

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

ATLANTIC WIND, LLC,

Plaintiff

v.

PENN FOREST TOWNSHIP ZONING
HEARING BOARD, CHRISTOPHER
MANGOLD, PHILLIP C. MALITSCH,
BETHLEHEM AUTHORITY,

Defendants

No. 16-2305

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Debra A. Shulski, Esquire	Co-Counsel for Atlantic Wind, LLC
Jonathan W. Bradbard, Esquire	Co-Counsel for Atlantic Wind, LLC
Matthew Rapa, Esquire	Counsel for Penn Forest Township ZHB
Bruce K. Anders, Esquire	Counsel for Christopher Mangold
Phillip C. Malitsch	Pro Se
James F. Preston, Esquire	Counsel for Bethlehem Authority

MEMORANDUM OPINION AND ORDER OF COURT

Serfass, J. - February 17, 2017

This matter is presently before the Court on Defendant, Penn Forest Township Zoning Hearing Board's preliminary objections to Plaintiff, Atlantic Wind, LLC's amended complaint which was filed in this Court on November 7, 2016. Defendant's preliminary objections arise under Pennsylvania Rule of Civil Procedure 1028(a)(1) relating to lack of jurisdiction over the subject matter of the action and improper venue, and Pennsylvania Rule of Civil Procedure 1028(a)(7) relating to a

failure to exhaust statutory remedies. For the reasons that follow, Defendant's preliminary objections will be sustained and Plaintiff's amended complaint will be dismissed with prejudice.

I. FACTUAL AND PROCEDURAL HISTORY

On April 4, 2016, Plaintiff filed a zoning application with Penn Forest Township seeking a special exception to construct and operate a wind turbine project on approximately two hundred sixty (260) acres of land which is owned by Bethlehem Authority and is situated north and south of Hatchery Road. Hearings before the Penn Forest Township Zoning Hearing Board (hereinafter "ZHB") commenced on May 12, 2016. Five (5) public hearings were held before the ZHB at the Penn Forest Township Volunteer Fire Company No. 1 (hereinafter "fire hall"). The hearings were held at the fire hall, rather than at the township building, to accommodate the large number of attendees who desired to observe and/or participate in the proceedings.

Alleging that threats of violence have affected Plaintiff's ability to receive a fair and meaningful hearing before the ZHB, on September 26, 2016, Plaintiff filed a complaint seeking injunctive relief in the form of a court order requiring that all future hearings take place at the Carbon County Courthouse and that an independent hearing officer be appointed to hear the matter and issue a decision thereon.

On October 4, 2016, Plaintiff filed an "Expedited Petition for Preliminary Injunction" seeking a preliminary injunction barring the ZHB from holding further hearings on Plaintiff's zoning application until such time as the relief sought in the complaint could be considered by this Court. After we had scheduled a hearing on Plaintiff's petition for October 18, 2016, Plaintiff and the ZHB filed a stipulation pursuant to which the ZHB agreed to hold no further hearings pending resolution of Plaintiff's claims before this Court. On October 18, 2016, we entered an Order approving the parties' stipulation and staying further proceedings before the ZHB. On that same date, the ZHB filed preliminary objections to Plaintiff's complaint.

On November 7, 2016, Plaintiff filed an amended complaint to which the ZHB filed the instant preliminary objections on November 14, 2016. Counsel for the parties appeared before the undersigned on December 20, 2016 for oral argument on the aforementioned preliminary objections. At the conclusion of oral argument, we granted Defendant's counsel two (2) weeks within which to provide the Court with a supplemental brief or additional case law in support of the position of the ZHB. We also granted Plaintiff's counsel one (1) week thereafter within which to furnish a responsive brief or case law on behalf of Atlantic Wind. No supplemental briefs nor additional cases were

submitted for our consideration and Defendant's preliminary objections are now ripe for disposition.

II. DISCUSSION

Defendant argues that this Court lacks equity jurisdiction because Plaintiff has failed to utilize and exhaust an exclusive statutory remedy set forth in the Pennsylvania Municipalities Planning Code. 53 P.S. §10101-11202 (hereinafter "MPC"). Plaintiff counters that the ZHB's inability or unwillingness to provide a safe hearing venue conducive to securing its rights to procedural due process requires this Court to exercise equity jurisdiction in order to ensure compliance with Plaintiff's constitutional rights.

