IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

HEATHER GRIGGS, Appellant	: No. 21-0224
	: Civil Action – Land Use Appeal
vs.	:
LYCOMING TOWNSHIP BOARD OF SUPERVISORS, Appellee	:
and	:
BEECH RESOURCES, Intervenor	:

ORDER

AND NOW, by way of background, Appellant commenced this action by filing a Notice of Land Use Appeal on March 12, 2021. On April 21, 2021, Appellant filed a Praecipe to Proceed In Forma Pauperis, with counsel certifying pursuant to Pennsylvania Rule of Civil Procedure 240(d)(1) her belief that Appellant was unable to pay the costs of litigation. On April 29, 2021, Intervenor filed a Response to Praecipe to Proceed In Forma Pauperis, contending that Appellant possessed significant assets which would provide her sufficient financial resources to pay the costs of litigation in this matter. On August 5, 2021, this Court issued an Opinion and Order holding, *inter alia*, that under Rule 240(d), like Rule 240(c), "[t]he mere filing of a praecipe for in forma pauperis status will not automatically establish the petitioner's right to proceed in that status," but instead the court must hold an evidentiary hearing if there is a question as to whether the petitioner is unable to pay.[1]

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[1] *See* August 5, 2021 Opinion and Order (quoting *In re Adoption of B.G.S.*, 614 A.2d 1161, 1171 (Pa. Super. 1992).

On October 12, 2021, the Court held an evidentiary hearing, and received a significant amount of evidence concerning the financial situation of Appellant and her family. Notably, Appellant presented this information, which included tax documents and bank statements, under confidential information cover sheets. On February 9, 2022, this Court issued an Order and Opinion, *inter alia*, denying Appellant's request to proceed in forma pauperis. In support of this decision, the Court discussed the specifics of Appellant's assets, liabilities, and income. The Court did not reproduce, and the Opinion did not include reproductions of, any documents that Appellant filed under seal; however, the Opinion contains exact figures and specific descriptions of assets taken from both Appellant's testimony and the exhibits she submitted in support of her Petition.

On March 10, 2022, Appellant filed a Motion for Protective Order of Confidential Information, seeking to redact approximately fifty pieces of information from the body of the February 9, 2022 Opinion and Order, as well as an entire table of information describing Appellant's account balances. Essentially, Appellant seeks to redact 1) information relating to the type of credit cards she has; 2) information related to her and her family's monthly income and expenses; 3) information related to her monthly payments on cars and mortgages; and 4) information related to outstanding balances remaining on her mortgages and automobile loans. The Court heard argument on Appellant's Motion for Protective Order on May 16, 2022.

ANALYSIS

The public access of information in case records is governed by 204 Pa. Code § 213.81, the Case Records Public Access Policy of the Unified Judicial System of

Pennsylvania. Section 7.0 of § 213.81 governs Confidential Information, requiring parties to not include certain information in any documents filed with the Court but instead to include that information on a Confidential Information Form filed contemporaneously. Similarly, Section 8.0 governs Confidential Documents and requires parties to file certain documents under a Confidential Document Form.

The official commentary to both of these sections explains that these requirements are not mandatory upon Courts, though Courts are expected to use discretion when deciding to include certain confidential information or documents in court-generated case records. The Commentary to Section 7.0 states, in relevant part:

> "Unless constrained by applicable authority, court personnel and jurists are advised to refrain from inserting confidential information in court-generated case records (e.g., orders, notices) when inclusion of such information is not essential to the resolution of litigation, appropriate to further the establishment of precedent or the development of law, or necessary for administrative purposes. For example, if a court's opinion contains confidential information and, therefore, must be sealed or heavily redacted to avoid release of such information, this could impede the public's access to court records and ability to understand the court's decision."

The Commentary to Section 8.0 includes a similar directive regarding the attachment of confidential documents to court-generated case records.

Here, the redactions proposed by Appellant do not consist of Confidential Information as defined by Section 7.0, and there are no documents attached to the February 9, 2022 Opinion and Order. To the extent that Appellant suggests that any *information* included in a Confidential Document is necessarily confidential for the purposes of the Case Records Access Policy, she has not provided authority for this position, which is contrary to the plain language of the policy.

Additionally, the inclusion of the majority of the information Appellant seeks to redact is "appropriate to further the establishment of precedent or the development of law...." There is a dearth of detailed case law addressing the issue of what measure of assets, debts, income and liabilities will support or contradict a party's petition to proceed in forma pauperis, and the Court's detailed analysis of the specifics of Appellant's financial situation was necessary to a resolution of the issue. To some extent, when a party in a publically accessible case claims an inability to pay the costs of litigation, that party must to some extent assume the risk that non-confidential aspects of her financial situation will become matters of public record. Therefore, the Court will deny the proposed redactions of financial figures and dollar amounts.

However, the Court agrees with Defendant that information regarding the type of credit card her business uses, and the types of vehicles she owns, is not necessary to include and does not further the development of law in this case or generally. Therefore, the Court will approve the following proposed redactions:

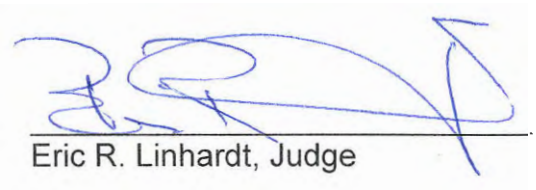
- The first redaction on Page 17; and
- The first, third, sixth, eighth, and tenth redactions on Page 20.

ORDER

For the reasons detailed above, the Court GRANTS IN PART Appellant's Motion for Protective Order of Confidential Information. The Prothonotary is **DIRECTED** to place the Court's February 9, 2022 Opinion and Order **UNDER SEAL.** A redacted version of this Court's February 9, 2022 Opinion and Order is attached to this Order and both shall be filed and be made part of the public record.

IT IS SO ORDERED this 15th day of August 2022.

By the Court,



Eric R. Linhardt, Judge

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LYCOMING TOWNSHIP BOARD OF SUPERVISORS, Appellee	:	
and	:	
BEECH RESOURCES, Intervenor	:	

OPINION AND ORDER

AND NOW, following an evidentiary hearing held on October 12, 2021 on Intervenor's Motion to Dismiss Appeal for Lack of Standing and on Intervenor's Objection to Appellant's *In Forma Pauperis* Status, the Court herby issues the following OPINION and ORDER.

BACKGROUND

Appellant commenced this action by filing a Notice of Land Use Appeal on March 12, 2021, appealing from Appellee's February 10, 2021 approval of Intervenor's conditional use application for a natural gas production well located at 223 Mitchell Hill Road in Williamsport (the "Property").[1] The merits of the appeal are not presently before the Court.[2] Rather, the parties have filed a number of threshold motions. The procedural history of this case was addressed in detail in this Court's

[1] *See* Appellant's Notice of Land Use Appeal, paragraphs 4-9.
[2] On the merits, Appellant contends that the conditional use approval should be revoked because Intervenor has not satisfied all Pennsylvania Department of Environmental Protection guidelines and the conditional use approval violates both the Lycoming Township Zoning Ordinance and the Constitution of Pennsylvania.

August 5, 2021 Order addressing the parties' various filings. As that Order recounted, in relevant part:

> "On March 24, 2021, the Court issued an Order setting a scheduling conference on the Land Use Appeal for April 15, 2021.
>
> Prior to the conference, on April 5, 2021, Appellant filed a *Motion for Leave to Amend Notice of Land Use Appeal*.... On April 12, 2021, Beech Resources ('Intervenor') filed a *Notice of Intervention*.... [O]n April 13, 2021, Intervenor filed a *Motion to Dismiss Appeal for Lack of Standing*. Intervenor maintains in this Motion that because Appellant had not attended the noticed hearing before the Board of Supervisors, under the law of the Commonwealth she lacks standing to appeal the Board's decision.
>
> At the conference held on April 15, 2021, the parties agreed that prior to scheduling an evidentiary hearing on the Land Use Appeal the Court would need to resolve the issue of whether Appellant has standing to bring the Appeal....
>
> Pending argument, on April 21, 2021, Appellant submitted... a *Praecipe to Proceed in Forma Pauperis*, which was certified by her legal counsel.... Intervenor filed a *Response to Praecipe to Proceed Informa* [sic] *Pauperis*, by which Intervenor objected that Appellant has sufficient financial resources as to be disqualified from *in forma pauperis* status."

In the August 5, 2021 Order, the Court first addressed Intervenor's Motion to Dismiss Appeal for Lack of Standing. Under Section 908(9) of the Pennsylvania Municipalities Planning Code ("MPC"), only a "party" to a hearing before a zoning hearing board or municipal board has standing to appeal a decision of the board; Intervenors contended that, because Appellant did not attend the February 10, 2021 board hearing, she was not a "party" to that hearing as defined by the MPC[3] and thus did not have standing to file this appeal.

