonable relationship to the purpose of the statute.

Brooks v. University of Louisville Hosp., Ky., 33 S.W.3d 526, 530 (2000). The class are adjoiners and those who utilize their property in certain ways. Is there a distinctive and natural reason to deny people who live and work near a merchant power plant these protections just because the plant will be located where coal was once processed or where another utility is located? No.

If the emissions and noise emanating from exhaust stacks are harmful or damaging to people, property and businesses located within 1,000 of any property and within 2,000 feet of property that has been put to a particular use by human beings, then it is impossible to see why reducing those

limitations just because a proposed plant may burn waste coal or be operated in conjunction with another utility. The health and well-being of each such citizen and business is of equal importance and cannot be cast aside simply to allow certain limited classes of plants to damage their health, property and businesses.

This analysis renders KRS § 278.706(2)(e) unconstitutional as well to the extent that it allows for deviations from the 1,000 and 2,000 foot setback requirements.

VI. KRS § 278.700, ET SEQ., IS UNCONSTITUTIONAL TO THE EXTENT THAT IT IMPROPERLY TREATS SOME CITIZENS DIFFERENTLY THAT DLX AND THE TRUST, THUS DENYING THEM THE EQUAL PROTECTION OF THE LAWS.

DLX and the Trust incorporate by reference the arguments in the foregoing section and state that this unequal treatment has no rational basis and thus violates Sections 1, 2, 3 and 171 of the Kentucky Constitution and the Fourteenth Amendment to the Constitution of the United States.

VII. KRS § 278.700, ET SEQ., IS UNCONSTITUTIONAL TO THE EXTENT THAT IT IMPROPERLY DELEGATES TO TYHE SITING BOARD THE RIGHT TO DECIDE TO WHAT EXTENT THAT IT CAN AUTHORIZE DEVIATIONS FROM THOSE REQUIRED BY KRS § 278.704(2).

Despite legislative findings found in KRS § 278.704(2), the Legislature saw fit to allow the Siting Board broad discretion as to whether and to what extent it could waive the two setback requirements that protect the property and personal rights of:

1. Citizens whose property adjoins the proposed site, any boundary of which is within 1,000 feet of an exhaust stack of the proposed facility; or

2. Citizens whose property constitutes a residential neighborhood, school, hospital or nursing home facility which is within 2,000 feet of an exhaust stack of the proposed facility.

KRS § 278.700, *et seq*., does not contain any guidance as to how these limitations can be varied and thus the delegation is improper, not only for the reasons set forth above, but because it lacks adequate safeguards.

As above, this analysis renders KRS § 278.706(2)(e) unconstitutional as well to the extent that it allows for deviations from the 1,000 and 2,000 foot setback requirements.

VIII. KRS § 278.700, ET SEQ., IS UNCONSTITUTIONAL TO THE EXTENT THAT IT DENIES DLX AND THE TRUST THE RIGHTS ENUMERATED HEREIN.

The Act is unconstitutional if it denies or to the extent that it is applied to deny DLX and the Trust any of the rights set forth herein. If the Act is constitutionally deficient, then it will be impossible to grant the Application.

IX. KRS § 278.700, ET SEQ., IS UNCONSTITUTIONAL TO THE EXTENT THAT IT GRANTS ANY INTEREST RIGHT OR INCENTIVE TO ECEP IN THE PROPERTY WHICH DLX AND THE TRUST CLAIM AND AMOUNTS TO A TAKING WITHOUT DUE PROCESS OF LAW.

The Act is unconstitutional if it denies or to the extent allows someone such as ECEP to "take" an interest in the property claimed by DLX and the Trust, that is, a development right, in violation of DLX's and the Trust's right to due process of law and thus violates Sections 1, 2, 7, 14 and 171 of the Kentucky Constitution and the Fifth and Fourteenth Amendments to the Constitution of the

United States.

X. ECEP'S PROFFER TO PRESENT ITS SURVEY AFTER THE HEARING AND TO RECORD THE SAME IN THE ESTILL COUNTY CLERK'S OFFICE WITH THE SITING BOARD'S BLESSING IS IMPROPER.

At the hearing, ECEP offered to "cure" its survey/legal description problem by agreeing that:

> A boundary survey shall be obtiained and recorded in the Estill County Clerk's office by ECEP or an affiliate of ECEP as lessor to ECEP for the real property upon which ECEP will construct the facility and upon which on-site coal will be mined as a fuel source for te facility.

