### IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PPM Atlantic Renewable

No. 1431 C.D. 2010 V.

Fayette County Zoning

Submitted: March 7, 2014

FILED: May 20, 2014

Hearing Board, Neil Brown and

Thomas J. Bozek

Appeal of: Thomas J. Bozek

BEFORE:

HONORABLE BERNARD L. McGINLEY, Judge

HONORABLE ROBERT SIMPSON, Judge

HONORABLE JAMES GARDNER COLINS, Senior Judge

### OPINION NOT REPORTED

### MEMORANDUM OPINION **BY JUDGE SIMPSON**

This case returns to us following our Supreme Court's remand in PPM Atlantic Renewable v. Fayette County Zoning Hearing Board, 81 A.3d 896 (Pa. 2013) (PPM Atlantic Renewable II). Thomas J. Bozek (Objector) asks whether the Court of Common Pleas of Fayette County (trial court) erred in reversing a decision of the Fayette County Zoning Hearing Board (ZHB). After an initial remand to the ZHB, the trial court granted PPM Atlantic Renewable's (Applicant) requests for numerous special exceptions and dimensional variances from setback requirements, subject to certain modified conditions, so as to allow Applicant to construct its proposed wind energy project, comprised of 24 wind turbines. Objector appealed both the trial court's remand decision and its subsequent decision granting Applicant's requests for relief. Upon review, we reverse the trial court's order and reinstate the ZHB's decision after remand.

### I. Factual and Procedural Background

In September 2007, Applicant filed numerous applications with the ZHB requesting special exceptions and dimensional variances to permit construction of a wind power facility known as the South Chestnut Windpower Project in southern Fayette County. The proposed project spans approximately three-and-a-half miles of the Chestnut Ridge in Wharton, Georges, and Springhill Townships.

In total, 22 of the 24 currently proposed wind turbines are located in Georges and Springhill Townships. Because neither of those townships have their own zoning ordinances, the proposed turbines that lie within those townships are subject to the Fayette County Zoning Ordinance (zoning ordinance).<sup>1</sup>

The zoning ordinance in existence when Applicant submitted its requests permitted wind turbines by special exception in the County's A-1 Agricultural-Rural Zoning Districts. See Section 1000-203(B) of the zoning ordinance, Table 1 (Non-residential).

In addition, Section 1000-876 of the ordinance contains 13 criteria that an applicant must satisfy in order to obtain a special exception for a windmill/wind turbine. Relevant here, one criterion requires a minimum setback from any lot line of 100% of the turbine's height. Section 1000-876(D) of the zoning ordinance. Also, Section 1000-876(N) of the zoning ordinance grants the

<sup>&</sup>lt;sup>1</sup> Wharton Township has its own zoning ordinance and the towers located in that township are not at issue in this appeal. Additionally, the effective date of the Fayette County Zoning Ordinance at issue here is November 1, 2006.

ZHB authority to attach conditions on the grant of a special exception for a windmill/wind turbine in order to protect the public health, safety and welfare, including the right to impose increased setbacks.

The ZHB held four hearings on Applicant's requests, during which it heard testimony as to Applicant's reasons for choosing the Chestnut Ridge locations, evidence regarding the various advantages and disadvantages of wind power, and public comment both in favor of and in opposition to Applicant's proposed facility. Objector, who owns land adjacent to the proposed facility, appeared at the ZHB hearings in opposition to Applicant's proposal.

Thereafter, the ZHB issued a decision in which it denied Applicant's requests in their entirety. Applicant appealed to the trial court.

Applicant's appeal was assigned to Judge Ralph C. Warman (first trial judge), who ultimately remanded to the ZHB. The first trial judge ordered the ZHB, based on the existing record, to consider and grant each special exception as required by law and to impose any condition it deemed fit to protect the health, safety and welfare of the community. The first trial judge also directed the ZHB to properly consider Applicant's requests for dimensional variances from the zoning ordinance's height and setback requirements.

Thereafter, the ZHB issued a second decision in which it: (1) granted (as *de minimis*) Applicant's request for variances from the height restrictions for all 22 turbines; (2) denied Applicant's requests for variances from the setback

requirements for eight of the 22 towers; (3) denied Applicant's special exception requests for these eight towers based on the denial of the requested setback variances; and, (4) granted Applicant's special exception requests for the remaining turbines, subject to seven conditions. Of import here, one attached condition requires Applicant to increase the minimum setbacks for its turbines to 500 feet from roadways and 425 from all property lines.

Applicant again appealed to the trial court, asserting, among other things, the ZHB erred in: denying its requests for dimensional variances from the setback requirements for the eight turbines; denying the corresponding eight special exceptions; and, imposing unreasonable conditions. The trial court, through Judge Steve P. Leskinen (second trial judge), ultimately agreed with the majority of Applicant's contentions.

Applicant's request for variances from the zoning ordinance's setback requirements. The trial court determined the requested variances were dimensional in nature and, therefore, the unnecessary hardship criterion was relaxed. The trial court determined the location in which Applicant seeks to construct its turbines consists of exceptional topographical or other unique conditions, and Applicant would suffer economic detriment absent the grant of the variances. The trial court also determined Applicant's proposal was consistent with the characteristics of the surrounding neighborhood, and the ZHB erred in concluding denial of the variances was proper based on the risk of "ice throw[s]" from the turbine blades. Tr. Ct., Slip Op., 6/18/10, at 15.

Based on its grant of the dimensional variances from the setback requirements, the trial court determined the ZHB erred in denying Applicant's request for special exceptions for the remaining eight towers as Applicant satisfied all other special exception criteria.

Finally, as to Applicant's challenge to five of the seven conditions attached to the grant of the special exceptions, the trial court struck three of these conditions. Notably, the trial court modified the ZHB's condition regarding increased setback requirements. Specifically, the trial court modified that condition as it relates to all 22 turbines to impose: "a setback requirement of 500 feet from the center of the turbine base to the nearest edge of the right-of-way of any public road," and "a setback requirement of 425 feet from the center of the turbine base to the line of any property not covered by a recorded lease or other appropriate conveyance to [Applicant] that specifically references the risk of ice throws." Tr. Ct., Slip Op., 6/18/10 at 34 (emphasis added). The trial court also imposed a requirement of "reasonable notice to other persons who might forseeably be within such increased setbacks. Such notice could be provided by posting conspicuous signage at 100' intervals around the perimeter of the property at risk throughout the relevant winter season." Id.<sup>2</sup>

(Footnote continued on next page...)

<sup>&</sup>lt;sup>2</sup> Of further note, in the conclusion section of its opinion, the trial court stated:

The court is aware that there have been revisions to the zoning ordinance since submission of this appeal to the court that could ultimately render this decision moot. The court is also aware that there are revisions to the ordinance now pending that will probably render this decision moot. Those past and future revisions dramatically illustrate the point made above that there are still many unanswered questions about the best way to implement wind energy technology. The laws governing wind energy are

After entry of the trial court's order sustaining Applicant's land use appeal, but prior to Objector's appeal to this Court, Applicant filed a motion for bond with the trial court. Objector then filed two notices of appeal with this Court. The first notice of appeal sought review of the second trial judge's order sustaining

(continued...)

in an understandable state of flux. However, neither party has requested that the appeal be withdrawn.

Further, [Applicant] is entitled to proceed with every permit application lawfully and timely made, whether it was requested under the old ordinance, the current ordinance, or some future ordinance. [Applicant] has the right to proceed under whichever version of the ordinance that appears most favorable to them.