[3] Section 908(3) of the MPC defines a party to a hearing as "the municipality, any person affected by the application **who has made timely appearance of record before the board**, and any other person including civic or community organizations permitted to appear by the board" (emphasis added).

Appellant admitted that she did not attend the February 10, 2021 hearing, but contends that she has not waived standing because proper notice of the hearing was not provided. Section 908(1) of the MPC requires the board to "conspicuously" post notice on the subject property at least one week prior to the hearing; Appellant contended that this requirement was not satisfied, and therefore her inability to attend the meeting should not be held to invalidate her standing.

The Court concluded that it did not have an evidentiary record sufficient to decide whether Appellees had provided proper notice of the February 10, 2021 hearing. Therefore, the Court scheduled an evidentiary hearing to provide the parties an opportunity to create a record on which this Court could decide whether Appellees had satisfied the MPC's notice requirements.

The Court reached a similar conclusion regarding Appellant's Praecipe to Proceed *In Forma Pauperis* and Intervenor's objection thereto. As explained in the Court's August 5, 2021 Opinion, a trial court that is uncertain about a litigant's right to *in forma pauperis* status "is required to hold a hearing to determine the veracity of the allegations contained in the *praecipe*."[4] The Court held the evidentiary hearing on these two issues on October 12, 2021.[5]

EVIDENTIARY HEARING

The October 12, 2021 evidentiary hearing was conducted in two phases. First, the parties presented evidence concerning the notice provided by Appellees of the February 10, 2021 hearing, and heard argument on this issue. Second, the

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[4] *Thompson v. Thompson,* 187 A.3d 259, 265 (Pa. Super. 2018).
[5] The Court deferred a ruling on the parties' remaining issues until it addressed the threshold question of standing.

parties presented testimony, evidence and argument on Appellant's petition to proceed *in forma pauperis*.

I. Notice and Standing Issue

A. Testimony and Evidence

The Court first heard testimony from Shelly Davis, who has served as Lycoming Township's secretary and treasurer for approximately four years. She testified that she was familiar with the notice requirements for conditional use hearings, which she understood to require the Township to publish notice twice in the newspaper as well as post the notice on the property. Appellees introduced Exhibit 1, which was the proof of newspaper publication of the February 10, 2021 hearing; Davis testified that this notice was emailed to the newspaper on January 14, 2021 and published on January 27, 2021 and February 3, 2021.[6]

Appellees also introduced Exhibit 2, which was a notice that Davis testified was intended to be posted on the property. Davis explained that, although she did not post the notice herself, she had drafted it on the same day she had prepared the newspaper ad, and prepared six notices for posting, laminating them because winter weather was expected. She testified that she called Larry DeRemer, the Township's Supervisor and Road Foreman, advising him that the last date to post these notices on the property was seven days prior to the hearing. She testified that she left the laminated notices on the coffee table at the township office for DeRemer to pick up. Davis also testified that she mailed notice of the hearing to the owners of property adjoining the well site on January 25, 2021.

[6] Appellant does not dispute that the notice was published in a newspaper as required by the MPC.

On cross-examination by Intervenor, Davis testified the notices she prepared were of a standard format used for second class townships, and that she also prepared notices for Anthony Township as part of her employment with that municipality. She testified that she had never received any prior complaints about notices she had created.

On cross-examination by Appellant, Davis explained that she went into Lycoming Township's physical building on Wednesdays, so she must have left the laminated notices on the coffee table for DeRemer on Wednesday, January 20, 2021. She indicated that when she returned to the Township building the following Wednesday, January 27, 2021, the notices were no longer on the table. Davis testified that she did not personally confirm the notices had been posted, and she did not drive by the Property to ensure they were posted and visible. When confronted about the font size and readability of the notice, she agreed she could not read the notice at a distance of about 20 feet, but was able to read it at 6 feet.

The next witness to testify was Larry DeRemer, who has been Lycoming Township's Supervisor and Road Master for approximately eleven years. DeRemer testified that part of his job duties included posting notice of conditional use hearings such as the February 10, 2021 hearing. The typical process would be for the Township's secretary to give him posters with the notice, advising him of the date they had to be posted.

DeRemer testified that he picked up six laminated notices from the Township building's coffee room table sometime after January 20, 2021. He explained how he put them on wooden stakes, assisted by Mark Berry, and put them up at the Property

the following week. He testified that he attempted to place the notices so as to "surround" the Property – one notice was posted at each end of Mitchell Hill Road, two notices were posted on the adjacent Almost Country Road, and two notices were posted at the point where the planned access road to the well pad meets the public road. DeRemer testified that he placed the signs so that they were visible and not covered by the snow, and that after the February 10, 2021 hearing he returned to the sites and found at least some notices located on Almost Country Road and Mitchell Hill Road. DeRemer clarified that he physically placed the stakes and notices sometime in the last week of January 2021, though he could not recall the exact date.

On cross-examination by Intervenor, DeRemer testified that Almost Country Road is approximately 33 feet wide, with the lane of travel approximately 18 feet wide. He explained that the notices were posted within this right-of-way, which extends 16.5 feet from the center line. He stated that Almost Country Road has a 35 mph speed limit, and has "moderate" traffic, which for Lycoming Township means approximately three cars per hour. DeRemer clarified that the two signs on Almost Country Road were posted at the same location, and testified that the signs were not difficult to see, describing them as conspicuous "if you were looking for [them]." DeRemer stated that Mitchell Hill Road is narrower and less traveled than Almost Country Road.

On cross-examination by Appellant, DeRemer testified that he posted all six signs on the same day. On the day he posted the signs, the weather was not "stormy," though there was snow on the ground. He explained that each stake was

wooden, about three feet tall and two inches wide, and that he and Marc Berry hammered them down into the snow approximately 12 inches. He stated that after placing the stakes, the notices were six-to-eight inches above the snow that had been left at the side of the road by plowing. DeRemer believed that the signs were far enough back from the road and out of the snow that they would not have been covered by anything other than deep snowfall, which he stated did not occur. DeRemer agreed that the signs may have been difficult to notice for someone driving by and looking straight ahead down the road, but noted that they had black lettering framed against a white background and white snow. DeRemer testified that, after placing the signs in late January, he went back on February 1 or 2 and ensured that all of them were still standing and were still staked into about the same amount of snow. He explained that he chose the spot on Almost Country Road because it was a level spot by a logging path, very near to where he was told the oil pad was going to be placed. He testified that he placed a stake with the notice on either side of this logging road, on the same side of Almost Country Road as the Property. He clarified that these signs were posted approximately five or six feet from the edge of the road.

Appellee's final witness was Marc Berry, an employee of Lycoming Township for the last three or four years. He testified that, in the course of his employment, he helped Larry DeRemer post a number of notices in late January or early February 2021. He testified that these notices were laminated and left in the Township building, and that he made the stakes and took them to DeRemer. Berry testified that they placed two notices on Almost Country Road just below the logging road landing, one notice at the bottom of Mitchell Hill Road, one notice at the top of Mitchell Hill

Road, and two notices in the middle of Mitchell Hill Road near the pipeline crossing. He explained that, when the notices were posted, there was snow on the ground, with snowbanks lining the roads. He estimated the notices were placed four or five feet off of the side of the road, outside of both the travel lane and the plow line. He explained that, when the notices were placed, they were visible and unobstructed above the snow line. Appellee introduced Exhibit 3, which was a photograph taken by Berry of one of the notices on Almost Country Road some time after February 2021. He explained that the signs remained there into the spring of 2021, though they had fallen into the grass at that point.

On cross-examination by Intervenor, Berry confirmed that the signs were still laminated and readable in the spring.

On cross-examination by Appellant, Berry clarified that, in the spring, the signs were dirty and had fallen over. He testified that the signs were placed in the areas chosen by his supervisor, with the front of each sign parallel to the road. He agreed that one would have to turn and look to the side of the road for it to be visible. Berry testified that, while there were likely some people walking on Almost Country Road and Mitchell Hill Road, most travelers would be driving. He explained that when the notices were placed, the entirety of the sign and a portion of the stake was visible above the ice and snow that was on the ground; although some of the stake was visible above the snow, the majority of what was visible above the snowline was the sign. He testified that the signs were far enough out of the snow that they wouldn't have been obscured by anything short of a major snowstorm, but he believed that all large snowstorms had occurred prior to their placement.

