IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA
CIVIL DIVISION

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CARBON COUNTY
PROTHONOTARY

ATLANTIC WIND, LLC, Appellant	:	
v.	:	No. 19-0416
THE ZONING HEARING BOARD OF PENN FOREST TOWNSHIP, Appellee	:	LAND USE APPEAL

BETHLEHEM AUTHORITY, Appellant	:	
v.	:	No. 19-0417
THE ZONING HEARING BOARD OF PENN FOREST TOWNSHIP, Appellee	:	LAND USE APPEAL

Debra A. Shulski, Esquire	Counsel for Atlantic Wind, LLC
Michael S. Greek, Esquire	Counsel for Penn Forest Township Zoning Hearing Board
Thomas S. Nanovic, Esquire	Counsel for Penn Forest Township
Bruce K. Anders, Esquire	Counsel for 42 Intervenors
James F. Preston, Esquire	Counsel for Bethlehem Authority
J. William Fontaine, II	Pro Se

MEMORANDUM OPINION

Serfass, J. - October 23, 2020

Bethlehem Authority filed a Notice of Appeal to the Commonwealth Court of Pennsylvania on June 22, 2020. The appeal seeks review and reversal of this Court's decision as set forth in our memorandum opinion and order of May 29, 2020. In that opinion and order, we

affirmed the decision of the Penn Forest Township Zoning Hearing Board, having found that the zoning hearing board's findings, conclusions and decision were supported by substantial evidence and that the board neither abused its discretion nor committed an error of law in denying the special exception of Atlantic Wind, LLC for a wind turbine project.

FACTUAL AND PROCEDURAL HISTORY

On or about June 25, 2020, we directed Bethlehem Authority to file of record and serve upon this Court a concise statement of matters complained of on appeal no later than July 16, 2020, in accordance with Pennsylvania Rule of Appellate Procedure 1925(b). Bethlehem Authority timely complied with our 1925(b) Order.

A "Notice of Docketing Appeal" dated October 14, 2020 was forwarded to this Court by the Prothonotary of the Commonwealth Court and the instant opinion is filed pursuant to Pa.R.A.P. 1925(a). All relevant facts relating to the issues raised in Bethlehem Authority's concise statement of matters complained of on appeal were included in our memorandum opinion of May 29, 2020. Consequently, in terms of the factual and procedural history of this matter, this Court relies upon our memorandum opinion, incorporates that opinion herein and attaches hereto a copy thereof for the convenience of the Honorable Commonwealth Court.

ISSUES

Bethlehem Authority raises the following issues in their concise statement of matters complained of on appeal:

1. The Court improperly determined Bethlehem Authority's dominion over vacant properties in Penn Forest Township is itself a "use" subject to regulation under the Penn Forest Township Zoning Ordinance;

2. The Court improperly determined that distinct tax parcels acquired by the Bethlehem Authority over time through different deeds from various grantors collectively constitute a "Lot" subject to regulation under the Penn Forest Township Zoning Ordinance;

3. Having improperly merged the Bethlehem Authority's properties into a single lot the Court improperly determined the resultant "Lot" contains a principal use;

4. The Court improperly ordained a principal use - which the Court refers to as "the production of potable water" - comprising the intentional "non-use" of vacant property;

5. The Court improperly relied on private agreements, private correspondence, and private contracts to ordain a regulated "use" comprising the intentional "non-use" of vacant property;

6. The Court improperly incorporated an intent requirement into the use regulations under the Penn Forest Township Zoning Ordinance;

7. The Court's interpretation and application of the Penn Forest Township Zoning Ordinance deprives the Bethlehem Authority of protected property rights;

8. The Court's interpretation and application of the Penn Forest Zoning Ordinance deprives the Bethlehem Authority of equal protection under the law;

9. The Court's application of the Penn Forest Township Zoning Ordinance to property owned by Bethlehem Authority is a taking under state and federal law;

10. As the proposed wind turbine use, the Court applied a standard for measuring sound that cannot be applied to a proposed (i.e. not yet permitted and constructed) facility; and

11. The Court improperly affirmed the Zoning Hearing Board's denial of the requested special exception use.

We will address each issue seriatim.

