

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

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

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

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Bruce K. Anders, Esquire	Counsel for 42 Intervenors
James F. Preston	Counsel for Bethlehem Authority
J. William Fontaine, II	Pro Se

**MEMORANDUM OPINION**

Serfass, J.- October 23, 2020

On June 24, 2020, Atlantic Wind, LLC (hereinafter "Atlantic Wind") filed a Notice of Appeal to the Commonwealth Court

FS-25-2020

of Pennsylvania seeking review and reversal of this Court's zoning appeal 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 Atlantic Wind's special exception application for a wind turbine project.

#### **FACTUAL AND PROCEDURAL HISTORY**

On or about June 25, 2020, we directed Atlantic Wind 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). Atlantic Wind 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 of Pennsylvania and the instant opinion is filed pursuant to Pa.R.A.P. 1925(a). All relevant facts relating to the issues raised in Atlantic Wind'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

Atlantic Wind raises the following issues in their concise statement of matters complained of on appeal:

1. The Trial Court improperly concluded that Atlantic Wind failed to demonstrate compliance with a sound provision of the Penn Forrest Township Zoning Ordinance ("Zoning Ordinance") (Section 402.A.54.p) and improperly interpreted the Zoning Ordinance in a manner which restricts the use of the subject property contrary to the Pennsylvania Municipalities Planning Code, other applicable wind turbine specific ordinance sections and applicable case law.
  - a. The Trial Court improperly disregarded undisputed substantial evidence of record that Atlantic Wind as the operator of the wind farm has complete control to monitor and maintain the sound levels in accordance with whichever sound metric was determined to apply under the Zoning Ordinance;
  - b. The Trial Court's conclusion that the applicable sound metric is Lmax is contrary to another zoning ordinance standard which requires that wind energy facilities be

constructed in accordance with industry and ANSI standards (Sections 402.A.54.f);

c. The Trial Court improperly concluded that the Zoning Hearing Board made credibility determinations and accepted certain testimony over that of Atlantic Wind's witnesses when in fact the Zoning Hearing Board made no credibility determinations and did not accept or reject any testimony in its decision;

2. The Trial Court improperly concluded that the proposed wind energy facility is prohibited as a second principal use on the subject property and improperly interpreted the Zoning Ordinance in a manner which restricts the use of the property;

a. The Trial Court improperly concluded that undeveloped vacant land constitutes a use for the "production of potable water" not based on any physical conditions or activities of the land itself but based strictly on ownership and improperly relied on private property agreements/correspondences;

b. The Trial Court disregarded unrefuted substantial evidence of record from the property owner that no use exists on the property;

c. The Trial Court improperly interpreted the Zoning Ordinance by recognizing the "production of potable water" as a use



- when no such use category exists under the Zoning Ordinance and improperly incorporated an intent requirement that does not exist into the use regulations of the Zoning Ordinance;
- d. The Trial Court improperly determined that distinct tax parcels acquired by the Bethlehem Authority over the years through separate deeds from separate grantors constituted one single lot under the Zoning Ordinance; and
3. The Trial Court improperly granted intervention to certain parties when they failed to establish appropriate standing including but not limited to allowing the intervention of William Fontaine, a person who resides 3 miles away from the subject property and whom the Zoning Hearing Board had determined did not have standing before the Zoning Hearing Board.

## **DISCUSSION AND ANALYSIS**

### **ISSUE NO. 1**

Atlantic Wind's first issue on appeal concerns compliance with section 402.A.54.p. of the Penn Forest Township Zoning Ordinance, which provides that: "The audible sound from the wind turbine(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."

a. In its first sub-issue, Atlantic Wind references the testimony presented by their expert, Mark Bastasch, that the wind turbines could be manually shut down during periods of high wind or ice accumulation in order to prevent the noise level from exceeding the maximum audible sound of forty-five (45) A-weighted decibels. However, based, in part, on the inconsistencies and uncertainty in Mr. Bastasch's testimony, the zoning hearing board found that Atlantic Wind failed to produce sufficient evidence to meet its burden that the sound level would not exceed the requirements of the Penn Forest Township Zoning Ordinance.

Atlantic Wind claims that because it would monitor the wind turbines from a location in Portland, Oregon, it would be able to assure that the sound generated from the Penn Forest Township facility would comply with the requirements of section 402.A.54.p. and that if the sound generated did exceed 45 A-weighted decibels, the wind turbines could be shut down. Neither the zoning hearing board nor this Court was persuaded by this testimony.