Next, Intervenor Beech Resources called its witness, Donald Stevenson. He testified that he has been Beech Resources' regulatory manager for three years, and worked in the same field prior to his employment with Beech Resources. He testified that part of his job was making applications to townships for land use approval; a regular part of this duty was to attend public hearings seeking conditional use and to monitor the township to ensure it complied with statutory notice requirements. Stevenson testified that the public hearing for the Property occurred on February 10, 2021, and he ensured that notices were posted more than a week prior. His testimony regarding the placement of the notices and the outdoor conditions of those areas was consistent with that of DeRemer and Berry. He explained that the posting on the sides of the logging road was the closest possible location to the proposed pad site. He described Appellant's property as being located approximately 1,000 to 1,500 feet west of the Property, with Williamsport and all nearby major roads being east of the Property. He testified that, immediately before the October 12, 2021 evidentiary hearing, he confirmed the signs were still located at their posted areas.[7]

On cross-examination, Stevenson clarified that he had driven to the posting locations shortly before testifying that day and saw the notices, still there but lying flat instead of standing straight up. He did not know when the stakes fell down. He explained that he first saw the notices posted in their locations in early February, having communicated with Lycoming Township prior to their posting and followed up by visiting the sites sometime prior to February 6, 2021 to confirm their posting. He testified that the signs were posted facing the cars on the road. He did not know how

[7] As of October 12, 2021.

much snow was present on February 1, 2021 or whether it snowed shortly after, but testified that even significant additional snowfall would not have covered the notices.[8] Stevenson explained that the stakes were anchored at least into the snow along the side of the road, which was higher than in most areas due to plowing, but did not know if they reached the ground below the snow.

On re-direct, Stevenson confirmed that the size of the notices was consistent with past postings in Beech Resources' other land use efforts.

Appellant next called her first witness, Suzanne Kutz. Kutz testified that she had lived on Almost Country Road, near both Appellant and the Property, since January of 2016. She explained that she received notice of the February 10, 2021 public hearing in the mail, and that she tried to call Lycoming Township about the meeting on the phone number provided, but the number was not in service. She agreed that the notice she received in the mail was similar, if not identical, to Appellee's Exhibit 2. She testified that she tried to call the Township "various times" before reaching DeRemer on Saturday, February 6, 2021, at which time she was informed that the secretary (who would presumably respond to her calls) only worked on Wednesdays.

Kutz explained that she often walked around the Property, as often as three to five times per week, and its owner had given her permission to do so. In taking her walks, she would travel approximately 800 feet from her own property, which would

[8] Appellant asked the Court to take judicial notice of a document, admitted as Exhibit T-3, indicating that there were 11.2 inches of snow at Williamsport Regional Airport on February 2, 2021. The parties disagreed, however, as to whether this indicated there were a total of 11.2 inches of snow *on the ground* at the airport as of February 2, 2021, or whether there was 11.2 inches of *new snowfall* at the airport on that date. The witness testified that, either way, the notices would have remained visible above the snowline.

take less than 10 minutes. She testified that she usually walked on the berm, and that around the time the signs were ostensibly posted the snow was up to her knees. She would not often drive on the roads near the Property. She explained that in late January, there was significant snow on the ground – though less than two feet – and that there was "a lot" of additional snowfall on Monday, February 1, 2021. She testified that she did not recall seeing posted notices prior to the February 10, 2021 hearing, and definitely did not see any signs on February 9, 2021.

Kutz testified that on February 11, 2021, the day after the hearing, she did notice one of the signs, and wondered why the township posted it the day after the hearing. She stated that she had to walk very near to the sign to read it, and observed that it was the same notice she had received in the mail. She stated that the white paper "blended right in" with the snow, and in particular the snow-covered hill immediately behind the notice. The notice was on a two-inch post, with about 5 or 6 inches of the post sticking up out of the snow below the paper. She testified that the notice was about two feet from the edge of the road, close enough to be plowed over, and recalled that, generally, there was snow "everywhere" in the vicinity of the notice. She explained that the front of the sign was facing the road, and opined that it would not be easy to see if driving past in a car.

On cross-examination, Kutz testified that she did not remember if she had ever driven by the area during the time the notices were allegedly posted. She confirmed that her husband attended the February 10, 2021 hearing pursuant to the notice provided them. She explained that she generally was aware of new objects along the side of Almost Country Road in the areas she frequented. She testified that,

during snowy weather, the road is usually plowed, and she will often walk on the road, though she would step onto the snowbank if she had to. She explained she did not take pictures of the relevant areas, though her husband took photographs of Mitchell Hill Road on February 8, 2021. She agreed that a driver on that road would need to be cautious, and would likely be looking to the sides of the road at least occasionally to watch for deer and children.

On re-direct, she reiterated her belief that the signs would not be "readable" for a driver unless they stopped, because the lettering was too small. She agreed on re-cross that it would not typically be unsafe for a driver to stop and read one of the signs.

Appellant's next witness was Kevin Mitstifer, who lived on Mitchell Hill Road and was familiar with the February 10, 2021 hearing and the Property. Appellant introduced Exhibit T4, which was a map of the relevant area. Mitstifer indicated that he used to live on the property designated as the "Wright property" on Exhibit T4, and that he saw the notice at the intersection of Dunkleberger Road and Mitchell Hill Road. He testified that the notice was a normal-sized piece of paper attached to a stick, which drew his attention and caused him to pull over to see what it was. He explained that he could not read the notice from his car, but had to walk to about six feet from the notice to read it. He stated that, later, he noticed the sign had been "repositioned" in the snow bank, about 10 feet from the roadway. Approximately 6 to 8 inches of the stake were above the ground, and the sign was "diagonal" to the road.

Appellant herself testified next. She explained that she has lived at 997 Almost Country[9] Road for seven years, and that she's familiar with the Property, driving by it about three times per day, each way. She testified that she would often pass by the area in her car, but never as a pedestrian. She stated that, prior to February 10, 2021, she did not see anything posted in any of the areas she frequented. She explained that the weather during the week of February 3, 2021 through February 10, 2021 was characterized by fluctuating temperatures and melting snow.

On cross-examination, Appellant admitted it was possible the notices were there but she did not see them; she explained that she often travelled the road with her children in the car, though, and none of them noticed or mentioned anything unusual. She did not believe having her children in the car was "distracting," and in fact noted that they would often point out things along the side of the road to her, such as a "for sale" sign. Her "best guess" was that the notices had been placed but that they had quickly fallen down in the melting snow. She testified that she didn't learn that the Township was required to conspicuously post notice until after the February 10, 2021 meeting. She stated that she was not looking for any signs, as she was not aware of the hearing. She noted that the white signs against the white background of the snow were not easily visible.

B. Argument

Appellant noted that Section 908(1) of the MPC requires notice to be posted conspicuously on the affected property one week prior to the land use hearing;

[9] Although Appellant's Residence is located on Almost Country Road, it is not immediately adjacent to the Property at issue.

Appellant argued that posting on the "nearest roadways" is not sufficient to satisfy the MPC's requirement that posting be "on the affected tract of land." More generally, Appellant avers that drivers would have great difficulty seeing these postings, and thus they cannot be said to be conspicuous, especially in light of the fact that the notices consisted of tiny writing on white paper framed against a background of white snow. Appellant argued that, because Appellee could not say exactly what day they were posted, Appellee could not meet its burden of demonstrating that the posting complied with the statutory timelines. Ultimately, Appellant argued, because the posting was not conspicuous, it was not proper, and thus the procedural standing requirement was waived under the terms of the MPC.

Intervenor argued that the evidence showed the notice was posted conspicuously, in light of the MPC's failure to specify any size, scale, or readability requirements. Intervenor suggested that the weight of credibility should be given to the Township's witnesses, essentially because they were not interested parties in the same way as Intervenor or Appellant and thus would not have any motive to prevaricate.

Appellee argued that the weight of the evidence is in favor of the Township. Specifically, Appellee averred that the placement of the notices on either side of the logging road at the base of the Property was sufficient to satisfy the "on the affected tract of land" requirement. Appellee suggested that the people who testified to not seeing the signs simply weren't looking for them, and that the signs were placed in accordance with the Township Ordinance requiring their placement at points deemed by the Township to be "along the affected tract." Appellee argued that the

requirement that notice be "conspicuous" cannot be read to necessitate the placement of a billboard, and noted that nothing in the MPC requires a specific color, font, or any other particular parameter. Ultimately, Appellee argued, the posting in this case satisfied Section 908(1) of the MPC.

II. *In Forma Pauperis* Petition

The Court next heard testimony and evidence on Appellant's Petition to proceed *in forma pauperis* and Intervenor's objection thereto. Appellant was the only witness, and testified at length, on direct and cross-examination, as to her and her family's financial situation.