DISCUSSION AND ANALYSIS

1. We respectfully submit that our memorandum opinion of May 29, 2020 thoroughly addresses Bethlehem Authority's first issue, at pages 13-15 thereof, and we attach hereto a copy of said opinion for the convenience of the Honorable Commonwealth Court.

2. We find no merit in Bethlehem Authority's second issue on appeal as neither the Penn Forest Township Zoning Hearing Board nor this Court made any determination which "improperly merged" the sixteen (16) tax parcels included in the site plan submitted by Atlantic Wind, LLC and referenced in pages two (2) and four (4) of our memorandum opinion of May 29, 2020.

3, 4. Here again, we submit that these issues were thoroughly addressed in our memorandum opinion of May 29, 2020.

5. In addition to respectfully referring the Honorable Commonwealth Court to our memorandum opinion of May 29, 2020, we note that the "private agreements, private correspondence and private contracts" referenced in Bethlehem Authority's fifth issue on appeal were not considered by the zoning hearing board or by this Court to supersede the Penn Forest Township Zoning Ordinance. Rather, they were considered as some proof as to the use Bethlehem Authority was making of the subject property. We submit that these documents were relevant for that purpose and that it was entirely proper for the zoning hearing board to consider them as such.

6, 7, 8. With regard to Bethlehem Authority's issues six (6) through eight (8), we note that "a Rule 1925(b) statement 'shall concisely identify each ruling or error that the appellant intends to challenge with sufficient detail to identify all pertinent issues for the judge' Pa.R.A.P. 1925(b)(4)(iii). 'Issues not included in the statement and/or note raised in accordance with the provisions

of this [Rule] are waived.' Pa.R.A.P. 1925(b)(4)(vii)." In Re: A-B, 63 A.3d 345, 350 (Pa.Super. 2013). Moreover, "Appellant's concise statement must properly specify the error to be addressed on appeal" Commonwealth v. Hansley, 24 A.3d 410, 415 (Pa.Super. 2011), appeal denied, 613 Pa. 642, 32 A.3d 1275 (2011) (citation omitted). "[T]he Rule 1925(b) statement must be specific enough for the trial court to identify and address the issue an appellant wishes to raise on appeal" Id. "When a court has to guess what issues an appellant is appealing, that is not enough for meaningful review" Commonwealth v. Dowling, 778 A.2d 683, 686 (Pa.Super. 2001) "A Concise Statement which is too vague to allow the court to identify the issues raised on appeal is the functional equivalent of no Concise Statement at all." Id. at 686-87.

The matters raised in issues six (6) through eight (8) of Bethlehem Authority's concise statement assert two broad legal rights: due process and equal protection. Bethlehem Authority also refers to the "Court's interpretation of the Penn Forest Township Zoning Ordinance" without specifying the section(s) of the ordinance it is referencing. Therefore, we respectfully submit that Bethlehem Authority's issues six (6) through eight (8) are insufficiently specific and, as a result, do not allow for meaningful review of those issues by this Court. And because issues six (6) through eight (8) are fatally vague, Bethlehem Authority has not preserved those issues on appeal.

9. In the ninth issue set forth in its concise statement, Bethlehem Authority asserts that this Court's interpretation and application of the Penn Forest Township Zoning Ordinance to the subject property constitutes a taking under state and federal law. Initially, we note that a landowner alleging a taking is under a heavy burden to establish that such a taking has occurred. See Zettlemoyer v. Transcontinental Gas Pipeline, 657 A.2d 920 (Pa. 1995). Moreover, a taking does not result merely because a regulation or decision may deprive the owner of the most profitable use of his property. Otherwise, all zoning regulations could be categorized as "takings" in the sense that the owner is not completely free to use his property as he chooses. See United Artists' Theater Circuit, Inc. v. City of Philadelphia, 635 A.2d 612 (Pa. 1993).