Though Mr. Bastasch testified that the wind turbines were capable of being manually controlled during periods of high wind, he never gave specific testimony that the noise from the wind turbines would not exceed forty-five (45) A-weighted decibels at the exterior of an occupied building. Additionally, the noise-level test performed by Mr. Bastasch utilized the Leq metric, which

measures the average level of noise over a period of time rather than the level of noise at any exact moment. Further, the test was based upon the Vesta 136 model wind turbine and Atlantic Wind has not committed to using that model nor determined the specific wind turbine model it intends to select for the project. Therefore, no testimony was presented as to how much sound would be generated by the wind turbines Atlantic Wind would actually install.

Moreover, we note that Atlantic Wind monitors "parameters" that "might be relevant for sound" as opposed to actual sound. (N.T. 10/19/18, at pgs. 101, 107-108). While Atlantic Wind monitors power production, kilowatt output and generator speed at its Oregon facility, it does not monitor sound. Neither Mr. Bastasch nor any other witness on behalf of Atlantic Wind testified as to how the determination would be made if a wind turbine was operating outside of its normal parameters for power production or kilowatt output, that it exceeded the audible sound requirements of section 402.A.54.p. of the zoning ordinance.

As to the specific issue of Mr. Bastasch's testimony, the Penn Forest Township Zoning Board found that "Evidence is not a 'promise' that the applicant will comply because that is a legal conclusion reserved for the Board once it hears what the applicant intends to do and then determine whether it matches the requirement

set forth in the ordinance." Edgemont Twp. v. Springton Lake Montessori School, et al., 622 A.2d 418, (Pa. Cmwlth. 1993) (Zoning Board Brief, 5/3/19, at pg. 6). The zoning hearing board found that the evidence presented by Atlantic Wind to demonstrate compliance with section 402.A.54.p. of the zoning ordinance was not responsive to the express requirements of that section. Clearly, the board cannot be compelled to find that Atlantic Wind has complied with the sound level requirements of the zoning ordinance based upon its promises to comply at some point in the future, after it determines exactly which model wind turbine it will install and exactly where it will install them.

b. The zoning hearing board found that the appropriate metric to use when evaluating a "shall not exceed" noise ordinance is the Lmax, which measures the highest level of sound, as opposed to the Leq metric, which measures the average sound level. The board also found that "The Lmax metric is commonly used in regard to a shall not exceed ordinance." ("Memorandum, Discussion, Conclusions of Law, Decision and Order", of the Penn Forest Township Zoning Hearing Board, 1/30/19, at pg. 12, paras. 56 & 57).

Atlantic Wind claims that the conclusion that Lmax is the applicable sound metric is contrary to section 402.A.54.f. of the Penn Forest Township Zoning Ordinance which provides that the wind

turbine(s) "...shall conform to applicable industry standards, including those of the American National Standards Institute." We are unaware of any applicable ANSI standard for a "shall not exceed" provision and our review of the record reveals no such standard. Therefore, we find no conflict between the conclusion of both the zoning heard board and this Court, and the provisions of section 402.A.54.f of the zoning ordinance. Moreover, we note that "a particular section of a zoning ordinance must "be read as an integral part of the whole and not as a separate portion with an independent meaning." Tobin v. Radnor Township Board of Commissioners, 597 A.2d 1258 (Pa.Cmwlth. 1991).

c. The zoning hearing board concluded that "Atlantic Wind failed to provide sufficient evidence, and failed to sustain its burden, to show that the wind turbine project would comply with Section 402.A.54.p. of the Zoning Ordinance ("Memorandum, Discussion, Conclusions of Law, Decision and Order" of the Penn Forest Township Zoning Hearing Board, 1/30/19, pg. 13, para. 7). In reaching this conclusion, the zoning hearing board considered the testimony of the expert witnesses appearing on behalf of Atlantic Wind as well as the testimony of the acoustics expert appearing on behalf of the opponents of the wind turbine project. As we explained in our memorandum opinion of May 29, 2020:

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.

(Memorandum Opinion, 5/29/20, at pgs. 11-12).

As the finder of fact, the zoning hearing board is the sole judge of credibility with power to resolve conflicts in the testimony and reject even uncontradicted testimony that it finds to be lacking in credibility. In re: Petition of Dolington Land Group, 839 A.2d 1021, 1026 (Pa. 2003). Here, the zoning hearing board evaluated the conflicting testimony of the expert witnesses and clearly resolved that conflict in favor of Mr. Rand and the opponents of the wind turbine project.