A. Family Circumstances

Appellant testified that she has five children, ages 18, 15, 13, 9 and 5. Her 9-year-old child has special medical needs, and must see non-local medical specialists on a regular basis. Largely because of this, Appellant is mostly a stay-at-home mother, though she works at a stand at the Williamsport Growers Market for her and her husband's business and helps with pre-school children (in an uncompensated role). She explained that her family has received EBT benefits for several years, and that she cans extra food for her family from the farmer's market where she works. Appellant testified that her family is covered by Pennsylvania's state health care program, but that much of the travel and hotel stays necessary to obtain non-local medical treatment for her child are not covered and thus paid out-of-pocket.

Appellant testified that her house is quite small for a family of seven, and suggested that she and her family live quite modestly. On cross-examination, Appellant explained that she, her husband, and her two oldest children have phones,

and she and her 15-year-old child have computers. She agreed that she and her family went on a vacation to Disney World about four years ago, but explained that this vacation was a gift from family members. She similarly testified that she saw Hamilton on Broadway recently, but this was a gift and the entire excursion lasted approximately two days.

Appellant testified that her 15-year-old and 13-year-old children are in gymnastics, and have been for 10 and 6 years respectively. She agreed that this activity requires significant training and travel, but testified that her children will often travel with other families or fundraise, and all other expenses are paid by her husband's mother.

Appellant explained that her family owns a total of five automobiles, three of which were financed and two of which were owned outright.[10] Appellant testified that two of these vehicles were for her and her husband. She stated that a third vehicle was needed because her oldest child has attended beauty school in Shamokin Dam since August of 2021 five days a week, approximately 40 miles from their residence. Appellant testified that there are no closer beauty schools, and that it was not possible to take public transportation from their residence to Shamokin Dam, resulting in her child's need to drive herself. Appellant admitted she did not know if there were other nearby students who could provide her daughter with transportation. Appellant testified that the fourth and fifth vehicle were both much older; one was kept because it could fit the entire family of seven members, and the other was a very old van with no seats that was used to take items to and from the farmer's market.

[10] The value and outstanding balances of Appellant's family's vehicles are discussed in more detail in Subsection C, *infra*.

B. Business

Appellant testified that she and her husband own a business, Elijah LLC; Appellant's share is 51% and her husband's is 49%. Appellant indicated that at one point she and her husband each owned 50% of the business, and could not remember exactly when or why she gained the majority share. Appellant's husband does contracting work under the business, and their farmer's market stand is also run as a part of the business. Appellant and her husband utilize some of the space in their residence at 997 Almost Country Road ("Appellant's Residence") for business purposes, and the business pays rent to Appellant and her husband for this space.[11] Appellant testified that her husband had done contracting since 2003 or 2004, and that business income was largely consistent, although sometimes there would be significant one-time losses (e.g. when a customer with a $60,000 bill failed to pay for services).

Appellant introduced Exhibit T5, consisting of monthly credit card statements for a [redacted] Card from March to September 2021. The credit limit on the card was $35,000. Appellant testified that this card is used by her and her husband for both business and personal expenses. The payments, charges, and balances for the card over the relevant period were as follows:

Month	New Payments	New Charges	Fees and Interest	End-of-Month Balance
Mar. '21	$6,506.98	$9,659.52	$379.09	$29,053.93
Apr. '21	$5,062.84	$4,548.00	$380.33	$28,919.42

[11] These payments are described in more detail in Subsection D, *infra*.

May '21	$5,011.25	$6,665.94	$444.15	$31,018.26
June '21	$8,000.00	$5,990.51	$426.54	$29,435.31
July '21	$9,000.00	$7,042.04	$652.65	$28,130.00
Aug. '21	$20,000.00	$22,941.22	$438.86	$31,510.08
Sep. '21	$16,717.93	$13,800.11	$371.90	$28,964.16

In total, over the seven month span, Appellant, her husband, and the business made total payments of $70,299.00, incurred total new charges of $70,647.34, and were assessed fees and interest of $3,093.52. Appellant testified that, given the nature of her husband's contracting business, large charges for materials and equipment were common, and most of Elijah LLC's gross revenue would be used up to cover business expenses, resulting in relatively little profit. Appellant testified that the business would pay her husband at most $10,000 in annual wages.[12]

C. Assets and Liabilities

Appellant testified that she and her husband owned two properties: Appellant's Residence, and another house located on McGill Hollow Road (the "McGill Hollow Property"). Appellant and her husband previously owned a third property, located at 200 East Church Street in Williamsport (the "Church Street Property"), but sold this property in 2019, and thus carried no assets or liabilities associated with the Church Street Property during the pendency of this case.[13]

[12] The income reported by Appellant and her husband is discussed in more detail in Subsection D, *infra*.

[13] The sale of the Church Street Property, and rents collected from the lease of that property, are discussed in greater detail in Subsection D, *infra*.

Appellant testified that the tax-assessed value of Appellant's Residence is approximately $110,000. Appellant introduced Exhibit T12, which is the mortgage on Appellant's Residence. The outstanding principal on this mortgage is $64,757.78. Appellant also introduced Exhibit T13, which is a home equity line of credit ("HELOC") secured by Appellant's Residence. The credit limit on the HELOC is $120,000, with an outstanding balance of $111,132.34 as of October 4, 2021. Appellant testified that she and her husband took out the HELOC to renovate the McGill Hollow Property, which was purchased with the intention of fixing up and selling at a profit. Appellant explained, however, that the COVID pandemic had resulted in delays and price increases, and she anticipated they may ultimately have to sell the McGill Hollow Property for no profit or at a net loss. Appellant testified that the mortgage on Appellant's residence was initially secured by the Church Street Property.

Appellant introduced Exhibit T14, which is the mortgage on the McGill Hollow Property. Appellant testified she and her husband purchased the McGill Hollow Property for $100,000, of which $79,900 was financed via mortgage. The outstanding principal balance on the mortgage was $74,289.04 as of September 15, 2021. Appellant testified that she and her husband were looking to sell the McGill Hollow Property; they had listed it for sale at $275,000, but had only received an offer of $230,000. Appellant testified that she did not have to put any money down on the McGill Hollow Property mortgage, though she was required to make a down payment of $20,000 or $25,000 on the HELOC.

Appellant testified that her family owned a total of five automobiles. Appellant introduced Exhibit T15, which was the payment history on an automobile loan for a 2019 [redacted] documenting monthly payments of $304.51 from September 2020 through September 2021. The outstanding balance on this vehicle was not listed. Appellant testified that this vehicle was purchased used. Appellant introduced Exhibit T16, which was the September 2021 statement for an automobile loan for a 2016 [redacted] The minimum payment due was $179.11, though Appellant had made a payment of $200.00 for August 2021. The principal balance remaining on the [redacted] was $6,372.17. Appellant also introduced Exhibit T17, which was the September 2021 statement balance for a 2017 [redacted] The minimum payment due was $199.99, though Appellant testified she typically made a monthly payment of $250.00 towards this loan. The principal balance remaining on the [redacted] was $12,458.36.

Appellant testified that, in addition to the three financed vehicles, her family owned a 2012 Ford Expedition, which is big enough to seat the entire family of seven, and a 2000 Chrysler Town & Country Van with no rear seats, which Appellant uses to haul items to and from the farmer's market where she works.

Appellant testified that her family did not own much additional property. Appellant testified that the value of the electronics in their house[14] was well under $1,000, and that she and her husband owned a canoe.

[14] Computers and phones, discussed in Subsection A, *supra*.

In total, the value of the real estate owned by Appellant and her husband is at least $340,000,[15] with outstanding balances of $250,179.20.[16] Appellant and her husband also own five vehicles; the outstanding balance on two of these vehicles is $18,830.53,[17] and an unknown balance is owed on a third. The credit card also carries approximately $30,000 in debt, though the intermingling of Appellant's personal debts with the debts of Elijah LLC on the card makes it difficult to determine what portion of that debt belongs to Appellant and her husband personally.

D. Income

As discussed above, Appellant testified that she is mostly a stay-at-home mother, working at a farmer's market as part of the family business but not drawing a wage from that work. She testified that the business pays her husband at most $10,000 in wages annually. Appellant presented her and her husband's three most recent tax returns, for years 2017 through 2019, to establish a snapshot of their financial situation.

Exhibit T21 was the joint tax return of Appellant and her husband for tax year 2017.[18] Appellant's total income for 2017 was $38,866, comprised of $14,400 in "business income" and $24,466 in "rental real estate, royalties, partnerships, S

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[15] This assumes a value of $110,000 (the assessed value for tax purposes) for Appellant's Residence and $230,000 (the offer received for purchase) for the McGill Hollow Property. The Court believes that both of these figures likely underestimate the actual value of each property.

