

PERQUIMANS COUNTY BOARD
OF COMMISSIONERS

CUP-16-01

In Re:

Application by Timbermill)
Wind, LLC for Conditional)
Use Permit for a Large Wind)
Energy Facility)

ORDER

SUMMARY OF PROCEEDINGS AND PRELIMINARY FINDINGS

This matter came before the Perquimans County Board of Commissioners (the "Board") on the above-referenced application submitted by Timbermill Wind, LLC ("Timbermill" or "Applicant") for a conditional use permit to construct and operate a Large Wind Energy Facility in the Bear Swamp and Center Hill communities, permit application number 16-01 (the "Application"). A quasi-judicial hearing was commenced on August 24, 2016 to consider the Application. Testimony from numerous witnesses, and documentary and other evidence was received during the hearing that spanned over a total of seven (7) evening sessions, and the evidentiary record was closed on October 18, 2016.

After hearing closing arguments on October 22, 2016, the Board met on November 14, 2016 to deliberate on the Application. In its deliberations, the Board considered all the testimony and evidence submitted during the hearing, and the requirements for a Large Wind Energy Facility as set forth in Section 907.27 of the Ordinance. The Board also deliberated regarding each of the four general requirements set forth in Section 903 of the Ordinance. The Applicant has the burden of proving at all times that the proposed use would not violate the requisites of Section 903 of the Perquimans County Zoning Ordinance. In so doing, the

Applicant is responsible for presenting competent, material and substantial evidence to support each of the following four requisites:

- (a) That the use will not materially endanger the public health or safety, if located according to the plan submitted and approved;
- (b) That the use meets all required conditions and specifications;
- (c) That the use will not substantially injure the value of adjoining or abutting property, or that the use is a public necessity; and
- (d) That the location and character of the use, if developed according to the plan as submitted and approved, will be in harmony with the area in which it is to be located and in general conformity with the Perquimans County Land Use Plan.

During its deliberations, the Board considered first the specific requirements set forth in Section 907.27. Following deliberations regarding the specific requirements, the Board considered separately the four (4) general requirements, deliberated over the evidence on each of the four (4) general requirements, and each individual Board member provided separate votes as to whether the applicant met its burden on each of the general requirements. Following the deliberations on the specific and general requirements, the individual Board members considered the record evidence, considered the prior determinations made as to the general conditions and voted on the ultimate issue: whether to grant or deny the Conditional Use Permit.

As to the first two general requirements, all five Board members concluded that the Applicant met its burden of proof based on the record evidence.

As to the third general requirement, Commissioners Leigh and Nelson concluded by vote that the Applicant failed to meet its burden that the use would not substantially injure the value of adjoining or abutting property and that substantial, competent and material evidence in the record demonstrated that the proposed use would substantially injure the value of adjoining or

abutting properties. The remaining three Commissioners concluded by vote that the Applicant met its burden based on the record evidence.

As to the fourth general requirement, Commissioner Jones concluded by vote that the Applicant failed to meet its burden that the location and character of the use, if developed according to the plan as submitted and approved, would be in harmony with the area in which it is to be located and that substantial, competent and material evidence in the record supported this conclusion. The remaining four Commissioners concluded by vote that the Applicant met its burden on this requirement based on the record evidence.

The deliberations and the aggregate of the individual votes taken on each of the four general requirements in Section 903 revealed that a majority of the five Commissioners (3 out of 5) concluded that at least one of these general requirements, all of which must be satisfied before the Application can be granted, were not satisfied by competent, material and substantial evidence in the record.

Pursuant to Section 903, a motion was then made by Commissioner Jones that based on the prior deliberations and actions of the Board that the Project be denied because the Applicant did not meet its burden on all of the general and specific conditions of the Ordinance. That motion was seconded by Commissioner Leigh and the motion passed by a 3 to 2 vote, with Commissioner Nelson joining Commissioners Jones and Leigh in voting in favor of the motion to deny the Application. Chairwoman Cole and Commissioner Muzzulin voted against that motion.

During the session held on November 21, 2016 to adopt this Order memorializing the decision reached by the Board on November 14, 2016, each of the three Board members voting to deny the Application (Jones, Nelson and Leigh), which constituted a majority, reviewed and

approved the following findings of fact and conclusions of law as specifically identified and set forth below:

FINDINGS OF FACT

A. General Findings of Fact

1. In the Application, Timbermill requests a conditional use permit to operate a Large Wind Energy Facility in the Bear Swamp and Center Hill communities of Perquimans County (the "Project"). The Project, as proposed by Timbermill, would consist of 57 industrial wind turbines ("IWTs"), each proposed to have a maximum height of 599 feet. The IWTs proposed by Timbermill would be larger than any other IWTs currently operating in the United States.