#### ISSUE NO. 2

We respectfully submit that the matters raised by Atlantic Wind in sub-issues 2(a), (b), (c) and (d) of its concise statement were thoroughly addressed in this Court's memorandum opinion of May 29, 2020. Consequently, we rely on said opinion and incorporate the same in response to the issues raised on appeal.

In further response to Atlantic Wind's second issue on appeal, we reference the decision of the zoning hearing board in addressing the nature of the subject property and the board's consideration of "private property agreements/correspondences":

The Applicant has proposed a wind turbine project consisting of twenty-eight (28) wind turbines (which it indicated was reduced to 24) with pertinent structures and infrastructures including access roads, permanent meteorological towers, electrical substation, overhead and underground electrical data cables, and transmission lines. The Project Area is located in Penn Forest

reservoir water shed. The Penn Forest reservoir water shed contains 8,783 acres, 7,222 of which are owned by the Bethlehem Authority. The real estate in the Project Area has been maintained by the Bethlehem Authority in an undeveloped state for purposes of maintaining the water quality of the water that would flow into the Penn Forest reservoir. The Penn Forest reservoir holds water which drains into the Wild Creek reservoir and both are sources of water for the City of Bethlehem. On May 25, 2011, the Bethlehem Water Authority entered into a term Conservation Easement with the Nature Conservancy. This Agreement was recorded in the Carbon County Recorder of Deeds Office and is for a term of sixty (60) years. The purpose of the Easement is to ensure that the undeveloped protect property listed in the Easement Agreement which comprises the Project Area, would be retained in its natural scenic forested and open space conditions free of forest fragmentation or additional development. Additionally, throughout the term of Conservation Easement, it is indicated that the use of the Bethlehem Authority property which is subject to the Conservation Easement including the Project Area is for the purpose of production of potable water.

On March 1, 2013, the Bethlehem Authority and the Applicant, Atlantic Wind, LLC entered into a Wind License and Wind Energy Lease Agreement. Throughout that Agreement various sections of the Agreement reference the primary or principal use of the Bethlehem Authority was the production of potable water.

On February 25, 2015, the Bethlehem Authority wrote to the Federal Regulatory Commission with its concerns relating to the construction of the PennEast Pipeline which would traverse through portions of the Applicant's Project Area stating that:

"the City's water comes entirely from surface sources and two (2) reservoirs in the Pocono Mountains. The two major components of the water supply system, which the Authority controls and has a duty to protect, are (i) the reservoirs holding the water including the headwaters and streams feeding those reservoirs and (ii) the pipeline conveyance



system that carries the water from the reservoir to more than 115,000 customers".

Additionally, in that letter the Bethlehem Authority stated that:

"protecting the Authority's reservoirs necessary requires protecting the surface waters feeding those reservoirs. To that end the Authority not only owns the reservoirs, it owns the lands containing the headwaters and the streams feeding the reservoirs. To protect the headwaters and feeder streams the Authority has placed significant portions of its land in a conservation easement."

Clearly, based upon the conservation easement, the terms of the Wind License and Wind Energy Lease Agreement as well as the letter of the Bethlehem Authority indicate the significance of maintaining the undeveloped nature of the Project Area as well as the principle use and the existing use of the property included in the Project Area for the production of potable water.

The Penn Forest Township Zoning Ordinance Section 801.B.2 specifically states 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 nature of the existing use given the representations of the Bethlehem Authority as well as the purposes of the inclusion in conservancy easement indicate that primary and principal use of the property is that of maintaining the land in an undeveloped state for the purpose of producing potable water for its customers. The Applicant and the Bethlehem Authority cannot now take an alternative position and claim that the land located within the Project Area is simply vacant and can be utilized for the construction of twenty-four (24) wind turbines with pertinent structures and infrastructures including access roads, permanent meteorological towers, electrical substation, overhead and underground electrical data cables, and transmission lines which obviously will result in significant disruption and alteration of the pristine lands which the Bethlehem Authority felt were so necessary to be

maintained in that state that it entered into a conservancy agreement. In effect, the ZHB has determined that since the main or dominant use of the property is the production of potable water, the proposed use of the property for twenty-four (24) wind turbines and accessory structures including the permanent meteorological tower whether as a principal use or accessory structure is precluded by the Penn Forest Township Ordinance.

("Memorandum, Discussion, Conclusions of Law, Decision and Order" of the Penn Forest Township Zoning Hearing Board, 1/30/19, at pgs. 16-18).