[16] The $64,757.78 owed on the mortgage on Appellant's Residence plus the $111,132.34 owed on the HELOC plus the $74,289.04 owed on the mortgage on the McGill Hollow Property.

[17] The $6,372.17 balance on the Subaru plus the $12,458.36 balance on the Honda.

[18] For ease of understanding, the remainder of this section will refer to "Appellant" to mean "Appellant and her husband" (e.g. "Appellant's total income for 2017 was $38,866" rather than "the total income of Appellant and her husband for 2017 was $38,866").

corporations, trusts, etc." No other sources of income, such as wages, were reported. Schedule C, the Profit or Loss from Business statement, listed the entirety of the business income as "gross receipts or sales." Schedule E, the Supplemental Income and Loss statement, listed "rents received" of $26,850 from the Church Street Property and $6,000 from Appellant's Residence. These amounts were reduced by expenses of $5,982 and $2,402 respectively;[19] the resulting amounts of $20,868 and $3,598 constituted the total rental income of $24,466.

Exhibit T22 was the joint tax return for tax year 2018. Appellant's total income for 2018 was $32,868, comprised of $14,400 in "business income" and $18,468 in "rental real estate...." Schedule C listed the entirety of the business income as "gross receipts or sales." Schedule E listed "rents received" of $15,188 from the Church Street Property and $11,000 from Appellant's Residence. These amounts were reduced by expenses of $3,792 and $3,928 respectively; the resulting amounts of $11,396 and $7,072 constituted the total rental income of $18,468.

Exhibit T23 was the joint tax return for tax year 2019. Appellant's total income for 2019 was $44,193, comprised of $10,000 in wages, $34,990 in capital gains, and a loss of $797 from "rental real estate...." No "business income" was listed. Schedule E listed "rents received" of $1,622 from the Church Street Property and $1,000 from Appellant's Residents. These amounts were reduced by expenses of $701 and $2,718 respectively; the resulting amounts of $921 income and $1,718 loss constituted the total rental loss of $797. Form 4797, the Sales of Business Property statement, indicated a gain of $34,990 from the sale of the Church Street Property.

[19] Expenses consist of items such as insurance, mortgage interest, taxes, utilities, and depreciation.

This amount reflected the difference between the gross sale price of $97,500 and the adjusted basis of $62,510.[20]

E. Additional Testimony and Argument

On cross-examination, counsel for Appellee noted that, between mortgage payments and car payments, Appellant's family has monthly payment requirements of approximately $2,300,[21] and asked Appellant how she continues to be approved for mortgages and loans if she is living in poverty with a very large debt-to-income ratio. Appellant responded, essentially, that the bank's decisions are their own, and that she is not aware of what exactly went into their approval. Appellant elaborated that some of her loans are not traditionally structured, and that despite her low income she and her husband have very good credit.

Counsel for Appellee asked Appellant how the business can make so little income but have large monthly payments on the credit card, sometimes as high as $20,000. Appellant explained that sometimes the business has large expenses, and when a large business expense is put on the card it is paid off with business cash. Appellant disputed counsel's characterization as her choosing to take on a large amount of debt, paying on multiple cars and properties, instead of retaining money to pursue this lawsuit; Appellant explained that the vehicles and properties were planned steps in her and her husband's financial life, but this lawsuit arose unexpectedly.

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[20] The adjusted basis of $62,510 represented the "cost basis plus expense of sale" amount of $79,170 less $16,660 in depreciation.

[21] Or approximately $27,600 annually.

At the conclusion of testimony, Appellant argued that her expenses were very high compared to her family's total income, which was typically just above or just below the federal poverty line for a family of seven. Appellant cited her use of food and medical benefits as well as the significant sums she needs to expend to provide treatment for her child's medical condition as indicative of her meeting the criteria to proceed *in forma pauperis*. Appellant argued that it would be improper and unfair to require her to either take out credit or sell assets or vehicles to afford the costs associated with this case.

Appellee argued that Appellant's comingling of her business and personal expenses obscured her true financial picture, rendering the numbers she reported on her taxes as unreliable. Appellee suggested that the evidence showed Appellant and her husband, who appeared to have significant equity in both their five cars and two properties, were not living in poverty. Appellee ultimately cited the apparent incongruity between Appellant's low income and her history of being approved for multiple large loans and mortgages as evidence that *in forma pauperis* status should not apply to Appellant.

Intervenor stressed its belief that the relevant question is whether Appellant is "in poverty," and argued that, generally, a family that owns 23 acres of land, 2 houses, 5 cars, 4 cell phones, is able to pay over $2,000 monthly in loans, and holds themselves out as "well off" is not who the *in forma pauperis* designation was designed to excuse from paying the costs associated with a civil case.

ANALYSIS

The two matters presently before the Court are Intervenor's Motion to Dismiss Appeal for Lack of Standing and Appellant's Praecipe to Proceed *In Forma Pauperis*. The Court will discuss and analyze these issues separately, as they are independent and a decision on one of these two issues has no bearing upon the other.

I. Notice and Standing Issue

A. Prior Discussion

The Court laid out the general framework for establishing standing in the context of grants of conditional use by municipalities under the MPC, and its application to the parties' positions in this case, in its August 5, 2021 Order:

> "The courts view the grant of a conditional use, which falls within the jurisdiction of a municipal governing body, as the equivalent to the grant of a special exception, which falls within the jurisdiction of a zoning hearing board. Thus, 'standards and burden of proof applicable to a special exception also apply to a conditional use.'[22] Pursuant to Section 908(9) of the MPC, only a 'party' to a hearing before a zoning hearing board (or in this case, municipal board) is afforded standing to appeal a decision of the board.[23] A party to the hearing is defined under section 908(3) as 'the municipality, any person affected by the application who has made timely appearance of record before the board, and any other person including civic or community organizations permitted to appear by the board.'[24]
>
> In light of these provisions the courts have held that, 'one must have procedural standing in order to be a party to a zoning hearing (e.g., asserted a right to participate sufficiently early) and substantive standing (e.g., possess a sufficient interest in the outcome of the

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[22] Brief in Support of Intervenor's Motion to Dismiss Land Use Appeal at pg. 2, n.2 (June 17, 2021) (quoting *Joseph v. N. Whitehall Twp. Bd. of Supervisors*, 16 A.3d 1209, 1215) (Pa. Commw. 2011); *In re Thompson*, 896 A.2d 659, 670 (Pa. Commw. 2006)).

[23] 53 P.S. § 10908(9) ("The board or the hearing officer, as the case may be, shall render a written decision or, when no decision is called for, make written findings on the application within 45 days after the last hearing before the board or hearing officer.... Nothing in this subsection shall prejudice the right of any **party** opposing the application to appeal the decision to a court of competent jurisdiction") (emphasis added).

[24] 53 P.S. § 10908(3).

litigation to be allowed to participate).'[25] Intervenor's Motion to Dismiss Appeal for Lack of Standing appears to be a challenge limited to Appellant's procedural standing. Regarding procedural standing, the Courts of this Commonwealth have consistently held that landowners who were afforded proper notice but failed to participate in the relevant proceeding before a zoning hearing board lack standing to appeal board decisions granting special exceptions, conditional uses, or variances.[26] This is because, in the course of making its decision on a conditional use application, the board will consider only the record made before it in the course of the public hearing.[27] However, participation may be indirect. For example, in instances where landowners sent a letter to the zoning board prior to the hearing detailing their objections, the landowners have been found to have standing to appeal even though they did not appear in-person at the hearing.[28] Further, a landowner may also appear at a hearing before the board through counsel, and thereby preserve their appeal.[29]

Appellant does not contend that the February 10, 2021 hearing was not duly advertised in local newspapers, but merely avers she did not see such advertisements, as she does not subscribe to any papers. Nor does Appellant cite to any authority establishing that she was

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[25] *In re City of Phila.*, 245 A.3d 346, 351 (Pa. Commw. 2020), reargument denied (Jan. 7, 2021) (citing *Worthington v. Mount Pleasant Twp.*, 212 A.3d 582, 590 (Pa. Commw. 2019)).

[26] *Leoni*, 709 A.2d at 1001 (citing In re Leopardi, 496 A.2d 867 (Pa. Commw. 1985), rev'd in part on other grounds, 532 A.2d 311 (Pa. 1987)) ("[I]t is well settled that individuals cannot be heard on appeal if they had notice of a public zoning hearing and failed to object at that time.").