2. The area in which the Project is proposed is zoned Rural Agriculture, and is currently used for both agricultural and residential purposes. While Timbermill presented evidence that the proposed turbines will be primarily located on timber land owned by the Weyerhaeuser Company and leased by Timbermill, much of the area adjoining and abutting the Project is owned by non-participating landowners, who live, farm, work and recreate in the area immediately adjacent to the Project area.

B. Findings of Fact concerning the requirement that the use will not substantially injure the value of adjoining or abutting property

3. Regarding whether the Project would substantially injure the value of adjoining or abutting properties, the testimony of Charles Moody ("Moody") and Mike McCann ("McCann") provided the primary evidence needed to evaluate this requirement. Both Moody and McCann provided expert witness testimony as real estate appraisers.

4. As to his examination of the Project, Moody performed two types of analyses: a prior sales analysis, which examined the alleged impact of the Project on home sales within

Perquimans County; and a review and analysis of several academic studies done by educational researchers who are not licensed appraisers qualified to make opinions as to value impacts.

5. In his sales analysis, Moody attempted to examine what, if any, impact the Project had on real estate values in Perquimans County. In doing so, Moody examined sales of real property within the Project area prior to 2013, and compared sales of the same property between 2013 and 2015 against paired sales outside the area to determine whether the anticipation and potential approval of the Project had any impact on sale price in the area. Moody's analysis assumed that the Project was known to the public in 2013, such that the resale price of the examined properties would reflect the impact of the Project.

6. The record contains substantial testimony from residents in the community that they were not aware of the proposed Project until the summer of 2015. Furthermore, Mr. Moody himself testified that the real estate professionals he spoke with in Perquimans County regarding the Project were not aware of the Project as late as the summer of 2016.

7. As to the second analysis conducted by Moody, his review of certain academic studies, two of these academic studies authored by Mr. Ben Hoen purport to examine the impact of dozens of operational wind facilities on real property values near wind energy facilities. These academic studies were not conducted by licensed appraisers and the data underlying these studies was never released to the public. As a result, Moody did not have the ability to review the underlying data. Moreover, these academic studies were not limited to, or focused on, those properties that actually adjoin or abut the studied wind turbine facilities. Finally, Moody could not articulate or explain the statistical measure (the R squared coefficient) in the hedonic regression analysis utilized in the 2009 and 2013 LBNL studies to determine their reliability.

8. Commissioner Nelson had concerns about the testimony and analysis used by Moody. Specifically, Commissioner Nelson found that Moody used a faulty assumption that people in the community were aware of the project in 2013 and 2014. Commissioner Nelson concluded that the applicant did not meet its burden concerning the requirement that the use will not substantially injure the value of adjoining or abutting property.

9. Commissioner Leigh did not find Mr. Moody's testimony to be very convincing.

10. Based on the whole record, Commissioners Leigh and Nelson conclude that the methodology used by Moody does not reasonably support his conclusion that the Project will not substantially injure the value of adjoining or abutting property as set forth in Section 903(c) of the Ordinance.

11. Testimony was also received from McCann. In addition to his testimony, McCann provided a thorough report to the Board explaining and supporting his conclusions, including his conclusion that the value of adjoining and abutting properties would be substantially injured as a result of the Project.

12. It is undisputed that McCann is the only witness to testify before the Board who conducted a sales comparison/paired sales analysis regarding the property value impacts of operational wind facilities on adjoining or abutting properties.

13. McCann has personally examined the impacts of industrial-scale wind facilities on communities like Perquimans County, and has shown that, based on the similarity to the Project, data collected at those facilities will reliably predict the impact of the Project on adjoining or abutting property. Based on the methodology he described, McCann provided the opinion that the Project will have a substantial negative impact on the value of properties that adjoin or abut the Project. McCann also provided in his report that "in his professional opinion

any value diminution that measurably exceeds typical negotiation range for an unaffected transaction must be considered substantial... .”

14. Commissioner Nelson also found that the expert testimony of McCann followed a more logical approach than that utilized by Moody.

15. Commissioner Leigh concluded that the testimony and report offered by Mr. McCann contained more information and was more credible on the requirement that the use will not substantially injure the value of adjoining or abutting property.

