

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

IN RE: LAND USE APPEAL OF  
BETHLEHEM AUTHORITY,  
SUCCESSOR IN INTEREST TO  
ATLANTIC WIND, LLC FROM THE  
REMAND DECISION OF THE  
ZONING HEARING BOARD OF  
PENN FOREST TOWNSHIP

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BETHLEHEM AUTHORITY,  
SUCCESSOR IN INTEREST TO  
ATLANTIC WIND, LLC,  
Appellant

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v.

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THE ZONING HEARING BOARD OF  
PENN FOREST TOWNSHIP,  
Appellee

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and

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PENN FOREST TOWNSHIP,  
CHRISTOPHER MANGOLD, ET AL.,  
Intervenors

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No. 23-0495

FILED  
2025 MAR 31 PM 4:16  
CARBON COUNTY  
PROTHONOTARY

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Mangold, et al.

MEMORANDUM OPINION

Serfass, J. - March 31, 2025

Here before the Court is the Appeal of Bethlehem Authority  
(hereinafter "Appellant") from our Order of December 31, 2024,

wherein we denied the underlying land use appeal and affirmed the decision of the Zoning Hearing Board of Penn Forest Township. We file the instant Memorandum Opinion pursuant to Pa.R.A.P. 1925(a), respectfully recommending that our Order be affirmed for the reasons set forth hereinafter.

#### FACTUAL AND PROCEDURAL BACKGROUND

The instant land use appeal involves a zoning matter which dates back to the February 5, 2018 filing of Atlantic Wind, LLC's special exception application (hereinafter "the Application") with the Penn Forest Township Zoning Hearing Board (hereinafter the "ZHB"), seeking approval to permit a proposed wind energy/wind turbine facility and associated improvements on real property owned by the Bethlehem Authority. This project consisted of twenty-eight (28) proposed wind turbines and related infrastructure including, but not limited to, permanent meteorological towers.

A total of twelve (12) hearings were held before the ZHB on the Application. By decision dated January 30, 2019, the ZHB denied the Application. Atlantic Wind and Bethlehem Authority filed a land use appeal with this Court on February 28, 2019. Via Order dated May 29 2020, we affirmed the decision of the ZHB. Atlantic Wind and Bethlehem Authority appealed that ruling to the Commonwealth Court of Pennsylvania. On January 12, 2022, the Commonwealth Court reversed the decision of the ZHB which denied

the special exception as a second principal use and vacated and remanded the matter to this Court for remand to the ZHB to make findings of fact and conclusions of law regarding the sound issue and whether the project would comply with the Penn Forest Township Zoning Ordinance.

On February 22, 2023, the ZHB issued its "Decision in Response to the January 12, 2022 Order of Commonwealth Court" (hereinafter "the Remand Decision") containing ninety-six (96) findings of fact and nine (9) conclusions of law. Bethlehem Authority, successor in interest to Atlantic Wind, appealed to this Court on March 24, 2023.

Following the oral argument of counsel and careful review of the parties' briefs, we found that there was substantial evidence to support the findings and conclusions of the Zoning Hearing Board and that the Board had committed no error of law nor abuse of discretion. Consequently, we denied the land use appeal and affirmed the Remand Decision of the Zoning Hearing Board via Order dated December 31, 2024. Appellant filed a Notice of Appeal to the Commonwealth Court of Pennsylvania on January 29, 2025. On that same date, we issued an Order directing Appellant to file a concise statement of matters complained of on appeal pursuant to Pa.R.A.P. 1925(b). In accordance with our Order, Appellant filed its concise statement on February 19, 2025.

### ISSUES ON APPEAL

In Appellant's "Concise Statement of Errors Complained of on Appeal Pursuant to Pa.R.A.P. 1925(b)", the following six (6) issues are raised for appellate review:

1. The Court of Common Pleas erred in affirming the Decision of the Zoning Hearing Board of Penn Forest Township ("ZHB");

2. The ZHB committed an error of law and/or abused its discretion by concluding that:

a. "§402.A.54.p is to be construed using Lmax."

b. "[Bethlehem Authority] has failed to sustain its burden of proof since it failed to identify the exact wind turbine equipment it would be installing."

c. "[W]ithout testimony concerning the exact type of equipment of wind turbine equipment [sic] and the noise generated therefore it is conjecture and not adequate proof as to what the sound levels the equipment generates."

d. "Rand is more credible than the witnesses presented by [Bethlehem Authority]."

e. "[E]ven if the appropriate measure of sound that §402.A.54.p requires were Leq, the project does not comply with §402.A.54.p..." ;

3. The ZHB abused its discretion and/or committed an error of law in disregarding substantial evidence that the relevant sound levels will not exceed "forty-five (45) weighted decibels," as measured at the exterior of an occupied dwelling on another lot in accordance with the relevant ordinance;

4. The ZHB abused its discretion and/or committed an error of law in disregarding substantial evidence that the relevant ordinance requires that the wind energy facilities be constructed in accordance with all applicable wind industry and ANSI standards; and

5. The ZHB abused its discretion and/or committed an error of law in not addressing the remand instructions of the Commonwealth Court.