[27] 53 P.S. § 10908(8) ("The board or the hearing officer shall not communicate, directly or indirectly, with any party or his representatives in connection with any issue involved except upon notice and opportunity for all parties to participate, shall not take notice of any communication, reports, staff memoranda, or other materials, except advice from their solicitor, unless the parties are afforded an opportunity to contest the material so noticed and shall not inspect the site or its surroundings after the commencement of hearings with any party or his representative unless all parties are given an opportunity to be present.").

[28] *See Orie v. Zoning Hearing Bd. of Borough of Beaver*, 767 A.2d 623 (Pa. Commw. 2001); *Gateside-Queensgate Co. v. Delaware Petroleum Co.*, 580 A.2d 443 (Pa. Commw. 1990). The recent Commonwealth Court decision in *Coppola v. Smith Twp. Bd. of Supervisors*, 208 A.3d 532 (Pa. Commw. 2019) further delineates this issue. In *Coppola*, the Commonwealth Court held that because the objector's letter to the municipal board of supervisors was not read into the record the board could not consider her objections as part of their deliberations, and thus the letter was inadequate to preserve issues for appellate review. However, the *Coppola* Court held that because the objector had acted in good faith and complied with the procedures established by the board, the case would be remanded for a supplementary hearing before the board so that objector's letter could be made part of the record and other parties would have the opportunity to respond.

[29] *See Active Amusement Co. v. Zoning Bd. of Adjustment*, 543, 479 A.2d 697 (Pa. Commw. 1984).

entitled to mailed notice of the hearing.[30] Appellant's counsel elaborated at argument that under Act 15 of 2020, during the ongoing disaster emergency declaration triggered by the COVID-19 pandemic, governmental entities shall, '[t]o the extent practicable… allow for public participation in a meeting, hearing or proceeding through an authorized telecommunication device or written comments.'[31] Appellant thereby contends she was denied a means to participate in the hearing.

However, the Court does not find that the language of Act 15 mandates governmental entities to conduct hearings remotely, nor impels governmental entities to actively solicit written comments. Further, Appellant has not averred that she made efforts to submit a comment by mail or email, as permitted by statute, but was frustrated in her efforts.[32] Absent evidence that Appellant took active efforts to participate in the February 10, 2021 hearing before the Board that were rebuffed, the Court cannot find that she was denied a meaningful opportunity to participate.

There is however, Appellant's allegation that notice of the hearing was not properly posted on the subject property. Appellant notes that the transcript of the Board's Findings of Fact and Decision contains no testimony or evidence as to posting of public notice.[33] Appellant represents that neither she nor her neighbors noticed posting on the property any time in the week leading up to the hearing, suggesting either that the property was not timely posted or was not conspicuously posted.[34] In *Eaton v. Zoning Hearing Board of Borough of Wellsboro*, the Commonwealth Court held that the zoning hearing board's failure to properly post notice regarding a special exception hearing on the affected tract of land nullified the board's decision to grant the exception. While acknowledging that the appellants in *Eaton* had received actual notice of the hearing, the Commonwealth Court characterized the posting requirement as 'mandatory[,]' reasoning that, '[t]he Legislature intended that posting be required so to properly inform the general public, not just the appellants.'[35] As the record before us is

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[30] Appellant represents that she lives within about 1,000 feet of the subject property. *Id.* at pg. 2. Lycoming County Zoning Ordinance § 27-1103.5.D. provides, "[i]n case of an appeal or a request for a variance or a special exception, all adjacent property owners within 300 feet of the nearest line of the property for which the variance or special exception is sought shall be given written notice within seven days of the hearing." (emphasis added).

[31] 35 Pa.C.S. § 5741(f).

[32] *Id.* ("Written comments may be submitted to the entity's physical address through United States mail or to an e-mail account designated by the entity to receive the comments.").

[33] Appellants Surreply to Intervenor's Brief in Support of Motion to Dismiss for Lack of Standing at pg. 2 (July 9, 2021).

[34] See id.

[35] *Eaton v. Zoning Hearing Bd. of Borough of Wellsboro*, 471 A.2d 919, 921 (Pa. Commw. 1984); *see also Appeal of Conners*, 215, 454 A.2d 233, 234 (Pa. Commw. 1983) (holding that use of the term "shall" in section 908(1) demonstrates that posting requirement is mandatory); *Kline v. Zoning Hearing Bd. of Twp. of Upper Saint Clair*, 903 A.2d 77, 80 (Pa.

devoid of facts regarding the posting of the subject property, the Court agrees with Appellant that an evidentiary hearing is required to determine whether the Board complied with the 908(1) notice requirements."

B. Question

The question before the Court is whether Appellee's notice of the February 10, 2021 hearing complied with and was sufficient under the MPC, and specifically Section 908(1). The stakes are significant: if Appellee's notice was sufficient, then Appellant lacks procedural standing, and this appeal must be dismissed. If Appellee's notice was insufficient, *Eaton* makes clear the February 10, 2020 hearing would be a legal nullity, and Intervenor would need to begin the process of seeking a conditional use permit from its inception. There is no remedy in between these two extremes; as established at the evidentiary hearing before this Court, Appellant had *actual* (albeit late) notice of the hearing, and the notice requirements are designed "to properly inform the general public, not just the appellants."

C. Summary of Relevant Factual Testimony

The Court credits the testimony of each witness, and does not believe that any of the testimony or evidence was inconsistent in any material way. The testimony and evidence showed that, in anticipation of the February 10, 2021 hearing, Appellant printed a number of documents entitled "NOTICE OF PUBLIC HEARING," providing the date, time, and location of the hearing on Intervenor's conditional use application, and mailed these notices to property

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Commw. 2006) (holding that the failure to comply with the zoning code's requirement that notice of a hearing be mailed at least seven days prior to the zoning hearing necessitated a new hearing).

owners adjacent to the Property. Appellant also laminated six of these notices, affixed them to wooden stakes, and placed them in late January or, at the latest, February 1, 2021. One notice was posted at each end of Mitchell Hill Road, two notices were posted on Almost Country Road near the logging road landing, and two notices were posted at the planned access point for the Property. The notices were posted along the side of the road, facing the road, within the 16.5-foot right-of-way from the road's center but at enough of a distance where they would not be plowed over. These notices were printed on normal-sized, white paper, with black lettering. There was snow on the ground when these notices were posted, and the weather between their posting and the hearing was mildly snowy and windy.

At least one nearby property owner noticed the posting on February 11, 2021, the day after the hearing, but found it to not stand out because it blended in with the snowy background. This neighbor did not notice the posting prior to the hearing. At least one nearby property owner did observe the posted notice at an unspecified time while driving, and stopped his car to read the notice. Appellant did not observe the posted notice despite driving through the area multiple times daily, although she did receive actual notice shortly before the hearing.[36] At least some of the notices were still where they had been posted many months later, although they may have fallen or

[36] The Court emphasizes that it *is not* considering whether Appellant *would have* been able to attend the hearing had she learned about the hearing earlier by viewing the posted notice. Appellant's *actual* notice is irrelevant to the matter before the Court. In the event it is deemed relevant at a later proceeding, however, the Court notes that Appellant admits she learned of the February 10, 2021 hearing at least one day in advance.

otherwise been obstructed with dirt and debris. The six notices were posted where Appellee believed they would best provide notice to the public – one at the top and bottom of Mitchell Hill Road, two on Mitchell Hill Road at the place where the pipeline would cross, and two on Almost Country Road at the entrance to the logging path that provided access to the Property.

D. Compliance with Section 908(1) of the MPC

The question before the Court is whether the notice above complied with Section 908(1) of the MPC. This section reads, in its entirety:

> "(1) Public notice shall be given and written notice shall be given to the applicant, the zoning officer, such other persons as the governing body shall designate by ordinance and to any person who has made timely request for the same. Written notices shall be given at such time and in such manner as shall be prescribed by ordinance or, in the absence of ordinance provision, by rules of the board. In addition to the written notice provided herein, written notice of said hearing shall be conspicuously posted on the affected tract of land at least one week prior to the hearing."

The question before the Court, then, is whether Appellee's posting of the six notices constituted "written notice... conspicuously posted on the affected tract of land...."[37]

There is relatively little case law addressing what constitutes conspicuous posting of a required written notice in the specific context of the MPC, and those cases that do discuss the requirement often do so cursorily.[38] At least one case

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[37] The Court finds that Appellee met their burden of demonstrating that the notices were posted at least one week before February 10, 2021.