<u>Id.</u> at 31. As alluded to by the trial court, a review of the County's website reveals the County Commissioners did, in fact, amend the zoning ordinance's provisions governing the special exception requirements for windmills/wind turbines in February 2009. The minimum setback requirement now states (with emphasis added):

All wind turbines shall be set back from the nearest non-participating property line a distance of not less than the greater of the maximum setback requirements for that zoning classification where the turbine is located or 1.1 times the turbine height not including the blades. The setback distance shall be measured to the center of the wind turbine base. No commercial windmill/wind turbine shall be located where the center of the tower(s) is a distance of five (5) times the height of the windmill/wind turbine, excluding the blades from any off-site residence or commercial structure or two times the height unless the owner of such existing residential or commercial structure shall have executed a non-disturbance easement, covenant or consent which has been recorded in the Office of the Recorder of Deeds of Fayette County.

Fayette County Zoning Ordinance Amendment ZA 09-04, 7-23-09, available at <a href="http://www.co.fayette.pa.us/planningzoning/Documents/za\_09-4\_windmill\_section\_1000-876.pdf">http://www.co.fayette.pa.us/planningzoning/Documents/za\_09-4\_windmill\_section\_1000-876.pdf</a> (last visited Apr. 14, 2014) (Section 1000-876(I)(C) of the zoning ordinance).

For a "residential windmill/wind turbine," the new setback requirement states, "[t]he minimum setback for a residential windmill/wind turbine located on a residential lot shall be two (2) times the height excluding the blades from all property lines." <u>Id.</u> (Section 1000-876 II(C) of the zoning ordinance).

Applicant's land use appeal. The second notice of appeal sought review of the first trial judge's remand order, which was made final by the second trial judge's subsequent order.

Thereafter, the trial court held a hearing on Applicant's motion for bond. At the conclusion of the hearing, the trial court granted Applicant's motion, and ordered Objector to file a bond as a condition of continuing with his appeal to this Court pursuant to Section 1003-A(d) of the Pennsylvania Municipalities Planning Code (MPC).<sup>3</sup> Reproduced Record (R.R.) at 48a.

Before this Court, Objector filed a motion to consolidate the appeals from the two trial court orders on the basis the appeals are actually the same case. Applicant subsequently filed a motion to quash the appeals, asserting Objector neither posted the bond ordered by the trial court nor appealed the bond order. Ultimately, this Court granted Applicant's motion to quash Objector's appeal based on Objector's failure to comply with or appeal the trial court's bond order. See PPM Atlantic Renewable v. Fayette Cnty. Zoning Hearing Bd., 22 A.3d 253 (Pa. Cmwlth. 2011), rev'd, PPM Atlantic Renewable II.

On further appeal, however, our Supreme Court granted Objector's petition for allowance of appeal and, upon review, it reversed this Court's order. See PPM Atlantic Renewable II. The Court held that, where, as here, the developer is the appellant before the common pleas court, Section 1003-A(d) of the

<sup>&</sup>lt;sup>3</sup> Act of July 31, 1968, P.L. 805, <u>as amended</u>, added by section 101 of the Act of December 21, 1988, P.L. 1329, 53 P.S. §11003-A(d).

MPC does not authorize the common pleas court to require an objector to post a bond in connection with the objector's appeal to the Commonwealth Court of a final trial court order. <u>Id.</u> As a result, the Court determined the trial court's bond order here was void *ab initio*, and as such, a legal nullity. <u>Id.</u> Accordingly, the Supreme Court remanded for this Court to resolve Objector's appeal on the merits. <u>Id.</u>

### II. Issues

As a threshold matter, Applicant asserts this Court should dismiss Objector's appeal because Objector did not preserve the issues raised in this appeal.

For his part, Objector contends the trial court erred in reversing the ZHB's decision regarding Applicant's requests for special exceptions and dimensional variances from the setback requirements where the ZHB's decision was adequately supported.

# III. DiscussionA. Waiver1. Contentions

Applicant<sup>4</sup> initially asserts we should dismiss Objector's appeal because Objector did not appeal from the ZHB's decision after remand, which granted all of Applicant's requests for variances from the zoning ordinance's height restrictions as well as special exceptions for 14 of the wind turbines.

<sup>&</sup>lt;sup>4</sup> Neil Brown, who agreed to lease property to Applicant for the proposed facility, joins in Applicant's brief.

Applicant also argues Objector did not preserve issues relating to the remaining special exceptions and the setback variances because he did not raise these issues before the ZHB or the trial court.

Applicant further contends Objector did not comply with Section 1002-A of the MPC,<sup>5</sup> 53 P.S. §11002-A, because he did not file an appeal with the trial court after the ZHB's second decision. Rather, Objector merely intervened in Applicant's second trial court appeal after the remand. However, Applicant argues, the second trial court appeal was limited to the setback variances, the denied special exceptions and the conditions imposed by the ZHB. Applicant argues it obviously did not appeal the special exceptions or the height variances the ZHB granted on remand and, as such, those issues were not in contention in the second trial court appeal. By failing to appeal those issues, Applicant argues, Objector waived them.

Applicant contends Objector's intervention in the second trial court appeal did not preserve issues not raised by Applicant. It asserts, where a party intervenes in a land use appeal, that party is limited to addressing those issues raised by the appellants. See Sell v. Douglas Twp. Zoning Hearing Bd., 613 A.2d 162 (Pa. Cmw1th. 1992).

Also, Applicant argues, as to the remaining issues Objector now raises, Objector did not preserve these issues because he did not raise them before the trial court or the ZHB. Applicant maintains the only issue Objector raised

<sup>&</sup>lt;sup>5</sup> Added by the Act of December 21, 1988, P.L. 1329, <u>as amended</u>.

before the ZHB or the trial court concerned his objection to potential noise from the proposed project. Thus, Applicant asserts, Objector did not preserve the other issues he raises for the first time in this appeal.

In his reply brief, Objector responds that Applicant ignores the fact that, although there are two trial court opinions at issue here, this is only one case. Objector argues he initially prevailed on all issues before the ZHB and, therefore, could not appeal. Objector asserts that since that time all that occurred was the resolution of a single trial court case that was not appealable until now. Objector contends the first trial judge's ruling was not appealable because it ordered a remand. Therefore, he argues, the first time he could appeal was now.

Objector maintains a single judge of this Court resolved this issue in his prior decision quashing Objector's second appeal to this Court by stating Objector's appeal of the first trial court order was unnecessary because all of Objector's issues were subsumed into the appeal of the second trial judge's decision. Therefore, Objector contends, he did not waive any issues.

### 2. Analysis

Objector did not waive issues regarding the grant of the special exceptions and setback variances. In its first decision, the ZHB denied all the relief sought by Applicant. Applicant appealed to the trial court. The first trial judge granted Applicant's special exception requests and remanded for the ZHB to consider Applicant's dimensional variance requests and to impose conditions on the special exceptions if the ZHB deemed any such conditions appropriate.

Clearly, Objector could not appeal the first trial judge's remand order as that order was interlocutory. See, e.g., Gatti v. Zoning Hearing Bd. of Salisbury Twp., 543 A.2d 622 (Pa. Cmwlth. 1994).

On remand, the ZHB granted Applicant's requests for special exceptions for 14 of its wind turbines, subject to attached conditions, denied Applicant's dimensional variance requests from setback requirements for eight of its wind turbines, denied the special exception requests associated with these eight turbines, and granted Applicant's requests for dimensional variances from height restrictions. Applicant again appealed to the trial court. The second trial judge granted the majority of the relief sought by Applicant. Objector, who intervened in both appeals, filed notices of appeal to this Court from the orders of the first trial judge and second trial judge.