### DISCUSSION

Initially, we note that the issues articulated in Appellant's concise statement were previously raised in the Land Use Appeal filed on March 24, 2023. Therefore, we will discuss those issues as addressed in our Order denying that appeal and affirming the decision of the zoning hearing board.

In reviewing a decision of a zoning hearing board, the court of common pleas, if it does not take additional evidence, is limited to determining whether the board committed a manifest abuse of discretion or an error of law. Swemly v. Zoning Hearing Bd. of

Canonsburg, 694 A.2d 384 (Pa.Cmwlth. 1997). An abuse of discretion occurs only when the Board's findings are not supported by substantial evidence in the record, (Valley View Civic Ass'n v. Zoning Bd. of Adjustment, 462 A.2d 647 (Pa. 1983); Pennsy Supply, Inc. v. Zoning Hearing Bd. of Dorrance Twp., 987 A.2d 1243 (Pa.Cmwlth 2009)) and the findings may not be disturbed if they are supported by substantial evidence. 53 P.S. §11005-A. "Substantial evidence" means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Oxford Corp. v. Zoning Hearing Bd. of Borough of Oxford, 34 A.3d 286 (Pa.Cmwlth. 2011). The fact that an "impressive" amount of evidence and testimony contrary to the zoning hearing board's findings was presented at the hearing below does not, of itself, mean that the board's findings are unsupported by substantial evidence. Lower Allen Citizens Action Group v. Lower Allen Twp. Hearing Bd., 500 A.2d 1253 (Pa.Cmwlth. 1985). Instead, the standard is whether there was capricious disregard of material, competent evidence. Taliaferro v. Darby Twp. Hearing Bd., 873 A.2d 807 (Pa.Cmwlth. 2005).

In weighing evidence heard before the zoning hearing board, the trial court may not substitute its interpretation of the evidence for that of the board (Vanguard Cellular System, Inc. v. Zoning Hearing Bd. of Smithfield Twp., 568 A.2d 703 (Pa.Cmwlth.

1989)) because the board is the sole judge of the credibility of witnesses and the weight to be afforded their testimony. Hawk v. City of Pittsburgh Zoning Bd. of Adjustment, 38 A.3d 1062 (Pa.Cmwlt. 2012). Accordingly, "[a] zoning [hearing] board is free to reject even uncontradicted testimony it finds lacking in credibility, including testimony offered by the expert witnesses[,] [and] [i]t does not abuse its discretion by choosing to believe the opinion of one expert over that offered by another." Taliaferro v. Darby Twp. Hearing Bd., *supra*, at 811. Assuming that the record demonstrates the existence of substantial evidence, the court is bound by the board's findings that are the result of a resolution of conflicting testimony rather than a capricious disregard of the evidence. Id.

"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 Associates, LLC v. City of Scranton Zoning Hearing Board, 152 A.3d 1118 (Pa.Cmwlt. 2017). While the Statutory Construction Act, 1 Pa.C.S.A. §§ 1501-1991, does not specifically apply to the construction of zoning ordinances, the Pennsylvania Supreme Court has nonetheless applied its principles in its interpretive decisions. Slice of Life, LLC v. Hamilton Township



Zoning Hearing Board, 207 A.3d 886 (Pa. 2019). Thus, undefined words and phrases that appear in a zoning ordinance are to be given their "plain and ordinary meaning." Id. It is the zoning hearing board that is charged with the interpretation and application of the zoning ordinance. Smith v. Zoning Hearing Board of Huntington Borough, 734 A.2d 55 (Pa. Cmwlth. 1999). It is well settled that a zoning hearing board's interpretation of its own zoning ordinance is entitled to great weight and deference from a reviewing court. Id. 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. Id.

The objective standard which is applicable to the limited purpose of the remand is set forth in Section 402.A.54.p. of the Penn Forest Township Zoning Ordinance, and provides, in relevant part:

The audible sound from the wind turbine(s) shall not exceed 45 A weighted decibels, as measured at the exterior of a[n] occupied dwelling on another lot, unless a written waiver is provided by the owner of such building.

Therefore, Appellant had the obligation to both present evidence and sustain the burden of showing that "the audible sounds for the wind turbine(s) shall not exceed forty-five (45) A-weighted decibels, as measured at the exterior of an occupied dwelling on another lot."