Neither DLX nor the Trust will agree to this proffer[14] for the following reasons:

1. ECEP should have filed the survey and provided the legal boundary description for the aforesaid property claims with the Application.
2. To allow ECEP to file a survey after the hearing would deny DLX and the Trust due process because:
    a. it does not afford notice to DLX or the Trust of what ECEP's boundaries were in time to cross examine them, which is particularly prejudicial when ECEP denied their every attempt to obtain this information before and during the hearing; and
    b. ECEP has not retained anyone to run the title to the properties and, although its contractor, CBC Engineering, began the survey around March, 2004, T:175, it has not completed it, T:122 and 171, probably because it wanted to avoid cross examination and/or await the outcome of the Bankruptcy Case.
3. The Act does not contemplate or require any applicant file any survey in a county clerk's

[14] *See* T:158.

office. Filing documents that reflect negatively on someone's title can constitute slander of title. *See White v. Winchester Land Development Corp.*, Ky.App., 584 S.W.2d 56 (1979). ECEP apparently recognizes that liability might ensue from filing a survey that claims any part of DLX's or the Trust's land and would like the Siting Board's seal of approval for additional protection so that it can argue that it was compelled to do so. In any event, ordering parties to do or not do something that affects the title to real estate is outside the Siting Board's jurisdiction as set forth above.

4. None of ECEP's alleged affiliates are before the Siting Board and are not subject to its jurisdiction. Indeed, this amounts to an admission that ECEP does not have the Requisite Interest needed to file the Application.

If ECEP needs to file a survey in this record, then it is too late. As for ordering ECEP to file in the Estill County Clerk's Office, this cannot be done.

XI. DLX AND THE TRUST ADOPT HEREIN THE ARGUMENTS MADE BY MR. HERRICK IN HIS BRIEF.

Mr. Herrick's arguments are adopted by reference to the extent that they do not conflict with the positions taken by DLX and the Trust.

XII. MOTION TO STRIKE CERTAIN TESTIMONY OFFERED BY ECEP IN SUPPORT OF CONCLUSIONS AND MAPS PERTAINING TO BOUNDARIES AND THE REQUIREMENTS OF THE ACT.

Mr. Del Jaggers and Mr. Gerald Mack testified at length about the nature and extent of DLX's and the Trust's claims and boundaries, but when DLX and the Trust tried to cross-examine them about these opinions, ECEP either objected because such questions were deemed to require inquiry

into matters of title or because they sought infrmation allegedly protected by the attorney-client privilege. Neither basis is adequate:

1. None of ECEP's objections, whether written or oral, provide sufficient facts to describe the item that it refuses to produce with enough particularity to enable anyone to determine whether it is correct.
2. ECEP has admitted that it has not retained any attorneys to run the title to the property that is the subject of the Application or to check the records in the Bankruptcy Case. T:55, 66 and 79. Accordingly, and as also admitted by ECEP, the attorneys for which the privilege is sought are allegedly those of an affiliated entity. As before, there are scant particulars, either as to the entity or the attorney. In each case, ECEP essentially asks the Siting Board to take it at its word. Such opinions or documents are not protected by KRE 503 as none of the documents or testimony came from ECEP's counsel. If the affiliate's counsel disclosed this to ECEP, then it is unprotected and the privilege has been waived.
3. Boundaries are important under the Act, as set forth above, and ECEP's witnesses testified often about their opinions about the extent of DLX's claims in the Bankruptcy case and as to the Trust's. They even admitted that they had examined deeds, pleadings and a survey, T:57-59, 75 and 182-183, and had overlain maps, T:185-200, to reach these conclusions; however, they refused to answer any questions or provide any documents that would have allowed DLX or the Trust to test the basis of these opinions.

Having established that these objections and defenses are without merit, the only way to correct the prejudice that DLX and the Trust have suffered is to enter an order striking those portions or the record wherein representatives of ECEP testified about: (a) their opinions about DLX's and the

Trust's claims; and (b) their opinions about the boundaries of DLX's and the Trust's property claims.

CONCLUSION

ECEP's application should be denied without prejudice. Even if the property that DLX and the Trust own is excluded, ECEP's application suffers from other deficiencies which warrant denial. For example, the Application does not provide any information as to the impact on the properties that DLX and the Trust claim because it presumed that they do not own them. If ECEP is in error, the impact will be significant as they are directly adjacent to As a practical matter, the consequences of granting such permission or conditional permission can be dire for all concerned, including ECEP.

In *Home Depot, U.S.A., Inc. v. Saul Subsidiary Limited Partnership*, Ky. App., _ S.W.3d _, 2004 WL 1699614 (2004), Home Depot wanted to build a detached building instead of connecting it to the Lexington Mall. Although Home Depot prevailed initially, the Court of Appeals reversed and remanded because it concluded that the restriction was binding and required the Fayette Circuit Court to determine the proper remedy. After remand, the Circuit Court ordered Home Depot to demolish its building and it appealed. The Court of Appeals affirmed. Although not yet final, this demonstrates the foolhardiness of proceeding where rights in real estate are in question and not yet final. To grant a construction certificate as to the Refuse Pile Tract and the Calla Subdivision invites a similar, if not more expensive, disaster.

ECEP admitted that if it does not get title to the 28 acres upon which the plant is to be built, that it will not build the plant and, consequently, the certificate, if granted, would not be utilized. T:69. ECEP has filed a premature application and it should be dismissed without prejudice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served via first class mail on this the 13th day of September, 2004, to the following:

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