We begin our analysis of this issue with a recognition that section 909.1(a)(6) of the MPC provides that the zoning hearing board shall have exclusive jurisdiction to hear and render final adjudications in matters involving special exceptions under the zoning ordinance. 53 P.S. §10909.1(a)(6). Moreover, the procedures for a land use appeal set forth in Article X-A of the MPC constitute "the exclusive mode for securing review of any decision rendered pursuant to Article IX (Zoning Hearing Board and other Administrative Proceedings) or deemed to have been made under this act." 53 P.S. §11001-A. This would include all decisions made in the course of special exception hearings.

It is to be noted that since May 12, 2016, a total of five (5) public hearings on Plaintiff's special exception application have been held before the ZHB¹. While counsel informed the Court at oral argument that each of the public hearings has lasted several hours and that the record is nearly complete, to date, the record remains open and no decision has been rendered by the ZHB.

The Commonwealth Court of Pennsylvania has long recognized that interference with the actions of a municipal body is to be undertaken only in extremely limited circumstances. Prin v. Counsel of Municipality of Monroeville, 645 A.2d 450, 452 (Pa. Cmwlth. 1994). Moreover, it is well-settled that where the Pennsylvania General Assembly provides a "statutory remedy which is mandatory and exclusive, equity is without power to act." DeLuca v. Buckeye Coal Company, 345 A.2d 637 (Pa. 1975). See also Borough of Green Tree v. Board of Property Assessments, Appeals and Review of Allegheny County, 328 A.2d 819 (Pa. 1974).

When, as here, there is a challenge that the statutory remedy does not meet the requirements of due process, the claim is essentially an assertion of the inadequacy of the statutorily prescribed remedy. Cedarbrook Realty, Inc. v. Nahill, 399 A.2d 374 (Pa. 1979). We note that due process principles apply to

¹ The five (5) public hearings before the ZHB were held on the following dates: May 18, 2016, June 23, 2016, July 14, 2016, July 21, 2016 and August 25, 2016.

quasi-judicial or administrative proceedings, such as the zoning hearings at issue in the matter *sub judice*, and require an opportunity, *inter alia*, to hear evidence adduced by the opposing party, cross-examine witnesses, introduce evidence on one's own behalf and present argument. See Kowenhoven v. County of Allegheny, 901 A.2d 1003 (Pa. 2006). Specifically, section 908(5) of the MPC provides that "[t]he parties shall have the right to be represented by counsel and shall be afforded the opportunity to respond and present evidence and argument and cross-examine adverse witnesses on all relevant issues." 53 P.S. §10908(5).

In this matter, the exclusive mode of review for a special exception application is before the ZHB. Section 908(2) of the MPC provides that the "hearings shall be conducted by the board or **the board may appoint** any member or an independent attorney as **a hearing officer**." 53 P.S. §10908(2), emphasis added. While Atlantic Wind filed its special exception application with the ZHB, it has failed to exhaust this exclusive statutory remedy claiming that the remedy is not adequate.

In its amended complaint, Plaintiff asserts that the hearing venue and threats of violence have tainted the proceedings and the ZHB itself. With regard to the fire hall, Plaintiff argues that it "...should not be forced to continue to put forth its "[a]pplication through witnesses and engage in

cross-examination of the opposition in an unsafe setting." See "Plaintiff's Memorandum of Law in Opposition to Defendant, Penn Forest Township Zoning Hearing Board's Preliminary Objections to Plaintiff's Amended Complaint", at page 12. Plaintiff maintains that "[t]he risk of harm would be greatly reduced by holding these hearings at a secure location with a police presence and metal detectors, such as the Carbon County Court of Common Pleas." Id. As to its request for the appointment of an independent hearing officer, Plaintiff claims that "[i]t is simply not possible for the current ZHB to render a fair, impartial, detached decision in the face of threats of violence..." Id., at page 14.