In a prior memorandum opinion, a single judge of this Court noted that, after the second trial judge issued his order, all previous interlocutory orders became appealable. PPM Atlantic Renewable v. Fayette Cnty. Zoning Hearing Bd. (Pa. Cmwlth., No. 1431 C.D. 2010, filed 10/8/10) (single judge op., Feudale, S.J.) (unreported); see 20 G. Ronald Darlington et al. Pennsylvania Appellate Practice §§341.3.1, 341.3.01 (2013-2014 ed.). Thus, Objector's appeal of the second trial judge's order subsumes all those issues Objector sought to raise in his appeal of the first trial judge's order. Through their two opinions, the first trial judge and the second trial judge addressed all of the issues raised in Objector's brief, which relate to the special exceptions granted by the first trial judge, the eight dimensional variances from setback requirements denied by the ZHB (that

were subsequently granted by the second trial judge), and the attached condition imposing increased setbacks (which the second trial judge modified). As such, Objector did not waive these issues.

#### **B.** Merits

### 1. Overview of Parties' Contentions

As to the merits, Objector argues the "overriding issue" is that the ZHB's decisions were supported by substantial evidence. Appellant's Am. Br. at 10. Objector asserts both trial judges made serious legal errors. He maintains the two largest errors are that the first trial judge ruled that all Applicant had to do to get its approval was simply file its application. Specifically, Objector contends the first trial judge improperly ruled the ZHB could not consider the contents of the required biological resource or viewshed impact studies because the zoning ordinance did not contain any specific criteria by which to evaluate these studies.

Objector further maintains the second trial judge's entire opinion is based on his decision to allow private individuals (those that are participating in Applicant's project by leasing their land for that purpose) to waive government zoning requirements. If that were deemed proper, Objector argues, there would be no need for zoning regulations. Objector asserts the second trial judge conceded, in at least two instances, that substantial evidence supported the ZHB's decision. Nevertheless, he overturned the ZHB's decision on the ground that private parties removed these issues from his consideration by waiving their right to challenge setback violations.

Objector also argues the trial court acknowledged a safety concern regarding "ice throws" from wind turbine blades, but it chose not to follow the ZHB's method for protecting the public. Instead, it substituted its judgment for that of the ZHB, and it allowed Applicant to construct the turbines, subject to modified conditions.

Applicant counters that the trial court correctly determined the ZHB abused its discretion and committed errors of law in denying the windmill special exceptions. It asserts that the evidence established the project complied with the objective requirements of the zoning ordinance. Opponents of the project (including Objector) did not produce competent evidence sufficient to prove the project would be detrimental to the public health, safety and welfare. Applicant maintains the ZHB failed to apply the correct standard of law and improperly substituted its own judgment for that of the legislative body. Therefore, the trial court properly reversed the ZHB's decision.

Applicant further contends the ZHB erred as a matter of law and abused its discretion in denying Applicant's dimensional variance requests. The ZHB failed to follow the law on dimensional variances, ignored substantial evidence establishing all the dimensional variance requirements, made findings unsupported by substantial evidence, relied on evidence not of record, failed to consider each variance application individually, misapplied the zoning ordinance, and failed to follow the law on *de minimis* variances. Therefore, Applicant asserts, the trial court properly reversed the ZHB's denial of the variances.

# 2. Special Exceptions a. Contentions

With regard to the special exceptions, Objector first takes issue with the following analysis in the first trial judge's opinion:

[T]he ZHB emphasizes that it is not empowered to rewrite the [zoning] [o]rdinance, while at the same time arguing that the results of the viewshed impact analysis and biological resource survey should be reviewed and weighed by the ZHB even though the [zoning] [o]rdinance is silent on the matter. The [zoning] [o]rdinance does not set forth any criteria to establish what the analysis or survey should contain. Nor does it provide any guidance to the ZHB on what to do with the results. Clearly, the ZHB erred in substituting its version of what it believed the [zoning] [o]rdinance should state for what was actually legislated by the County.

Supplemental Reproduced Record (S.R.R.) at 20b (footnote omitted).

Objector contends the first trial judge erred in holding the ZHB should not have considered the substance of the two required studies. He asserts Applicant could not obtain the requested special exceptions by simply attaching these studies to its application. Objector argues the first trial judge offered no explanation as to why the ZHB could not review the studies, and it defies common sense to hold the ZHB lacked the power to consider the substance of the studies.

In addition, Objector asserts the first trial judge mischaracterized the terms of one of the zoning ordinance provisions. Specifically, he argues Section 1000-876(G) of the zoning ordinance states that the biological resources study must "identify and determine what conflicts are likely to occur with birds or other sensitive biological resources." <u>Id.</u>; R.R. at 12a. If a submitted study reveals such a conflict, Objector contends, clearly the ZHB has the power to deny the

application. Objector maintains this is precisely what occurred here as the ZHB determined there is a significant conflict between the wind turbines and the migratory routes of bats and birds. Objector asserts this constitutes sufficient evidence of detriment to the community; thus, the ZHB had authority to deny the special exceptions. Objector further maintains the potential environmental impact here is greater than normally expected from this type of use.

As to the viewshed study, Objector argues this study also reveals the proposal's negative impact on the community because Applicant seeks to locate its turbines on the last ridge of the Allegheny Mountains, leading to a much greater viewshed impact than a project hidden deeper in the mountains that could not be seen. Objector also notes the record reveals the impact of the proposed project on the viewshed would likely harm Fayette County's tourism industry. Objector further contends Applicant presented a viewshed analysis that only considered a five-mile radius and consisted simply of several photographs upon which Applicant superimposed the turbines, supposedly to scale, and a couple of maps purporting to show vegetation to hide the turbines from view at certain locations.

Applicant responds the trial court correctly determined the ZHB erred in denying the special exceptions. Applicant argues it is undisputed that it completed a viewshed impact analysis and a biological resource survey and submitted these studies to the ZHB. It notes the ZHB took issue with these studies and objected to the results based on the impact on the viewshed and on bats. However, the relevant zoning ordinance provisions contain no standards for how these studies are to be completed and contain no criteria relating to the results.

Applicant asserts the zoning ordinance only requires these studies be completed, and Applicant unquestionably met this requirement. By grafting additional requirements onto these zoning ordinance provisions, Applicant contends, the ZHB effectively amended the zoning ordinance. Applicant argues this Court's decision in Greth Development Group, Inc. v. Zoning Hearing Board of Lower Heidelberg Township, 918 A.2d 181 (Pa. Cmwlth. 2007), involved a similar factual scenario, and it supports a conclusion that Applicant satisfied the zoning ordinance requirements regarding the viewshed impact analysis and biological resource study.

Applicant also asserts the general testimony presented by Objector regarding potential harm to the community was insufficient to defeat the special exception requests, and the ZHB erred in concluding otherwise.

Applicant further maintains Objector's concerns about the impact on tourism were speculative and concerns over aesthetics are not sufficient to deny a special exception. Applicant argues the ZHB erred in determining such reasons justified denial of the special exceptions. Applicant also maintains Objector's arguments concerning the effects on the bat population misstate the evidence. Applicant asserts there was no evidence to show a high probability that the proposed facility would generate adverse biological impacts, including the impact on the bat population, not normally generated by this type of use.

As a final point, Applicant notes the ZHB erred in determining the proposed facility did not comply with the policies of the zoning ordinance as such considerations are improper in evaluating a special exception request.