In this case, the Court's decision does not deprive Bethlehem Authority of all economically viable uses of the subject property. Currently, the principal use of the property is the production of potable water. Although the wind turbine project would constitute a second principal use of the land owned by Bethlehem Authority and is, therefore, prohibited by the zoning ordinance, the property could be used in a manner that does not conflict with the current principal use. Bethlehem Authority may use or lease the property for the purpose of a project that will further its mission of producing potable water and is consistent with such principal use. We also

note that if Bethlehem Authority ceases to use the property for the production of potable water, the proposed wind turbine project may be permitted as a special exception under the zoning ordinance, provided that the project complies with all remaining requirements of the ordinance, as it would then constitute the principal use of that property. Therefore, the Court's decision in this matter does not effect a taking of Bethlehem Authority's property in any manner whatsoever.

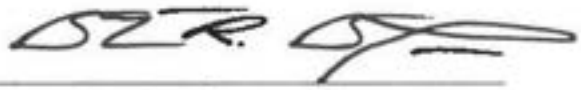
10. We submit that our memorandum opinion of May 29, 2020 thoroughly addresses Bethlehem Authority's tenth issue on appeal, at pages 11-13 thereof, and respectfully refer the Honorable Commonwealth Court thereto.

11. With respect to Bethlehem Authority's eleventh and final issue on appeal, we again note that "the Rule 1925(b) statement must be specific enough for the trial court to identify and address the issues an appellant wishes to raise on appeal" Commonwealth v. Hansley, 29 A.3d 410, 415 (Pa. Super. 2011). Here, Bethlehem Authority flatly asserts that this Court "improperly affirmed the Zoning Hearing Board's denial of the requested Special Exception Use". Therefore, this issue is insufficiently specific and does not allow for meaningful review. Moreover, for the reasons set forth in our memorandum opinion of May 29, 2020, we submit that the decision of the zoning hearing board was properly affirmed by this Court.

CONCLUSION

For the reasons set forth hereinabove and in our memorandum opinion dated May 29, 2020, we respectfully recommend that the instant appeal be denied that our order of May 29, 2020 be affirmed accordingly.

BY THE COURT:



Steven R. Serfass, J.

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MEMORANDUM OPINION

Serfass, J. - May 29, 2020

Appellants Atlantic Wind, LLC, and Bethlehem Authority bring before this Court their land use appeals from the January 30, 2019,

decision of the Penn Forest Township Zoning Hearing Board denying Atlantic Wind's special exception application for a wind turbine project. For the reasons set forth hereinafter, the aforesaid appeals will be denied.

FACTUAL AND PROCEDURAL BACKGROUND

Penn Forest Township (hereinafter "the Township") is a township of the second class located in Carbon County, Pennsylvania. The Township has both a zoning ordinance known as the "Penn Forest Township Zoning Ordinance of 2011" (hereinafter "Zoning Ordinance" or "the Ordinance") and a zoning hearing board, created pursuant to 53 P.S. §10901, known as the Penn Forest Township Zoning Hearing Board (hereinafter "ZHB") which is charged with the interpretation and application of that ordinance.

Bethlehem Authority, a Pennsylvania municipal authority, owns real estate in the Township identified by tax parcel numbers 52-51-A8, 37-51-A7, 24-51-A1, 25-51-A2, 38-51-A1.02, 37-51-A4, 38-51-A1.01, 24-51-A3,4, 37-51-A6, 25-51-A3, 37-51-A7.04, 37-51-A9, 37-51-A2, 37-51-A3, and 37-51-A1 (hereinafter "Project Area").

The majority of the Project Area is located in the R-1 and R-2 Residential Zoning Districts. On March 1, 2013, Atlantic Wind entered into a "Wind License and Wind Energy Lease Agreement with Bethlehem Authority (hereinafter "Lease Agreement") to permit Atlantic Wind to develop wind energy in the Project Area.