C. Findings of Fact concerning the requirement that the location and character of the use, if developed according to the plan as submitted and approved, will be in harmony with the area in which it is to be located and in general conformity with the Perquimans County Land Use Plan

16. The Project proposes to construct 57 of the largest turbines in the United States. These turbines will be installed in an area with little-to-no industrial activity, and that is otherwise agricultural and residential.

17. Additionally, the Project plans, as well as the visual simulations presented by Timbermill itself, demonstrate that the proposed IWTs will rise far above all their surroundings, and will have a significant visual impact. This visual impact will change the nature and character of this rural and pastoral area indefinitely.

18. The visual impact of the project cannot be mitigated in any reasonable fashion, based on the sheer height of the proposed turbines.

19. Further, regarding the visual impact of the Project, evidence was presented by Tommy Stokely, a licensed surveyor experienced in preparing visual simulations, showing visual simulations of specific residential locations around the Project area. These simulations demonstrate the impact of the Project on, among other things, the residential property surrounding the Project area. Specifically, the visual simulations presented by Mr. Stokely

showing the impacts of the IWTs on residential homes owned by Dabney Scaff, Dennis Hunter, Clyde Elliott and Kristi Copeland and other nearby property owners.

20. Commissioner Jones specifically took note of Ms. Scaff, Mr. Hunter, and Mr. Elliott's testimony on how they currently use their property and the character and use of their property.

21. As to the issue of harmony, Commissioner Jones found that the evidence presented by the residents, and opponents to the Project, was compelling. Based on all of the evidence presented, including but not limited to the evidence presented in opposition to the Application, Commissioner Jones concluded that the project would not be in harmony with the area in which it is to be located.

22. The Project as a whole would be in sharp contrast to the current surroundings in the Bear Swamp and Center Hill communities.

23. In addition, Timbermill presented evidence regarding the shadow flicker that will result from the operation of these turbines. In presenting that evidence, Timbermill contends that no residence will receive more than 30 hours of shadow flicker per year. Residents testified that the the amount of shadow flicker projected in Timbermill's own evidence will severely limit and impair the harmonious use and enjoyment of these properties.

CONCLUSIONS

1. Based on the above findings and the whole record, three members of the Board (a majority) have determined that Timbermill failed to satisfy all four general requirements set forth in Section 903. Specifically, three members of the Board (a majority) found that at least one of the four general requirements in Section 903 were not satisfied by competent, material and substantial evidence in the record.

2. Timbermill failed to meet its required burden of proof to obtain the requested conditional use permit.

3. As demonstrated by the above findings and based on evidence contained in the whole record, Timbermill failed, as to Commissioners Leigh and Nelson, to present competent material and substantial evidence on the requirement that the proposed use will not substantially injure the value of adjoining or abutting property.

4. As demonstrated by the above findings and based on evidence contained in the whole record, Timbermill failed, as to Commissioner Jones, to present competent material and substantial evidence on the requirement that the location and character of the use, if developed according to the plan as submitted and approved, will not be in harmony with the area in which it is to be located.

5. A majority of the Board, in the aggregate, concluded that Timbermill failed to present competent material and substantial evidence on all four of the required general conditions contained in Section 903 and, as such, the majority voted to deny the Application.

WHEREFORE, based on the majority vote of the Commissioners to deny the Application for failing to meet its burden on all of the general and specific conditions of the Ordinance, and for the reasons set forth herein, the Application is hereby DENIED.

This the 21st day of November, 2016.

By: 
Janice McKenzie Cole, Chairwoman
Perquimans County Board of Commissioners

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing pleading was this date served upon the following persons(s) as follows:

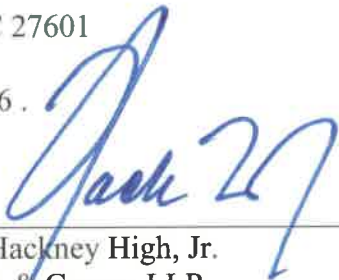
_____ By Hand Delivery

 X By placing a copy in an envelope with adequate postage thereon and depositing the same in an official depository of the United States Postal Service under the exclusive care and custody of the United States Postal Service, said envelope being properly addressed to:

Chad Essick
Poyner Spruill
301 Fayetteville St
Suite 1900
Raleigh, NC 27601

Henry Campen
Parker Poe
301 Fayetteville St
Suite 1400
Raleigh, NC 27601

This the 22nd day of November , 2016 .



W. Hackney High, Jr.
High & Crowe, LLP
PO Box 92
Edenton, NC 27932