### b. Analysis

Because the parties presented no additional evidence after the ZHB's decision, our review is limited to determining whether the ZHB committed an abuse of discretion or an error of law. <u>Taliaferro v. Darby Twp. Zoning Hearing Bd.</u>, 873 A.2d 807 (Pa. Cmwlth. 2005). Thus, although some of the parties' arguments focus on the trial court's opinion, we review <u>the ZHB's decision</u> to determine whether the ZHB committed an error of law and whether the ZHB's necessary findings are supported by substantial evidence.

This Court may not substitute its interpretation of the evidence for that of the fact-finder, the ZHB here. <u>Taliaferro</u>. It is the function of the fact-finder to weigh the evidence before it. <u>Id.</u> The fact-finder is the sole judge of the credibility of witnesses and the weight afforded their testimony. <u>Id.</u> Assuming the record contains substantial evidence, we are bound by findings that result from resolutions of credibility and conflicting testimony. <u>Id.</u>

A special exception is a permitted use to which an applicant is entitled if it proves compliance with the specific, objective requirements in a zoning ordinance, and if the zoning board determines the use would not adversely affect the community. Blancett-Maddock v. City of Pittsburgh Zoning Bd. of Adjustment, 6 A.3d 595 (Pa. Cmwlth. 2010). The applicant has the burden to

show its application complies with the specific criteria delineated in the ordinance. Id. By showing compliance with the specific criteria, the applicant establishes the proposal is presumptively consistent with the promotion of the public health, safety and welfare. Id. To overcome this presumption, an objector must prove to a high degree of probability that the impact from the proposed use will substantially affect the health, safety and welfare of the community to a greater extent than would be expected normally from that type of use. Id. The objector does not meet its burden with speculation. Id.

Here, the zoning ordinance contains 13 detailed criteria an applicant must satisfy in order to obtain a special exception for a windmill/wind turbine. Of relevance here, these criteria consist of: a minimum setback requirement, a required viewshed impact analysis, and a required biological resource survey to identify and determine what conflicts are likely to occur with birds or other sensitive biologic resources. Sections 1000-876(D), (F), (G) of the zoning ordinance. In addition, subsection (N) authorizes the ZHB to "attach additional conditions pursuant to this section in order to protect the public's health, safety and welfare. These conditions may include but are not limited to increased setbacks." Section 1000-876(N) of the zoning ordinance.

There is no dispute that Applicant's proposed wind turbines qualify as windmills/wind turbines within the meaning of the zoning ordinance. However, in its initial decision, the ZHB determined Applicant was not entitled to special exceptions for its 22 proposed wind turbines. In so doing, the ZHB made the following relevant determinations:

- 3. Generally, for the grant of a special exception, the location and size of the use requested may not be hazardous, inconvenient, or conflict with the general character and intensity of development of the area. In addition, the location and height of the structures must not hinder or discourage the appropriate development and/or use of adjacent land. The proposed use should be viewed as to its relationship to and effect upon surrounding land uses and existing environmental conditions.
- 4. [Applicant] ... requested special exception[s] for the construction and placement of [22] wind turbines across the top of Chestnut Ridge. The height, number, and configuration of the suggested wind turbines across the top of Chestnut Ridge does not fit within the general character and intensity of development of the area. Additionally, the location, number, and height of the structures will hinder or discourage the appropriate development and use of the adjacent land and, will have a negative impact generally upon the surrounding land uses and will pose a general detriment to the public's health, safety, and welfare.
- 5. [Applicant] ... failed to meet its burden with regard to the objective criteria and expressions of general policy as set forth in the [z]oning [o]rdinance and the County's comprehensive plan to obtain a special exception. [An applicant] for a special exception must persuade the [ZHB] that the proposal complies with all of the objective requirements of the [z]oning [o]rdinance and expressions of general policy and planning in order to obtain approval of the special exception. Because [Applicant] has failed in meeting its burden, its petition for special exception must be denied.
- 6. Even if [Applicant] was successful in meeting its burden for a special exception pursuant to the objective requirements of the [z]oning [o]rdinance, the suggested use, because of placement, number, and configuration of the wind turbines, would conflict with the expressions of general policy contained within the [z]oning [o]rdinance. The general policy of the [z]oning [o]rdinance is for the protection of timber and other forest resources, wildlife habitat, special planned communities, scenic resources, and other natural areas such that the minimal

development which is allowed must be located so as to maximize the amount of undisturbed natural areas.

- 7. In the instant matter, the erection of [22] wind turbines across the highest portion of Chestnut Ridge will certainly produce an overall general negative effect on the scenic beauty of the area and the tourism which the natural beauty generates for the County, the wildlife habitat, and the timber forest resources.
- 8. [Applicant] admitted during presentation of its case that the placement of the wind turbines in a line across the highest portion of Chestnut would be visible for numerous miles in many directions. [Applicant] also admitted that wind turbines have killed birds and bats. Additionally, there was testimony regarding the need for red blinking lights to be placed on the wind towers pursuant to Federal Aviation [Administration] rules and regulations. Thus, [Applicant] failed to demonstrate any type of mitigation efforts to mitigate the undue adverse impacts upon the view shed and scenic beauty of the mountain ridge and its subsequent impacts on tourism or the killing of birds and bats. In other words, [Applicant] had no mitigation measures in place to mitigate the detrimental effects upon the health, safety, and general welfare of the public.

\* \* \* \*

10. Accordingly, after review of the [z]oning [o]rdinance, the testimony presented by [Applicant] as well as the [o]bjectors and relevant case law, the [ZHB] concludes that the breadth and depth and overall scope of the suggested project, the number, height, configuration, and placement of the wind turbines would produce too great of a negative impact upon Fayette County's scenic Chestnut Ridge and would generally have a detrimental effect upon the health, safety, and general welfare of not only the adjacent communities, but all of Fayette County and therefore the request of [Applicant] for a special exception for a wind powered electricity generating facility containing [22] wind towers ... is denied.

ZHB Op., 3/11/08, Concls. of Law Nos. 3-8, 10.

Based on the above determinations, we agree with the first trial judge's conclusion that the ZHB did not apply the proper legal standards in evaluating Applicant's special exception requests. Contrary to the ZHB's reasoning, a special exception is not an exception to a zoning ordinance, but rather it is a use to which the applicant is entitled if it meets the objective standards in the zoning ordinance for special exception approval. <u>Union Twp. v. Ethan-Michael, Inc.</u>, 979 A.2d 431 (Pa. Cmwlth. 2009). The allowance of a special exception use in a particular zoning district indicates legislative acceptance that the use is consistent with the municipality's zoning plan and that the special exception use, if the applicable objective standards are met, does not adversely affect the public interest of health, safety and welfare. <u>Id.</u>

Further, because the ZHB is not a legislative body, it lacks authority to modify or amend the terms of a zoning ordinance. Cf. Hill v. Zoning Hearing Bd. of Maxatawny Twp., 597 A.2d 1245 (Pa. Cmwlth. 1991) (power to amend zoning ordinances lies with a municipality's governing body). Thus, "zoning boards ... must not impose their concept of what the zoning ordinance should be, but rather their function is only to enforce the zoning ordinance in accordance with the applicable law." Ludwig v. Zoning Hearing Bd. of Earl Twp., 658 A.2d 836, 838 (Pa. Cmwlth. 1995) (quoting In re Kline Zoning Case, 148 A.2d 915, 916 (Pa. 1959)); see also Piscioneri v. Zoning Hearing Bd. of Borough of Munhall, 568 A.2d 610, 611 (Pa. 1990) ("Zoning boards ... are not entitled to substitute their concept of a better ordinance than the one enacted.")