On February 5, 2018, Atlantic Wind submitted an application for a special exception to the ZHB. Atlantic Wind's application proposed the construction of a wind energy facility in the Project Area owned by Bethlehem Authority consisting of twenty-eight (28) wind turbines with appurtenant structures and infrastructure, including access roads, permanent meteorological towers, an electrical substation, overhead and underground electrical and data cables, and transmission lines (hereinafter "Wind Turbine Project"). Atlantic Wind's application for a special exception requested the following:

1. A special exception pursuant to Zoning Ordinance Section 306.B.1 to permit the proposed Wind Turbine Project under the category of a miscellaneous use in the R-1 Zoning District;
2. If the proposed permanent meteorological towers are not permitted as part of the wind turbine use, Atlantic Wind requested an interpretation from the zoning officer pursuant to Zoning Ordinance Section 603.C.11, that the permanent meteorological towers are permitted as an accessory use or structure that is customary and incidental to the permitted wind turbine use pursuant to Zoning Ordinance Section 402.A.54(n) which permits accessory electrical facilities; and

3. In the alternative, Atlantic Wind requested a special exception pursuant to Zoning Ordinance Section 105.B to permit the permanent meteorological towers as a use not specifically provided for and not prohibited in any of the Township's zoning districts.

The ZHB held a total of thirteen (13) hearings on Atlantic Wind's application which convened on the following dates: March 1, 2018; April 4, 2018; April 23, 2018; May 22, 2018; June 5, 2018; July 16, 2018; July 23, 2018; August 13, 2018; September 10, 2018; October 2, 2018; October 9, 2018; October 30, 2018; and December 17, 2018.

The site plan submitted by Atlantic Wind with its special exception application indicates development or improvements on the fifteen (15) tax parcels in the Project Area as well as tax parcel 38-51-A4. Though included in the site plan, tax parcel 38-51-A4 was not included within the original zoning application, narrative, zoning officer's report, or the advertisement and public notice for the first zoning hearing on March 1, 2018. At the August 13, 2018 hearing, the ZHB voted to re-advertise the application to include tax parcel 38-51-A4 and re-post the application at the same locations as the original posting for the first hearing. No individual or party at any of the four (4) subsequent hearings claimed a lack of notice concerning the parcels included in the site plan or application before the ZHB.

During the zoning hearings, a group of forty-two (42) Carbon County property owners (hereinafter "42 Intervenors") participated through counsel as objectors. J. William Fontaine, II, also participated as an objector in the zoning hearings subject to the ZHB's final determination regarding his standing to participate. Mr. Fontaine purchased the property located at 57 Sunset Drive, Penn Forest Township, Carbon County, Pennsylvania in October of 2018. A majority of the 42 Intervenors and Mr. Fontaine own property within approximately one (1) mile of the nearest proposed wind turbine, and all of their properties are within approximately three (3) miles of the nearest proposed wind turbine as listed in Zoning Hearing Exhibit "O-31".

On January 30, 2019, following the conclusion of all hearings, the ZHB denied Atlantic Wind's application for a special exception in a decision and order including findings of fact and conclusions of law. The ZHB found that Atlantic Wind had failed to meet its burden of demonstrating compliance with the requirements of the Zoning Ordinance, specifically that Atlantic Wind had failed to demonstrate that the sound generated by the wind turbines would not exceed forty-five (45) A-weighted decibels at the nearest occupied dwelling as required by Section 402.A.54.p of the Zoning Ordinance and that the wind turbine project would constitute a second principal use within a residential zoning district in violation of Section 802.B.2 of the Zoning Ordinance.

Atlantic Wind initiated the instant action on February 28, 2019, with the filing of a land use appeal of the January 30, 2019, decision of the ZHB. On that same date, Bethlehem Authority also filed a land use appeal concerning the same ZHB decision in Case No. 19-0417. On March 12, 2019, the Township filed a notice of intervention in both cases. The 42 Intervenors and Mr. Fontaine filed petitions to intervene in each case on March 22, 2019 and on March 25, 2019, respectively. Atlantic Wind filed answers in opposition to both intervention petitions on April 7, 2019 and April 12, 2019. A hearing on the petitions to intervene was held before the undersigned on May 17, 2019 and, on June 5, 2019, this Court entered an order granting both intervention petitions.

On April 22, 2019, Atlantic Wind and Bethlehem Authority filed a joint motion to consolidate these cases. Following the issuance of a rule by this Court and confirmation that there was no opposition thereto, on May 21, 2019, this Court granted the joint motion to consolidate both cases under Case No. 19-0416.