[38] *See Kossman v. Zoning Hearing Bd. of Borough of Green Tree*, 597 A.2d 1274 (Pa. Cmwlth. 1991). In *Kossman*, the Commonwealth Court addressed the issue, in its entirety, as follows: "Kossman claims that notice of the hearing was not conspicuously posted. However, a review of the record reveals that notices were posted in conspicuous areas outside the entrances to the property [and] that the hearing was duly advertised in the proper newspapers ...."

seems to suggest that simply posting notice "in conspicuous areas outside the entrances to the property" is sufficient.[39]

In *Wiles v. Washington County Tax Claim Bureau*,[40] the Commonwealth Court engaged in a detailed discussion of posting requirements, and what constitutes "conspicuous" posting, in the context of tax upset sales. Although the statute concerning notice in tax upset sales merely requires that "[e]ach property scheduled for sale shall be posted at least ten (10) days prior to the sale,"[41] the Court explained that it "has interpreted [that requirement] to mean that the method of posting must be reasonable and likely to inform the taxpayer as well as the public at large of an intended real property sale."[42] The requirement that posting be "reasonable" has been interpreted by case law to mean "conspicuous to the owner and public and securely attached. 'Conspicuous' means posting such that it will be seen by the property owner and public generally."[43] The Court indicated that it "has taken a practical and commonsense approach to determine whether a posting was reasonable."[44] The Court explained that, in previous cases, posting a notice "on a glass door of the dwelling which faced the road" was deemed sufficient, but "posting a notice on a door which faced the side yard" and posting a notice "folded into thirds and wrapped around a small tree branch and placed on the side of the house" did not constitute reasonable notice.[45]

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[39] *Id.*
[40] *Wiles v. Washington County Tax Claim Bureau*, 972 A.2d 24 (Pa. Cmwlth. 2009).
[41] 72 P.S. § 5860.602(e)(3).
[42] *Wiles*, 972 A.2d at 28.
[43] *Id.*
[44] *Id.*
[45] *Id.*

In *Wiles*, the petitioner contended that the posted notice was insufficient "because it consisted 'of one half of an 8.5 x 11 piece of paper attached to a 2 inch wide piece of wood lath with two staples."[46] The Court described the evidence as establishing:

1) that the Property was a vacant lot;
2) that the Property was located between [the petitioner's] residence and [his neighbor's] residence;
3) that the posting notice was stapled twice, at the top and at the bottom, to a stick and hammered securely into the ground on the Property;
4) that the posting notice was conspicuously placed on the property and was "parallel to the row of houses" and faced the road;
5) that [the official who placed the notice] photographed the posting notice as required by the Tax Claim Bureau;
6) that the purchaser of the Property, first became aware of the upcoming upset tax sale when he saw the posting notice on the Property; and
7) that "the posting was there for quite a while and then the whole thing was gone, the stick and everything was gone."[47]

[46] *Id.* at 27-28.
[47] *Id.* at 28.

The Commonwealth Court held that the above evidence established "the posting notice was conspicuous and that the posting was reasonable and was reviewable from the public road."[48]

Here, this Court similarly concludes that the posting of the six laminated notices by Appellee satisfied the MPC's requirement that posting be "conspicuous." Appellant presented multiple witnesses who testified that the notices were placed either directly adjacent to the Property or alongside nearby public roads in places that were designed to be viewable by the public. The notices were on stakes, facing the road. They were close enough to the lanes of travel to still be within the road's right-of-way, but far enough back that they would not be plowed over. The testimony at the evidentiary hearing established that they could be and in fact were noticed by both pedestrians and motorists.

The requirement for conspicuous posting is designed to ensure that notice can be seen by the public and attract the attention of passersby. It is always possible to imagine, in retrospect, a means of providing notice that would have reached *more* members of the public – a billboard in the city center or a neon-lighted display would certainly be more likely to inform a broader portion of the public of the upcoming hearing than six laminated notices posted along the roads near the Property. Pennsylvania law generally, and the MPC in particular, do not, however, impose any such mandates. There is no requirement for a certain color, text size, or location of the posting, other than that the notice "be conspicuously posted on the affected tract of land at least one week prior to the hearing."

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[48] *Id.* at 28-29.

Appellant also denies that the postings were "on the affected tract of land." As Exhibit T4 shows, the Property is adjacent to a road on its smallest side, with its north edge running along Almost Country Road for a few hundred feet. In this case, Appellees testified that they placed the six notices in the areas they believed would best provide notice to the public – one at the top and bottom of Mitchell Hill Road, two on Mitchell Hill Road at the place where the pipeline would cross, and two on Almost Country Road at the entrance to the logging path that provided access to the Property.

The requirement that notice "be conspicuously posted on the affected tract of land" is phrased as a single criterion; it is clear that both the need for the notice to be conspicuous and the need for the notice to be "on the affected tract of land" is to inform the public of the upcoming hearing. The requirement cannot be read so literally as to require every notice to be located on the affected property, as opposed to alongside the road or at the entrance to the affected property; if an "affected property" does not abut any public thoroughfare and is surrounded on all sides by private property, then conspicuous posting within the borders of the affected property would not do anything at all to inform the public of the upcoming sale. The Court holds that posting at the logging road on Almost Country Road adjacent to the Property, at the location of the anticipated pipeline crossing and access point to the Property on Mitchell Hill Road, and at the intersection on either side of the entrance to the Property constitutes posting "on the affected tract of land" in such a way as to satisfy the requirement of the MPC that the public be informed of the upcoming hearing.

Because the notices in this case were posted at the entrances to the Property, posted over a week prior to the February 10, 2021 hearing, and posted conspicuously – that is, in a manner calculated to provide notice to members of the public passing by – Appellee has satisfied the requirements of the MPC. Appellant thus lacks procedural standing to bring this appeal.

II. *In Forma Pauperis* Issue[49]

A. Prior Discussion

As with the question of compliance with the MPC, the Court discussed the contours of the *in forma pauperis* dispute, and the need for a hearing, in its August 5, 2021 Order:

> "Intervenor claims within its *Response to Praecipe to Proceed Informa* [sic] *Pauperis* that because Appellant co-owns 22.28 acres of land, improved with a residential structure, and is married to a licensed contractor and owner of a construction business, she evidently has sufficient means as would disqualify her from *in forma pauperis* status....[50]
>
> [Pennsylvania Rule of Civil Procedure 240] applies in this case.... A party may apply for *in forma pauperis* status under Rule 240(c) by petitioning the court. The petition must be accompanied by an affidavit in which the party affirms that he or she is indigent and provides an itemization of income and expenses.[51] Alternately, Rule 240(d)(1) provides that '[i]f the party is represented by an attorney, the prothonotary shall allow the party to proceed *in forma pauperis* upon the filing of a *praecipe* which contains a certification by the attorney that he or she is providing free legal service to the party and believes the party is unable to pay the costs.'[52]

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[49] The Court's ruling that Appellee complied with the MPC's notice requirements means that Appellant lacks standing, and therefore this appeal will be dismissed. Nonetheless, the Court will proceed to an analysis of Appellant's Praecipe to Proceed *In Forma Pauperis* and Intervenor's objection thereto, inasmuch as this issue is relevant to any further proceedings in this matter, including any potential appeal of this Opinion and Order to a higher Court and any subsequent proceedings on remand.

[50] Response to Praecipe to Proceed Informa [sic] Pauperis ¶¶ 3-4 (April 29, 2021).

[51] Pa. R.C.P. 240(c). Pa. R.C.P. 240(h) prescribes the form of the affidavit.

[52] Pa. R.C.P. 240(d)(1).

Rule 240(f)(2) further provides that '[a] party permitted to proceed *in forma pauperis* shall not be required to... post bond or other security for costs as a condition for commencing an action or proceeding or taking an appeal.'[53] Intervenor asserts that this latter provision prescribes their right to petition the Court to require Appellant to post a bond as a condition of proceeding with the appeal. Once a petition for posting a bond is presented, the Court must hold an evidentiary hearing to determine whether the appeal is frivolous. If the Court finds the appeal is frivolous, it will grant the petition and require the land use appellant to post a bond.[54]

Rule 240(b) provides that '[a] party who is without financial resources to pay the costs of litigation is entitled to proceed *in forma pauperis*.'[55] However, the courts have elaborated upon review of petitions for *in forma pauperis* status accompanied by the petitioner's affidavit under Rule 240(c) that '[t]he mere filing of a praecipe for *in forma pauperis* status will not automatically establish the petitioner's right to proceed in that status. The trial court must satisfy itself of the truth of the averment of [an] inability to pay. Once the opposing party denies the petitioner's averments the trial court must determine the truthfulness of the averments.'[56] If the trial court has any question as to the truth of the petitioner's averments within the petition, then it is incumbent upon that court to hold an evidentiary hearing.[57]

The bulk of decisions involving hearings to determine whether a person may claim *in forma pauperis* status involve petitions filed pursuant to Rule 240(c). However, in *Thompson v. Thompson*, the Superior Court applied the same precepts to an attorney-certified *praecipe* for *in forma pauperis* status filed pursuant to Rule 240(d). *Thompson* involved an appeal from a civil contempt order issued pursuant to the mother/appellants failure to timely make child support payments (an ongoing violation for which the court had issued a prior contempt order). After the court's issuance of the second contempt order, the appellant submitted an attorney-certified *praecipe* for *in forma pauperis* status. The court's prothonotary did not confer *in forma pauperis* status. Instead, the trial judge dismissed the praecipe on the

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[53] Pa. R.C.P. 240(f)(2).