Despite its general statements that Applicant did not satisfy the zoning ordinance's special exception criteria, the ZHB made no findings specifying what criteria Applicant failed to satisfy. See Tr. Ct., Slip Op., 4/30/09, at 14. Moreover, the ZHB's determinations that Applicant's proposal does not comply with the general policy of the zoning ordinance are insufficient to defeat a special exception request. See, e.g., In re Appeal of Baker, 339 A.2d 131, 136 (Pa. Cmwlth. 1975) ("It is in the nature of a special exception to require that the applicant meet reasonably definite conditions, and it would be manifestly unfair to require him to prove conformity with a policy statement, the precise meaning of which is supposed to be reflected in specific requirements.") (Emphasis added.)

While the trial court proceeded to consider assertions in the ZHB's brief that the ZHB denied the special exceptions based on Applicant's failure to, among other things, submit an adequate biological resource study or viewshed impact study as required, see Tr. Ct., Slip Op., 4/30/09, at 14, as the trial court acknowledged, the ZHB's written decision did not identify these alleged deficiencies as grounds for denying Applicant's special exception requests. Clearly, assertions in the ZHB's brief cannot supplement the findings and determinations in the ZHB's opinion. Absent any clear findings on the purported deficiencies in Applicant's biological resource and viewshed impact studies, these alleged deficiencies cannot serve as bases to deny the requested special exceptions.

In addition, the ZHB made no findings that the landowners who appeared in opposition to Applicant's proposal proved, to a high degree of probability, that the impact from the proposed turbines will substantially affect the

health, safety and welfare of the community to a greater extent than would be expected normally from that type of use. See Blancett-Maddock. On this point, the first trial judge aptly stated:

Clearly, the [o]bjectors' testimony regarding the adverse impact to the viewshed and tourism amounts to nothing more than mere speculation. It is undisputed that due to their height and proposed location the turbines will be visible. It is also undisputed that the turbines are known to kill bats. [o]bjectors have not set forth any evidence to show that the impact on the viewshed and to the bats would be greater than would normally be expected from this type of use. [o]bjectors seem to assume that just because the turbines would be added to the Chestnut Ridge viewshed that this would cause a negative impact. The [o]bjectors presented no expert testimony to support their position and they admit that there is no way to predict if people will stop coming to the area due to the turbines. While the concept of the general welfare of a community in zoning matters includes a consideration of aesthetics, aesthetics alone cannot support a determination that the health, safety and general welfare of a community would be adversely affected by the grant of a special exception. Heck v. Zoning Hearing Board for Harvey's Lake Borough, [397 A.2d] 15, 19 (Pa. Cmwlth. 1979)], citing County of Fayette v. Holman, [315 A.2d 335 (Pa. Cmwlth. 1973)]; Soble Construction Co. v. Zoning Hearing Board, [329 A.2d 912 (Pa. Cmwlth. 1974)].

Tr. Ct., Slip Op., 4/30/09, at 20-21. Our review of the cited testimony confirms the trial court's conclusions, see R.R. at 140a-166a; as such, this testimony does not provide a sufficient basis to deny the special exceptions. Blancett-Maddock.

Ultimately, the first trial judge determined the ZHB erred in denying the requested special exceptions, and he ordered the ZHB grant the special exceptions subject to its right to attach conditions to protect the public health, safety and welfare. No error is apparent in that determination.

On remand, the ZHB granted Applicant's special exception requests for 14 of the turbines that comply with the setback requirement set forth in the special exception criteria (requiring a minimum setback of 100% of a turbine's height from any lot line). However, the ZHB denied special exceptions for the remaining eight turbines that did not comply with the setback requirement based on its determination that Applicant did not prove its entitlement to dimensional variances from the setback requirement for these eight turbines.

Significantly, on remand, the ZHB also attached a condition imposing increased setbacks on the 14 turbines for which it granted special exceptions. See Section 1000-876(N) of the zoning ordinance. That condition requires setbacks of 500 feet from all roadways and 425 feet from all property lines to avoid the potential of dangerous ice throws for the 14 turbines that were granted special exceptions. An examination of the propriety of this condition is necessary as it is directly implicated by Objector's arguments.

As to the ZHB's authority to impose conditions on the grant of a special exception, this Court holds:

[T]he ability to impose a condition on a special exception is not unfettered. Conditions must be reasonable and must find support in the record warranting the imposition of such conditions; otherwise, the imposition of conditions constitutes an abuse of discretion. Sabatine v. Zoning Hearing Board of Washington Township, 651 A.2d 649, 655 (Pa. Cmwlth. 1994). '[T]he Board is not required to support the imposition of

conditions; rather, the opposite is true-property owners are required to show that the imposition of conditions was an abuse of discretion.' Leckey v. L. Southampton Twp. Zoning Hearing Bd., 864 A.2d 593, 596 (Pa. Cmwlth. 2004).<sup>10</sup>

<sup>10</sup> In <u>Leckey</u>, this Court described the standard of review of conditions attached to the grant of a special exception as follows:

... <u>a court reviews a challenge to the reasonableness of those conditions; it does not determine whether there is substantial evidence, which is a 'fact standard,' but whether those conditions constitute an abuse of discretion.</u>

<u>Id.</u> at 596. As explained in several other cases, the imposition of a condition when there is no evidence in the record to support the condition is manifestly unreasonable and an abuse of discretion. <u>See Berger v. Zoning Hearing Board of the Borough of Mifflinburg</u>, 482 A.2d 1184 (Pa. Cmwlth. 1984); <u>Abernathy v. Zoning Hearing Board of Hampton Township</u>, 546 A.2d 1311 (Pa. Cmwlth. 1988); <u>Sabatine</u>, <u>supra</u>.

Coal Gas Recovery, L.P. v. Franklin Twp. Zoning Hearing Bd., Greene Cnty., 944 A.2d 832, 838-39 (Pa. Cmwlth. 2008) (emphasis added); see also HHI Trucking, Inc. v. Borough Council of Borough of Oakmont, 990 A.2d 152 (Pa. Cmwlth. 2010) (reasonable conditions are those that advance a valid zoning interest and are supported by record evidence).

In reviewing the ZHB's imposition of the increased setback condition, the second trial judge explained:

Condition five increases setbacks for all wind turbines to 500 feet from roadways and 425 feet from *all* property lines to eliminate the risk associated with 'ice throw[s].' (Resolution 07-80R, 20.) [Applicant] has not met its burden of proof to show that this condition is entirely unreasonable because the

evidence in the record does support some 'ice throw' condition. [Applicant's] own representative testified about the risk of ice throws. (Tr. 12/19/07, p. 26); (tr. 10/31/07 pp. 155-56); (tr. 10/17/07 p. 122).

However, the ZHB cannot reasonably be concerned about ice throws *within* the exterior boundaries of the land comprising and participating in the wind farm. Again, the landowners of the properties within the wind farm have voluntarily accepted the risks associated with wind turbines, and to the extent they have knowingly, intelligently and voluntarily bargained away their private property rights, they are not members of the 'general public' that the ZHB has the duty and authority to protect.

Tr. Ct., Slip Op., 6/18/10, at 29-30 (underlined emphasis added). Thus, the trial court modified the condition so that it imposes: "a setback requirement of 500 feet from the center of the turbine base to the nearest edge of the right-of-way of any public road," and "a setback requirement of 425 feet from the center of the turbine base to the line of any property not covered by a recorded lease or other appropriate conveyance to [Applicant] that specifically references the risk of ice throws ...." Id. at 30. Also, the trial court imposed a requirement of "reasonable notice to other persons who might forseeably be within such increased setbacks. Such notice could be provided by posting conspicuous signage at 100' intervals around the perimeter of the property at risk throughout the relevant winter season."