On April 18, 2019, Atlantic Wind filed a brief in support of its land use appeal. On April 22, 2019, Bethlehem Authority filed a brief in support of its land use appeal. On May 3, 2019, the ZHB and the Township each filed a brief in support of the ZHB decision and in opposition to the land use appeals. On June 18, 2019, Mr. Fontaine filed briefs in support of the ZHB decision. On June 19, 2019, 42 Intervenors filed a brief in support of the ZHB decision.

On June 26, 2019, Atlantic Wind filed a reply brief. Oral argument on the land use appeal was held on June 26, 2019. On June 27, 2019, this Court entered an order granting the Intervenors' oral request for additional time within which to file briefs in response to Atlantic Wind's reply brief. On July 24, 2019, the Township filed a supplemental brief and on July 26, 2019, Bethlehem Authority and 42 Intervenors each filed a reply brief. This matter is now ripe for disposition.

DISCUSSION

Upon careful consideration of the certified record in this case, review of the parties' briefs, and following oral argument before this Court, we are constrained to deny the appeals of Atlantic Wind and Bethlehem Authority as we find that the ZHB's findings of fact are supported by substantial evidence and that the ZHB neither abused its discretion nor committed any error of law.

Where, as here, the trial court does not take additional evidence, our review is limited to determining whether the zoning hearing board abused its discretion or committed an error of law and whether its necessary findings of fact are supported by substantial evidence. Aldridge v. Jackson Twp., 983 A.2d 247, 260 (Pa.Cmwlth. 2009). "The findings of the governing body, board or agency shall not be disturbed by the court if supported by substantial evidence." 53 P.S. §11005-A. Substantial evidence is

"such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Valley View Civic Ass'n v. Zoning Bd. of Adjustment, 462 A.2d 637, 640 (Pa. 1983). If substantial evidence exists on the record in support of a zoning hearing board's determination, the trial court may not overrule the zoning hearing board's decision. A & L Investments v. Zoning Hearing Board of the City of McKeesport, 829 A.2d 775, 777 (Pa.Cmwlth. 2003). The zoning hearing board, as factfinder, is the sole judge of credibility with power to resolve conflicts in the testimony and to reject even uncontradicted testimony that it finds to be lacking in credibility. In re: Petition of Dolington Land Grp., 839 A.2d 1021, 1026 (Pa. 2003).

The primary objective of interpreting ordinances is to determine the intent of the legislative body that enacted the ordinance. *See* Adams Outdoor Adver., L.P. v. Zoning Hearing Bd. of Smithfield Twp., 909 A.2d 469 (Pa.Cmwlth. 2006), *appeal denied*, 923 A.2d 1175 (Pa. 2007). An ordinance's plain language generally provides the best indication of legislative intent and thus statutory construction begins with an examination of the text itself. Malt Beverages Distribution v. Liquor Control Board, 918 A.2d 171, 176 (Pa.Cmwlth. 2007). As in statutes, words and phrases in an ordinance shall be construed in accordance with their common and accepted usage. Aldridge v. Jackson Twp., 983 A.2d at 253. When interpreting zoning ordinances, a reviewing court must rely

on the common usage of words and phrases and construe language in a sensible manner. City of Hope v. Sadsbury Township Zoning Hearing Board, 890 A.2d 1137, 1143-44 (Pa.Cmwlth. 2006). "Where the words in an ordinance are free from all ambiguity, the letter of the ordinance may not be disregarded under the pretext of pursuing its spirit." *Id.* (citing 1 Pa. C.S.A. § 1921). "An ambiguity exists when language is subject to two or more reasonable interpretations and not merely because two conflicting interpretations may be suggested." *Id.* (citing New Castle County v. Hartford Accident & Indem. Co., 970 F.2d 1267 (3d Cir.1992)). Further, it is well settled that a zoning hearing board's interpretation of its own zoning ordinance is entitled to great weight and deference by a reviewing court. Hafner v. Zoning Hearing Bd. of Allen Twp., 974 A.2d 1204, 1210 (Pa.Cmwlth. 2009). The basis for the judicial deference is the knowledge and experience that a zoning hearing board possesses to interpret the ordinance that it is charged with administering. Smith v. Zoning Hearing Board of Huntington Borough, 734 A.2d 55 (Pa.Cmwlth. 1999).