[54] *See* Appellant's Reply to Invervenor's Response to Proceed in Forma Pauperis at pgs. 5-6 (citing 53 P.S. § 11003-A(d)). The Court notes that the right to petition for the posting of a bond is limited to a landowner whose land use or development is challenged.

[55] Pa. R.C.P. 240(b).

[56] *In re Adoption of B.G.S.*, 614 A.2d 1161, 1170 (Pa. Super. 1992) (citing *Nicholson v. Nicholson*, 371 A.2d 1383 (Pa. Super. 1977); *Koziatek v. Marquett*, 484 A.2d 806 (Pa. Super. 1984)) (internal citations omitted).

[57] *Id.* at 1171 (citation omitted).

basis that '[the appellant] would not have incurred certain costs if she had made regular support payments as ordered.'[58]

On appeal, the Superior Court addressed, among other issues, whether the trial court erred in denying appellant's counsel-certified *praecipe* for *in forma pauperis* status. The Superior Court ultimately held that the trial court had committed an abuse of discretion and reversed the trial court's denial of *in forma pauperis* status on the basis that 'the trial court did not hold a hearing or make any findings.'[59] The Superior Court elaborated that '[i]f the trial court does not believe the averments in a *praecipe* to proceed *in forma pauperis*, the court is required to hold a hearing to determine the veracity of the allegations contained in the *praecipe*.'[60]

The Court interprets *Thompson* to stand for the proposition that a trial court should hold an evidentiary hearing as to a party's qualification for *in forma pauperis* status, even following the party's submission of an attorney-certified *praecipe* under 240(d), if the trial court has questions as to whether the party is truly indigent. The Court finds in this matter that Intervenor's *Response to Praecipe to Proceed Informa* [sic] *Pauperis* raises sufficient question to merit a hearing."

B. Summary of Relevant Factual Testimony

The apparent intermingling of the assets and cash flow of Appellant and her husband with the financials of their business complicates the Court's inquiry. Although Appellant's testimony suggested that most of the expenses and payments on the credit card were attributable to the business, rather than personal, no precise delineation can be established, and this necessarily precludes any measure of exactitude in evaluating Appellant's total financial picture. The Court notes that in 2017 and 2018, when Appellant and her husband reported significant rental income on their taxes, Appellant's husband did not receive wages from the business, but in 2019 when the Church Street Property was sold Appellant's husband received wages

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[58] *Thompson v. Thompson*, 187 A.3d 259, 265 (Pa. Super. 2018), aff'd, 223 A.3d 1272 (Pa. 2020) (summarizing procedural history).
[59] *Id.* at 266.
[60] *Id.* at 265 (citing *Crosby Square Apartments v. Henson*, 666 A.2d 737, 738 (Pa. Super. 1995)).

of $10,000. This at least suggests that the business's finances are not independent of, but rather responsive to, the family's financial needs at any given time. No evidence was ever presented as to the approximate value of the business.

Regarding Appellant's day-to-day life, it is clear to the Court that Appellant and her family do not live extravagantly. The Court accepts Appellant's testimony that Appellant's Residence is not well appointed, their personal possessions (such as electronics) are lower-end, and the nuclear family relies on assistance from extended family members and friends for things like vacations and participation in youth sports. The size of Appellant's family, and to a greater extent her child's specific medical needs, certainly create some hardship. That Appellant and her family receive state assistance for food and medical purchases is evidence of such.

It is also clear that Appellant has significant equity in the real property and vehicles she and her husband own. As noted above, Appellant's two properties are worth *at least* $90,000 more than is owed on them, and likely more. Until 2019, Appellant and her husband owned *a third* property, which they sold for a profit. Appellant and her family own five vehicles. Two of these vehicles are owned outright, and three are financed. Of the three financed vehicles, their model years are 2016, 2017 and 2019. The Court has never encountered a party with such significant assets seeking *in forma pauperis* status.

Ultimately, Appellant's reported annual income of approximately $40,000, compared with her obligations on mortgages and automobile loans of approximately $2,300 monthly, leaves her and her family with a little over $1,000 each month before other costs are taken into account.

C. *In Forma Pauperis* Standard

Rule of Civil Procedure 240(b) states that "[a] party who is without financial resources to pay the costs of litigation is entitled to proceed *in forma pauperis*." The Superior Court of Pennsylvania has explained the standard by which the trial court must evaluate a petitioner's claim of inability to pay:

> "The mere filing of a praecipe for [*in forma pauperis*] status will not automatically establish the petitioner's right to proceed in that status. The court must satisfy itself of the truth of the averment of inability to pay. If it believes the petitioner's averments, there is no requirement that the court conduct an evidentiary hearing. The trial court has considerable discretion in determining whether a person is indigent for purposes of an application to proceed *in forma pauperis*. However, in making that determination, it must focus on whether the person can afford to pay and cannot reject allegations contained in an application without conducting a hearing."[61]

Under Rule 240 – and particularly the form of the affidavit described in Rule 240(h) – the court is not permitted to merely consider a party's gross income; rather, the rule "clearly directs that the court take into consideration both monthly income and the delineated monthly obligations in making a determination of [*in forma pauperis*] status."[62] Rule 240(h) lists factors to be considered by the court, including monthly salary of the petitioner, other income (such as business income, interest, dividends, social security benefits, disability payments, workman's compensation, and public assistance), contributions by household members, property owned (such as cash, bank accounts, real estate, vehicles, stocks, or other assets), debts and obligations (such as mortgage, rent, loans, or other payments), and whether the petitioner has any dependents.

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[61] *Amrhein v. Amrhein*, 903 A.2d 17, 19 (Pa. Super. 2006) (internal citations omitted).
[62] *Id.* at 22.

D. Analysis

The Court finds that Appellant has the financial resources to pay the costs of litigation in this case, and thus denies her *praecipe* to proceed *in forma pauperis*. It is clear that Appellant and her family have significant financial obligations, resulting in monthly payments of approximately $2,300 towards mortgages and automobile loans and leaving a little over $1,000 per month to take care of the family. The Court stresses that it is not finding that Appellant lives above her means, holds her or her family out as wealthy, or spends her money on frivolities rather than necessities.

This, however, is only one part of Appellant's financial picture. Appellant and her husband own a business that reports annual income and pays a wage. They own two properties, and recently sold a third, and have significant positive equity in their real estate assets. They also own five vehicles. Although given Appellant's family circumstances this amount of asset ownership is not extravagant or unwarranted, it is also not consistent with an inability to pay the costs of legal proceedings.

Appellant argues that it would be unfair to require her to sell assets or seek additional financing to proceed with this case. It plainly cannot be the case, however, that a party can be excused from paying court costs for the sole reason that there is little daylight between their monthly income and monthly obligations; otherwise, even a litigant with a high salary could avoid court costs simply by arguing that any liquid assets are quickly consumed by an equally high debt obligation.

The determination of whether a party may proceed *in forma pauperis* requires the Court to balance income, obligations, assets, family, and other relevant factors.

There is no mechanical formulation by which the Court can make this determination, and when a party's indigence or affluence are not obvious there will always be a measure of subjectivity. On balance, taking into account Appellant's income, obligations, assets, and family circumstances, the Court finds that Appellant is able to pay the costs of litigation and therefore is not entitled to proceed *in forma pauperis* under Rule 240.

CONCLUSION

The Court finds that Appellee has complied with the MPC's requirements for posting notice of the February 10, 2021 zoning hearing. Therefore, Appellant does not have procedural standing to bring this appeal. For this reason, Intervenor's Motion to Dismiss Appeal for Lack of Standing, filed April 21, 2021, is GRANTED and this matter is DISMISSED WITH PREJUDICE.

Additionally, the Court finds that Appellant is able to pay the costs and fees associated with this action under Rule 240. Therefore, Appellant's Praecipe to Proceed *In Forma Pauperis* is DENIED.

IT IS SO ORDERED this 9th day of February 2022.

By the Court,

Eric R. Linhardt, Judge

ERL/jcr
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