Given the ZHB's supported findings regarding the potential for dangerous ice throws from the wind turbine blades, and the trial court's recognition that Applicant's own representative testified about the risk of ice throws, see Tr. Ct., Slip Op., 6/18/10, at 29; R.R. at 79a-80a, 123a-24a, the trial court exceeded its

authority in modifying the attached condition. To that end, in order to successfully challenge the attached condition, Applicant bore the burden of proving the ZHB abused its discretion in imposing the condition. Coal Gas Recovery; Leckey. Based on its acknowledgement that the record supported the ZHB's imposition of the condition, the trial court exceeded its authority in modifying the condition.

As for the trial court's rationale in modifying the condition (that the increased setbacks should not apply to landowners who are "participants" in the project), the trial court cites no authority that allows a court to waive a validly attached condition on this basis, and we are not aware of any authority that would allow the trial court to modify the condition on this basis. Indeed, the MPC authorizes a ZHB to attach conditions to the grant of special exceptions "as it may deem necessary to implement the purposes of [the MPC] and the zoning ordinance." Section 912.1 of the MPC, <sup>6</sup> 53 P.S. §10912.1 (emphasis added). In turn, the primary purpose of the MPC is "to protect and promote safety, health and morals ...." Section 105 of the MPC, 53 P.S. §10105 (emphasis added). Similarly, Section 1000-876(N) of the zoning ordinance, which sets forth the special exception criteria for windmills/wind turbines, expressly permits the ZHB to "attach additional conditions ... in order to protect the public's health, safety and welfare. These conditions may include but are not limited to increased setbacks." Id.

In light of the stated purposes in the MPC and the zoning ordinance, we discern no abuse of discretion in the ZHB's decision to attach a condition

<sup>&</sup>lt;sup>6</sup> Added by the Act of December 21, 1988, P.L. 1329, as amended.

requiring increased setbacks from <u>all</u> property lines to avoid the potential for dangerous ice throws rather than increased setbacks <u>only</u> for those properties <u>not</u> involved in Applicant's project. As such, under the circumstances presented here, we conclude the trial court erred in modifying what it acknowledged was a validly attached condition.<sup>7</sup>

# 3. Dimensional Variances from Setback Requirements a. Contentions

Objector next argues that, in granting the requested dimensional variances, the second trial judge improperly gave individual citizens the right to waive zoning requirements. Objector points out the second trial judge relied on the fact that "all of the adjoining landowners specifically consent to the wind farm

ZHB Op., 6/29/09, at 19-20 (Condition 3(e)). The trial court modified this condition by substituting the word "feather" for "tether," based on its determination that the colloquy in the record in which this specific condition was requested related to Applicant "feathering" (rather than "tethering") its wind turbine blades. See Tr. Ct., Slip Op., 6/18/10, at 28 n.3 (citing Certified Record, ZHB Hearing, Notes of Testimony (N.T.), 1/30/08, at 22-25, 82-84). Because the record supports the trial court's determination that the requested condition related to Applicant "feathering" rather than "tethering" its wind turbine blades, we will not disturb the trial court's modification of this condition. N.T., 1/30/08 (morning session), at 24-25; N.T., 1/30/08 (afternoon session), at 82, Reproduced Record (R.R.) at 184a, 228a; see also R.R. at 118a, 332a-33a, 354 (referencing "feathering" of the wind turbine blades). Objector points to no record evidence that utilizes the word "tethering."

<sup>&</sup>lt;sup>7</sup> Objector also briefly asserts the trial court erred in modifying the following condition imposed by the ZHB (with emphasis added):

<sup>(</sup>e) If [Applicant's] post construction studies performed pursuant to the cooperation agreement between [Applicant] and the Pennsylvania Game Commission and U.S. Fish and Wildlife Service indicate a serious bat kill problem as defined by [Applicant] in its study (Exhibit "A") as 2200 bat kills in one year, then [Applicant] shall tether its wind turbines during the hours of 7:00 p.m. through 7:00 a.m. beginning July 16 and ending September 15, beginning the first year the threshold number of 2200 bat kills occurs.

use." Tr. Ct., Slip Op., 6/18/10, at 17. Objector maintains this flawed premise permeates all facets of the second trial judge's opinion.

Objector maintains it is common sense that an adjoining property owner cannot waive zoning ordinance requirements. Nevertheless, Objector argues, the second trial judge relied on this flawed premise in granting the requested setback variances. Objector points to the following excerpt from the second trial judge's opinion:

[T]he proposed wind power development is consistent with 'the characteristics of the surrounding neighborhood' as demonstrated by the adjoining landowners joining in the project as co-lessors. ... All of the variances were denied even though the landowners on both sides of the line joined in and consented to the wind turbine use! There is no reference in [the ZHB's decision] to any public health, safety or welfare benefit that results from the ZHB's enforcing the literal terms of the setback with respect to an adjoining landowner that has joined in and consented to the development of the wind turbine project. That is simply because there is no public benefit.

Tr. Ct., Slip Op., 6/18/10, at 12-13 (emphasis added).

Objector argues the salient fact here is that Applicant proposes to construct a wind power facility on land it does not own; rather, all the land is leased. Objector argues all the property owners leased their land for a guaranteed financial return if the project is approved. Thus, Objector contends, it is obvious why these landowners would waive any setback violations. Objector asserts that, although zoning laws are to be construed so as to allow the broadest use of land, a court cannot allow private individuals to waive the need for zoning variances.

Objector further argues both trial judges erred with regard to the requested variances. He asserts the first trial judge afforded the ZHB's interpretation of the zoning ordinance no deference; instead, he overruled the ZHB's interpretation and discarded much of the ZHB's reasoning.

As to the required variance criteria, Objector argues, there are no unique physical circumstances that justify variance relief, other than the fact that the properties at issue contain the last ridge of the Allegheny Mountains, which places the wind turbines squarely in the middle of bat and bird migration routes.

Objector acknowledges that under <u>Hertzberg v. Zoning Board of Adjustment of City of Pittsburgh</u>, 721 A.2d 43 (Pa. 1998), financial hardship may be considered in the context of a request for a dimensional variance. However, he contends, an applicant must still satisfy the remaining variance criteria. Objector asserts a major issue exists here because Applicant could, in fact, relocate the turbines to dimensionally compliant locations.

In addition, Objector asserts, the properties can be reasonably developed in conformance with the zoning ordinance. On that point, Objector contends the second trial judge improperly ruled that the ZHB erred in viewing this project as a whole rather than considering each parcel at issue separately. If, in fact, each tract is treated separately, Objector argues, there are numerous, alternative locations on which Applicant could locate its proposed wind turbines that would not violate setback requirements. Objector notes the eight parcels for which Applicant seeks setback variances are 37, 121.9, 180, 206, 127.5 and 2,793

acres in size; therefore, turbines could be placed at other dimensionally compliant locations on those parcels.

Objector also argues any hardship is self-inflicted. In particular, Applicant has at least two options that would allow it to comply with the setback requirements: move the proposed wind turbines or move some of the proposed turbines and purchase more land to alleviate the setback issues for the remaining turbines. Objector contends there was no testimony that Applicant could not take these steps in order to comply with the zoning ordinance or at least minimize the proposed setback deviations.