A special exception is neither special nor an exception; it is a use expressly contemplated that evidences a legislative decision that the particular type of use is consistent with the zoning plan and presumptively consistent with the health, safety and welfare of the community. Greth Development Group, Inc. v. Zoning Hearing Bd. of Lower Heidelberg Twp., 918 A.2d 181, 188

(Pa.Cmwlth. 2007). An applicant for a special exception has both the duty of presenting evidence and the burden of persuading the zoning hearing board that its proposed use satisfies the zoning ordinance's objective requirements for the grant of a special exception. Allegheny Tower Assocs., LLC v. City of Scranton Zoning Hearing Bd., 152 A.3d 1118, 1123 (Pa.Cmwlth. 2017). Once the applicant meets its burden of proof and persuasion, a presumption arises that it is consistent with the health, safety and general welfare of the community, and the burden shifts to the objectors to present evidence and persuade the board that there exists a high probability that the use will generate adverse impacts not normally generated by this type of use and that these impacts will pose a substantial threat to the health and safety of the community. *Id.* However, where the applicant for a special exception cannot meet the requirements of the zoning ordinance relative to the use intended, and does not challenge the validity of the ordinance or seek to have the property rezoned, the burden does not shift and the application must be denied. *See* Ralph & Joanne's, Inc. v. Neshannock Twp. Zoning Hearing Bd., 550 A.2d 586, 589 (Pa.Cmwlth. 1988).

I. THE ZHB DID NOT COMMIT AN ERROR OF LAW OR ABUSE ITS DISCRETION IN FINDING THAT ATLANTIC WIND FAILED TO DEMONSTRATE COMPLIANCE WITH ZONING ORDINANCE SECTION 402.A.54.P

Here, the principal use of wind turbine(s) is permitted in the R-1 Zoning District as a special exception. Zoning Ordinance § 306.B.1. Section 402.A.54 of the Zoning Ordinance enumerates the specific requirements for a wind turbine special exception. Section 402.A.54.p of the Zoning Ordinance provides that: "The audible sound from the wind turbines(s) shall not exceed 45 weighted decibels, as measured at the exterior of an occupied dwelling on another lot, unless a written waiver is provided by the owner of such building."

To demonstrate compliance with Section 402.A.54.p, Atlantic Wind presented the testimony of Mark Bastasch, an acoustical engineer. Mr. Bastasch modeled the projected sound level of the Wind Turbine Project using the LEQ standard of sound measurement, which measures the average sound level over time, has a variance of three (3) to eleven (11) decibels, and may include sounds greater than the average value. Mr. Bastasch testified that the projected sound level would not exceed forty-five (45) A-weighted decibels at the exterior of an occupied dwelling using the LEQ method.

The opponents of the Wind Turbine Project called Robert Rand to testify as an expert in the area of acoustics and noise measurement. Mr. Rand disagreed with Mr. Bastasch and testified that the sound level would exceed forty-five (45) A-weighted

decibels at the exterior of occupied dwellings near the Project Area.

The ZHB determined that the LEQ method of sound measurement was not responsive to the Zoning Ordinance's requirement that sound "shall not exceed" forty-five (45) A-weighted decibels. The ZHB found that the LMAX standard of sound measurement, which measures the instantaneous maximum sound at any given time, should be used because it matches the plain-language meaning of the Zoning Ordinance's requirement that sound from the wind turbines shall not exceed forty-five (45) A-weighted decibels. As a result, the ZHB found that Atlantic Wind failed to produce sufficient evidence that the proposed Wind Turbine Project will comply with section 402.A.54.p of the Ordinance because the testimony presented that the anticipated long-term average project sound level is not expected to exceed forty-five (45) A-weighted decibels under the LEQ method at any occupied dwelling was not, in the ZHB's view, responsive to the Ordinance's requirement that the sound shall not exceed a maximum of forty-five (45) A-weighted decibels.