In reviewing the amended complaint, we find no averments that Plaintiff previously raised its claims of bias before the ZHB in an attempt to determine whether the ZHB would remain impartial in deciding Plaintiff's special exception application in the face of any actual or perceived intimidation or threats. Plaintiff has also failed to aver that any member of the ZHB has displayed an inability to remain fair and impartial. Moreover, the amended complaint contains no averments that the ZHB has infringed upon Plaintiff's rights to present evidence and argument or that it has taken action to improperly limit Plaintiff's right to cross-examine adverse witnesses.

Therefore, Plaintiff has failed to plead facts sufficient to support a finding of bias on behalf of the members of the ZHB.

Both parties cite to HYK Construction Co., Inc. v. Smithfield Twp., 8 A.3d 1009 (Pa. Cmwlth. 2010), in support of their respective positions concerning the appointment of an independent hearing officer. In HYK Construction Co., the Commonwealth Court vacated a final order issued by the Court of Common Pleas of Monroe County which granted equitable relief via the appointment of an independent hearing officer in place of a township board. The plaintiff in HYK filed a conditional use application with Smithfield Township to construct and operate a concrete manufacturing facility, and public hearings on that application were commenced before the township's board of supervisors. While the hearings before the board were proceeding, HYK filed a complaint seeking equitable relief with the trial court. Within its claim for equitable relief, the plaintiff requested that the trial court void the ongoing hearings, preclude and enjoin the township board from hearing the application due to a possible conflict of interest, and to appoint an independent hearing examiner to rule on the application. HYK Construction Co., Inc., 8 A.3d at 1013.

Finding in favor of Smithfield Township on appeal, the Commonwealth Court held that the facts of the case did not rise to the level necessary to invoke equity, since they did not

involve a commingling of the township's prosecutorial and adjudicative functions. Moreover, the Court found that HYK had failed to exhaust the statutory remedies mandated by the MPC.

Similarly, we conclude that the facts in this matter do not rise to the level necessary to invoke equity. As in the HYK case, we find that Atlantic Wind's equity action represents an improper attempt to circumvent the mandatory statutory review process. The matter here before us amounts to an improper interlocutory appeal and a usurpation of the clear statutory authority of the ZHB. As the Commonwealth Court stated in the HYK decision:

To allow equity jurisdiction to usurp the power of the Board would create infinite challenges to interlocutory determinations and defeat or, at the very least, disrupt the Commonwealth's structure for review of zoning decisions by local boards and governing bodies. ... Any claims of unfairness or bias should be raised first before the hearing tribunal, in this case the Board, and then ultimately on appeal...

HYK Construction Co., Inc., 8 A.3d at 1021.

CONCLUSION

Having concluded that an adequate remedy at law exists in this matter, we find no justification for the exercise of equity jurisdiction. We will, therefore, sustain the instant preliminary objections and enter the following

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Co-Counsel for Atlantic Wind, LLC
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Counsel for Penn Forest Township ZHB
Counsel for Christopher Mangold
Pro Se
Counsel for Bethlehem Authority

ORDER OF COURT

AND NOW, to wit, this 17th day of February, 2017, upon consideration of Defendant, Penn Forest Township Zoning Hearing Board's Preliminary Objections to Plaintiff's Amended Complaint, Plaintiff's Answer thereto, review of the briefs of counsel, and after oral argument thereon, it is hereby


ORDERED and DECREED that the aforesaid Preliminary Objections are **SUSTAINED** and that Plaintiff's Amended Complaint is **DISMISSED** with prejudice.

IT IS FURTHER ORDERED and DECREED that the stay on further proceedings before the Penn Forest Township Zoning Hearing Board imposed by this Court, pursuant to the parties'

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stipulation and our Order dated October 18, 2016, is hereby
LIFTED².

BY THE COURT:

A handwritten signature in black ink, appearing to read 'SERFASS', written over a horizontal line.

Steven R. Serfass, J.

² During oral argument on Defendant's preliminary objections, counsel for the ZHB stated that the board has no objection to Plaintiff's request that future hearings concerning its special exception application be held at the Carbon County Courthouse. In that regard, we are willing to entertain a written stipulation prepared by counsel memorializing the parties' agreement, with the understanding that use of county facilities and the scheduling of public hearings must be coordinated with the Court, the Sheriff's Department and the Office of the Carbon County Commissioners.