Objector also contends the proposed facility will alter the essential character of the neighborhood because the surrounding area is rural and scenic. Objector further argues the ZHB had the authority to deny the requested setback variances based on a safety issue, the risk of ice throws from the wind turbine blades, which the trial judges acknowledged here.

Objector notes the first ZHB opinion denied the setback variances on the ground that the only testimony Applicant offered in support of its variance requests was that it needed the variances for financial reasons. Objector argues this was correct, and the first trial judge erred in remanding to the ZHB for reconsideration of this issue. Further, both trial judges' reliance on Applicant's representative's testimony concerning the need to place the turbines at the proposed locations in order to maximize turbine output is improper because such evidence implicates only a financial reason.

In response, Applicant argues the ZHB erred in denying the requested dimensional variances for several reasons. First, the ZHB did not properly apply the law on dimensional variances when it relied on invalid language in Section 1000-1102 A.1 of the zoning ordinance, which requires that the unnecessary hardship justifying a variance "is not financial." ZHB Op., 3/11/08, at 5. Applicant contends this language conflicts with the MPC provision on variances, which contains no such language; thus, it is invalid.

Applicant next argues substantial evidence supports the grant of the dimensional variances from the setback requirements. In particular, it asserts the ZHB ignored substantial, uncontradicted evidence showing that physical conditions peculiar to the properties inflict unnecessary hardship, and the properties cannot be developed in strict conformity with the setback requirements for windmills such that setback variances are necessary to enable reasonable use of the properties.

As found by the trial court, Applicant contends, it presented testimony showing it selected the turbine sites based on numerous factors, including: maximizing separation from residences; maintaining a distance from roads of at least 500 feet; utilizing the estimated wind resource at the chosen locations; the separation distance from the location that is to the north and south; the location in an east-west orientation due to westerly wind direction; the location on the highest

possible elevations; and, the narrowness of the ridge line. R.R. at 60a-61a; 66a-67a; 79a-80a; 94a.8

Applicant further maintains the evidence showed the setback variances were consistent with the characteristics of the surrounding neighborhood as the variances were only requested from the property lines of landowners who are participating in the project, and who signed leases containing non-disturbance clauses. In other words, the requested setback variances did not impact adjoining landowners not involved in the project. R.R. at 60a-68a; see also R.R. at 264a-309a (Applicant's Exs. A-C). Moreover, Applicant contends with regard to the setback variance requested for tower no. 11, the evidence showed that adjacent properties owned by the same owner, Neil Brown, were being combined into one parcel, which, as the trial court noted, would alleviate the need for a variance for tower 11.

In short, Applicant argues the evidence established that physical conditions unique to the property resulted in unnecessary hardship, based on consideration of economic detriment, financial hardship and the characteristics of the surrounding neighborhood. Further, the evidence showed the property cannot be developed in strict conformance with the setback requirements for windmills so that setback variances are necessary to enable reasonable use of the property. As such, Applicant contends, the ZHB erred in denying the setback variances.

<sup>&</sup>lt;sup>8</sup> Although Applicant also argues in support of the ZHB's grant of the dimensional variances from the zoning ordinance's height restrictions, Objector's brief indicates he is not challenging the grant of the dimensional height variances.

Applicant also maintains the ZHB erred in concluding it did not show the setback variances would not be detrimental to public welfare. Applicant argues the ZHB reached this conclusion by relying on items not in evidence including, but not limited to, hearsay evidence, such as an alleged Penn State "ice throw study." R.R. at 42b; R.R. at 48b; ZHB Finding of Fact (F.F.) No. 11; R.R. at 54b, Concl. of Law No. 9. Applicant contends the ZHB's finding was not supported by substantial evidence. To the contrary, the evidence showed the setback variances would not harm the public welfare. Applicant argues all of the participant property owners waived their claims regarding any negative effects. As the parties affected by any potential ice throws, Applicant contends, the property owners' waivers certainly support Applicant's showing that the setback variances would not be detrimental to public welfare. Despite this, Applicant asserts, the ZHB rejected the waivers and excluded them from its consideration.

As a final point, Applicant asserts the ZHB erred in failing to consider the setback deviation sought for turbine 23 was *de minimis*. Applicant argues the requested setback variance for turbine 23 of 245 feet rather than 262.5 feet is a minor deviation. Applicant maintains rigid compliance with the setback requirement in the zoning ordinance is not necessary to protect the public policy concerns in the zoning ordinance, and the ZHB erred by not considering or granting a *de minimis* variance for tower 23.

### b. Analysis

Here, the requested variances are from the zoning ordinance's setback requirements. Specifically, as one of the enumerated special exception criteria, the

zoning ordinance requires "[t]he minimum setback of a windmill/wind turbine from any lot line shall be equal to one hundred percent (100%) of the windmill/wind turbine's height." Section 1000-876(D) of the zoning ordinance. Based on this setback requirement, the setback deviations Applicant sought for its towers were approximately: 148 feet, 168 feet, 163 feet, 143 feet, 208 feet, 118 feet, 18 feet, 173 feet, 98 feet and 68 feet from various property lines. See ZHB Op., 6/29/09, F.F. No. 5. Notably, if Applicant is unsuccessful in its attempt to obtain setback variances for these eight turbines, denial of its special exception requests for these eight turbines would be required because Applicant could not satisfy the setback requirements. See Section 1000-876(D) of the zoning ordinance.

### A ZHB may grant a variance when the following criteria are met:

(1) an unnecessary hardship will result if the variance is denied, due to the unique physical circumstances or conditions of the property; (2) because of such physical circumstances or conditions the property cannot be developed in strict conformity with the provisions of the zoning ordinance and a variance is necessary to enable the reasonable use of the property; (3) the hardship is not self-inflicted; (4) granting the variance will not alter the essential character of the neighborhood nor be detrimental to the public welfare; and (5) the variance sought is the minimum variance that will afford relief.

# <u>Taliaferro</u>, 873 A.2d at 811-12.

A dimensional variance involves a request to adjust zoning regulations to use the property in a manner consistent with regulations, whereas a use variance involves a request to use property in a manner that is wholly outside

zoning regulations. <u>Hertzberg</u>. The same criteria apply to use and dimensional variances. <u>Id.</u> However, in <u>Hertzberg</u>, our Supreme Court set forth a more relaxed standard for establishing unnecessary hardship for a dimensional variance, as opposed to a use variance.

Under <u>Hertzberg</u>, courts may consider multiple factors in determining whether an applicant established unnecessary hardship to justify the grant of a dimensional variance. These factors include the cost of strict compliance with the zoning ordinance, the economic hardship that will result from denial of a variance, and the characteristics and conditions of the surrounding neighborhood. <u>Id.</u>

Although <u>Hertzberg</u> eased the requirements, it did not remove them. <u>Tri-Cnty. Landfill, Inc. v. Pine Twp. Zoning Hearing Bd.</u>, 83 A.3d 488 (Pa. Cmwlth. 2014). An applicant must still present evidence as to each of the conditions listed in the zoning ordinance, including unnecessary hardship. <u>Id.</u> Where no hardship is shown, or where the asserted hardship amounts to a landowner's desire to increase profitability or maximize development potential, the unnecessary hardship criterion required to obtain a variance is not satisfied even under the relaxed standard set forth in <u>Hertzberg</u>. <u>Id.</u>