The ZHB, as factfinder, accepted the testimony of Mr. Rand and rejected the testimony of Mr. Bastasch, and we will not disturb the ZHB's determinations as to the credibility of the witnesses appearing before it. Further, the ZHB's interpretation of Section 402.A.54.p is entitled to great deference and weight. *See* Hafner v. Zoning Hearing Bd. of Allen Twp., 974 A.2d at 1210. The ZHB's

determination that the Zoning Ordinance requires the use of the LMAX measurement method is based upon the plain language meaning of the words "shall not exceed." We find that the ZHB did not abuse its discretion or commit an error of law in arriving at this conclusion.

II. THE ZHB DID NOT COMMIT AN ERROR OF LAW OR ABUSE ITS DISCRETION IN FINDING THAT THE WIND TURBINE PROJECT WOULD CONSTITUTE A SECOND PRINCIPAL USE WITHIN A RESIDENTIAL DISTRICT IN VIOLATION OF ZONING ORDINANCE SECTION 801.B.2

Section 801.B.2 of the Zoning Ordinance provides that "A lot within a residential district shall not include more than one (1) principal use and shall not include more than one (1) principal building unless specifically permitted by this Ordinance." The Ordinance also permits a "Government Facility" in R-1 and R-2 zoning districts as a special exception use. The Ordinance defines a "Government Facility, Other than Township owned" as: "A use owned by a government, government agency or government authority for valid public health, public safety, recycling collection or similar governmental purpose, and which is not owned by Penn Forest Township." Zoning Ordinance § 202. The Zoning Ordinance defines "use" as "The purpose, activity, occupation, business or operation for which land or a structure is designed, arranged, intended, occupied, or maintained." *Id.*

The ZHB found that Bethlehem Authority has kept the Penn Forest Reservoir watershed, which includes much of the Project Area, in an undeveloped state for the purpose of maintaining the quality of the water flowing into the Penn Forest Reservoir. Evidence was presented during the ZHB hearings that Bethlehem Authority has entered into a "Term Conservation Easement" with the Nature Conservancy, which provides that the Project Area is utilized for the production of potable water and kept in an undeveloped state for that purpose. The Lease Agreement between Atlantic Wind and Bethlehem Authority states that the primary mission of Bethlehem Authority is to produce potable water and that one of the primary uses of the Project Area is for the production of potable water. Based upon this evidence, the ZHB found that the maintenance of the Project Area in an undeveloped state by Bethlehem Authority for the production of potable water constitutes a valid public health "use" under the Ordinance.

Because the proposed Project Area is within the R-1 and R-2 residential zoning districts, it can have only one (1) principal use. The ZHB found that the Project Area currently has as its principal use the production of potable water and that the proposed wind turbine project would constitute a second principal use in violation of Zoning Ordinance Section 801.B.2.

The ZHB's determination that the Project Area is maintained in an undeveloped state for the purpose of producing potable water

is supported by substantial evidence. The ZHB's interpretation of the definition of "use" under the Zoning Ordinance fits the plain-language meaning of the ordinance. We find that the ZHB did not abuse its discretion nor commit an error of law by finding that the maintenance of the Project Area in an undeveloped state for the purpose of the production of potable water constitutes a principal use and that the Wind Turbine Project would constitute a second principal use in violation of Zoning Ordinance Section 801.B.2.

CONCLUSION

As the findings, conclusions, and final decision of the Penn Forest Township Zoning Hearing Board are supported by substantial evidence and the Zoning Hearing Board has neither abused its discretion nor committed an error of law in denying Atlantic Wind's application, we shall affirm the decision of the Penn Forest Township Zoning Hearing Board and enter the following

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ORDER OF COURT

AND NOW, to wit, this 29th day of May, 2020, upon consideration of the appeals of the decision of the Zoning Hearing Board of Penn Forest Township filed by Atlantic Wind, LLC and Bethlehem Authority, the submissions of the parties and review of the record

as certified by the zoning hearing board solicitor, and following oral argument thereon, and for the reasons set forth in our Memorandum Opinion bearing even date herewith, it is hereby

ORDERED and DECREED that the decision of the Penn Forest Township Zoning Hearing Board is **AFFIRMED** and that the Land Use Appeals of Atlantic Wind, LLC, and Bethlehem Authority are **DENIED**.

BY THE COURT:

Steven R. Serfass, J.