With respect to the measurement of sound and its limit to forty-five (45) A-weighted decibels under subsection (p), "[d]ecibels is a volumetric scale or a volume scale in terms of sound level... The higher the decibel level the higher the volume. The A-weighting is a representation of how the human ear generally responds to typical environmental sounds. It's the most common metric used in regulatory ordinances." (Cmwlth. Ct. Op. at 19 n.25).

The express language of Section 402.A.54.p. states, "The audible sound from the wind turbine(s) shall not exceed 45 A weighted decibels as measured at the exterior of an occupied dwelling on another lot." The "plain and ordinary meaning" of the phrase "shall not exceed" is self-evident. Therefore, between the two metrics which were presented to the ZHB (i.e., Leq or Lmax), the Board found that only the Lmax metric is responsive to what is required under Section 402.A.54.p. of the zoning ordinance.

In order to prove compliance with this requirement of the Zoning Ordinance, Appellant called Mark Bastasch to testify as a professional acoustical engineer. In modeling the sound level, Bastasch used the "Leq metric." The Leq metric averages sound over a period of time. Bastasch testified that the predicted project sound level will not exceed forty-five (45) A-weighted decibels at the exterior of an occupied dwelling. However, in addition to the

Leq metric being an average, it is less than clear over what period of time Bastasch calculated the average sound level using the Leq metric. Therefore, the evidence produced by Appellant to show compliance with Section 402.A.54.p. of the Zoning Ordinance (i.e. an average sound level) was not responsive to the express requirement of that section (i.e., "shall not exceed").

The opponents of the wind turbine project called Robert W. Rand as an expert in the area of acoustics and noise measurement (N.T. 7/16/18 @ 21). Rand disagreed with Bastasch. He testified that the maximum sound level would exceed forty-five (45) A-weighted decibels at the exterior of occupied dwellings on other lots. (N.T. 7/16/18 @ 26-29). The ZHB found Rand's testimony to be credible on this point. As fact finder, the ZHB has every right to accept the testimony of Rand and reject the testimony of Bastasch.

Rand credibly testified there is a method of measuring the sound generated from wind turbine(s) which could have been used to respond to the "shall not exceed" standard stated in Section 402.A.54.p. of the Zoning Ordinance. The Lmax measures the instantaneous maximum sound level during any given time period. Although the Lmax metric is not the wind industry standard for modeling the level of sound generated by a wind turbine, it is not difficult to get an accurate measurement. In fact, the Lmax metric

is commonly used to measure the level of sound in response to a "shall-not-exceed" standard.

The Lmax metric can only be used to measure sound generated by an existing facility. (N.T. 7/16/18 @ 121-122). However, Rand used "established conservative adjustments" to calculate the maximum sound level using the Leq data provided by Bastasch. Stated another way, Rand took the Leq data as presented by Bastasch, and applied historical experience to predict the maximum sound which would be generated by the wind turbines after they would be in operation. And, based upon Rand's calculation, the maximum sound would exceed forty-five (45) A-weighted decibels as measured at the exterior of many occupied dwellings on other lots. The ZHB found Rand to be credible on this point.

Again, Section 402.A.54.p. of the Zoning Ordinance provides that the sound "shall not exceed 45 A weighted decibels, as measured at the exterior of an occupied dwelling on another lot." That is clear and free from doubt. It is equally clear and free from doubt that the Leq metric measures average sound level, and the Lmax measures the maximum sound level. Therefore, the ZHB found that the only metric which is responsive to Section 402.A.54.p. is the Lmax metric.

In its Remand Order, the Commonwealth Court directed the ZHB to "... provide an adequate explanation of its resolution of the

factual questions involved, and set forth its reasoning in such a way as to show its decision was reasoned and not arbitrary." Commonwealth Court Opinion at pg. 33. The ZHB's Remand Decision included findings of fact and conclusions of law, supported by credibility determinations and reconciliation of the parties' expert testimony, a determination of the applicable metric for measurement of the project's sound level pursuant to Section 402.A.54.p. of the Zoning Ordinance, and a determination as to whether the wind energy project would comply with that metric.

The ZHB found the Intervenor's expert to be more credible than Appellant's expert. The ZHB concluded that the use of the Lmax measurement method is based upon the plain language meaning of the words "shall not exceed" in section 402.A.54.p. of the Zoning Ordinance, and that the proposed wind turbine project does not comply with that standard. Therefore, we find that the Remand Decision of the ZHB is supported by substantial evidence and that the ZHB committed neither errors of law nor abuses of discretion in rendering that decision. As a result, the instant land use appeal is without merit.

#### CONCLUSION

Based upon the foregoing, we respectfully recommend that our Order of December 31, 2024, denying Appellant's land use appeal

and affirming the Remand Decision of Penn Forest Township Zoning Hearing Board, be affirmed by the Honorable Commonwealth Court.

**BY THE COURT:**

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

**Steven R. Serfass, J.**