Further, this Court consistently rejects requests for dimensional variances where proof of hardship is lacking. Where no hardship is shown, or where the asserted hardship amounts to a landowner's desire to increase profitability or maximize development potential, the unnecessary hardship criterion required to obtain a variance is not satisfied even under the relaxed standard set

forth in Hertzberg. Soc'y Hill Civic Ass'n v. Phila. Zoning Bd. of Adjustment, 42 A.3d 1178 (Pa. Cmwlth. 2012); see, e.g., Singer v. Zoning Bd. of Adjustment of City of Phila., 29 A.3d 144 (Pa. Cmwlth. 2011) (rejecting applicant's request for dimensional variances from zoning code's parking, floor area ratio and loading dock requirements where asserted hardship amounted to applicant's desire to maximize development potential of property); Lamar Advantage GP Co. v. Zoning Hearing Bd. of Adjustment of City of Pittsburgh, 997 A.2d 423 (Pa. Cmwlth. 2010) (rejecting applicant's request for dimensional variance for proposed sign where only asserted hardship involved alleged benefit to community and increase in income); Twp. of Northampton v. Zoning Hearing Bd. of Northampton Twp., 969 A.2d 24 (Pa. Cmwlth. 2009) (rejecting applicant's request for variance from ordinance's off-street parking requirements where no evidence of hardship presented even under relaxed Hertzberg standard and evidence revealed applicant could use property in a manner consistent with ordinance requirements); In re-Boyer, 960 A.2d 179 (Pa. Cmwlth. 2008) (rejecting applicant's requests for dimensional variances from ordinance's steep slope and setback requirements in order to construct in-ground pool where no evidence of hardship presented even under relaxed Hertzberg standard); One Meridian Partners, LLP v. Zoning Bd. of Adjustment of City of Phila., 867 A.2d 706 (Pa. Cmwlth. 2005) (rejecting request for dimensional variance from floor area ratio and height requirements where asserted hardship was essentially financial in nature); Yeager v. Zoning Hearing Board of City of Allentown, 779 A.2d 595 (Pa. Cmwlth. 2001) (rejecting applicant's request for dimensional variances from ordinance's setback and clear sight triangle requirements where only hardship amounted to applicant's desire to

construct a building for its new car dealership that complied with specifications required by vehicle manufacturer).

Applicant asserts it proved unnecessary hardship here based on its witnesses' testimony that it chose the locations for its wind turbines based on its desires to: (1) achieve maximum distance from residences; (2) ensure performance based on wind assessments; (3) locate the turbines in an east-to-west orientation because of the prevailing winds; and, (4) construct the turbines at the highest possible elevations.

However, the ZHB, the fact finder here, determined Applicant did not prove the requisite hardship, twice finding that Applicant did not prove that the denial of its requests for the multiple setback variances would result in unnecessary hardship. ZHB Op., 3/11/08, F.F. No. 6; ZHB Op. 6/29/09, F.F. Nos. 6-8, Concls. of Law Nos. 7-8. To that end, the ZHB found that Applicant's representatives testified that denial of the setback variances would result in "less profit being realized by [Applicant]." ZHB Op., 3/11/08, F.F. No. 6; see also ZHB Op. 6/29/09, Concl. of Law No. 8. These determinations are supported by the testimony of Gary Verkleeren, Applicant's Project Manager, who testified that, although Applicant attempts to locate its turbines away from residences, "it's sometimes the case that [the turbines] fall pretty close to a property line; and we do that to maximize the performance of the machine and the output." R.R. at 62a; see also R.R. at 60a, 66a, 67a.

The ZHB further determined that Applicant did not prove that, as a result of any asserted hardship, there is no possibility that the properties at issue (which include properties that are 37, 122, 180, 206, 128, and 2,793 acres in size) can be developed in strict conformity with the provisions of the zoning ordinance. ZHB Op. 6/29/09, Concl. of Law No. 8. To that end, this Court holds that, in determining whether an applicant satisfied the requirements for a dimensional variance, all compliant uses of the property must be considered, not just the particular use that the owner prefers. Twp. of Northampton; Yeager. "A variance may be granted only upon proof that a substantial burden attends all dimensionally compliant uses of the applicant's property ...." Twp. of E. Caln v. Zoning Hearing Bd. of E. Caln Twp., 915 A.2d 1249, 1254 (Pa. Cmwlth. 2007) (emphasis added); see DigEntGrp, LLC v. W. Nantmeal Twp. Zoning Hearing Bd. (Pa. Cmwlth., No. 1969 C.D. 2012, filed June 19, 2013), 2013 WL 3156573 (unreported).

Here, Applicant does not assert a substantial burden attends all dimensionally compliant uses of the property as required. <u>Id.</u> Our review of the zoning ordinance reveals the A-1 zoning district in which the properties lie permits numerous residential and non-residential uses by right, including, but not limited to, single-family detached dwellings, bed and breakfasts, agriculture, fairgrounds, forestry, oil or gas wells, parks/playgrounds/playfields, and schools. <u>See</u> Section 1000-203 of the zoning ordinance, Table 1. Thus, both the record and applicable law support the ZHB's determination that Applicant did not prove that, as a result of any asserted hardship, there is no possibility that the properties at issue can be developed in strict conformity with the provisions of the zoning ordinance. This

Court may not substitute its interpretation of the evidence for that of the fact-finder, the ZHB here. Taliaferro.

Additionally, the ZHB determined Applicant did not prove the grant of the variances would not harm the public welfare based on the risk of ice throws from the wind turbine blades. As explained above, the trial court acknowledged that Applicant's own representative testified regarding the risk of ice throws. Based on this acknowledged risk, we reject Applicant's argument that the ZHB erred in finding Applicant did not meet its burden of proving the variances would not be detrimental to the public welfare. ZHB Op., 6/29/09, Concl. of Law No. 12(B).

Based on the ZHB's findings that Applicant did not prove unnecessary hardship, did not prove that a substantial burden attends all dimensionally compliant uses of the properties, and did not prove that there would be no detrimental impact on the community, no error is apparent in the ZHB's denial of the eight setback variances requested. As explained above, this in turn, necessitates denial of the corresponding special exception requests for these eight wind turbines, as compliance with the minimum setback criterion is required for a grant of special exception relief. Section 1000-876(D) of the zoning ordinance.

As for Applicant's claim that turbine 23 requires only a *de minimis* variance, we note, a *de minimis* variance may be granted, even where the strict requirements for a variance have not been met, where the variation requested is minor and rigid compliance is not necessary to protect the public policy concerns

of the ordinance. Lench v. Zoning Bd. of Adjustment of City of Pittsburgh, 13 A.3d 576 (Pa. Cmwlth. 2011). The grant of a *de minimis* variance is a matter of discretion with the local zoning board. Id. Here, in light of the ZHB's condition increasing required setbacks to 500 feet from roadways and 425 feet from property lines based on the risk of ice throws, Applicant's request regarding turbine 23, which might be considered *de minimis* from the initial setback requirement, cannot be viewed as such when viewed in light of the greatly increased setbacks. As such, no abuse of discretion is apparent in the ZHB's decision not to apply a *de minimis* variance analysis to Applicant's dimensional variance request for turbine 23.

### IV. Conclusion

For the reasons set forth above, we reverse the second trial judge's order and reinstate the ZHB's June 29, 2009 decision after remand.

ROBERT SIMPSON, Judge

## IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PPM Atlantic Renewable :

:

v. : No. 1431 C.D. 2010

:

Fayette County Zoning

Hearing Board, Neil Brown and

Thomas J. Bozek

:

Appeal of: Thomas J. Bozek

# ORDER

**AND NOW**, this 20<sup>th</sup> day of May, 2014, the order of the Court of Common Pleas of Fayette County dated June 17, 2010, is **REVERSED**.

ROBERT SIMPSON, Judge