We submit that the "private property agreements/correspondences" referenced in Atlantic Wind's second issue on appeal were not considered by the zoning hearing board or by this Court to supersede the Penn Forest Township Zoning Ordinance. Rather, those documents were considered as some proof as to the use Bethlehem Authority was making of the subject property. We submit that those documents were relevant for that purpose and that it was entirely proper for the zoning hearing board and this Court to consider them as such.

### **ISSUE NO. 3**

Atlantic Wind's third and final issue on appeal concerns this Court's decision granting intervention to J. William Fontaine, II and the "Forty-Two Property Owners" opposing the wind turbine project. Initially, we note that the zoning hearing concluded that "Given the expensive nature of the project, all of the objectors are persons aggrieved since they will be able to hear

and see the wind turbines from their property and the proposed wind turbine project will be directly and adversely affected the ZHB decision." ("Memorandum, Discussion, Conclusions of Law, Decision and Order" of the Penn Forest Township Zoning Hearing Board, 1/30/19, at pg. 13, para. 3).

Upon consideration of the "Petition to Intervene Pursuant to Pa.R.C.P. 2328" filed by forty-two (42) Carbon County property owners on March 22, 2019 and the "Petition to Intervene Pursuant to Pa.R.C.P. 2328" filed by Mr. Fontaine on March 25, 2019, this Court convened an evidentiary hearing on May 17, 2019. In their filings, the petitioners sought permission to intervene in the zoning appeals of Atlantic Wind and Bethlehem Authority pursuant to Pa.R.C.P. 2327(4) which provides that:

At any time during the pendency of an action, a person not a party thereto shall be permitted to intervene therein, subject to these rules if . . . (4) the determination of such action may affect any legally enforceable interest of such person whether or not such person may be bound by a judgment in the action.

In order to have standing, a party must have an interest in the controversy that is distinguishable from the interest shared by other citizens. Commonwealth ex rel. Fisher v. Phillip Morris, Inc., 736 A.2d 705, 706 (Pa. Cmwlth. Ct. 1999) (quoting Sprague v. Casey, 550 A.2d 184, 187 (Pa. 1988)). To surpass the common interest shared by other citizens, an intervening party's interest

must be substantial, direct, and immediate. *Id.* Pennsylvania courts have previously stated that the "owners of property in the immediate vicinity of property involved in zoning litigation have the requisite interest and status to become intervenors under Pa. R.C.P. 2327(4)." Grant v. Zoning Hearing Board of the Township of Penn, 776 A.2d 356, 359 (Pa.Cmwlth. 2001) (citing Esso Standard Oil Co. v. Taylor, 159 A.2d 692 (Pa. 1960) and Schatz v. Upper Dublin Township Zoning Hearing Board, 343 A.2d 90 (Pa.Cmwlth. 1975)).

In Grant v. Zoning Hearing Board of the Township of Penn, the Commonwealth Court held that intervenors who did not attend or speak at the zoning board hearings held in regard to a proposed special exception permit for the construction of combustion turbine generators did have sufficient interest to intervene in the case based upon the fact that the intervenors lived within approximately one (1) mile of the proposed electric generating facility. Grant, supra at 359.

Here, the majority of the intervenors' properties are within approximately one (1) mile of the proposed wind turbine project and all of the intervenors are within approximately three (3) miles of the project. Additionally, many of the intervenors in this case also attended and participated in the zoning board hearings on this matter. Therefore, we found that J. William Fontaine, II, who had acquired possession of property situated at 57 Sunset

Drive, Penn Forest Township, Carbon County, Pennsylvania, and the forty-two (42) owners of property in close proximity to the proposed wind turbine project have a substantial, direct, and immediate interest in the proposed wind turbine project. Therefore, they were permitted to intervene in the underlying zoning appeals. We submit that intervention was properly granted 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 and that our order of May 29, 2020 be affirmed accordingly.

**BY THE COURT:**



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**Steven R. Serfass, J.**

FILED

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

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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

FILED

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

2020 MAY 29 AM 11:06

CARBON COUNTY  
PROTHONOTARY

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

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

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 Intervenorors  
James F. Preston, Esquire Counsel for Bethlehem Authority  
J. William Fontaine, II Pro Se

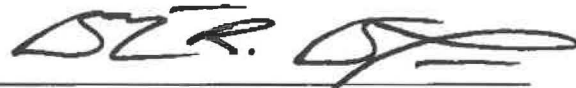
ORDER OF COURT

AND NOW, to wit, this 29<sup>th</sup> 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:**

A handwritten signature in dark ink, appearing to read "S.R. Serfass", written over a horizontal line.

**Steven R. Serfass, J.**