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

PHILLIP C. MALITSCH and CHRISTOPHER MANGOLD,	:	
Plaintiffs/Appellants	:	
v.	:	No. 17-1011
PENN FOREST TOWNSHIP ZONING HEARING BOARD,	:	
Defendant/Appellee	:	
and	:	
ATLANTIC WIND, LLC, PENN FOREST TOWNSHIP, and BETHLEHEM AUTHORITY,	:	
Intervenors	:	

Theodore R. Lewis, Esquire	Counsel for Philip C. Malitsch
Bruce K. Anders, Esquire	Counsel for Christopher Mangold
Matthew J. Rapa, Esquire	Counsel for Defendant
Debra A. Shulski, Esquire	Co-Counsel for Atlantic Wind, LLC
Edward J. Greene, Esquire	Co-Counsel for Atlantic Wind, LLC
Thomas S. Nanovic, Esquire	Counsel for Penn Forest Township
James F. Preston, Esquire	Counsel for Bethlehem Authority

MEMORANDUM OPINION

Serfass, J. – December 29, 2017

Phillip C. Malitsch and Christopher Mangold (hereinafter "Plaintiffs") initiated this case on May 22, 2017, when they filed a land use appeal of the Notice of Deemed Approval published by Atlantic Wind, LLC, in The Times News on May 5, 2017. In response, the Penn Forest Township Zoning Hearing Board (hereinafter "Defendant") filed a "Motion to Strike Notice of Deemed Approval

Published May 5, 2017" on May 25, 2017. Atlantic Wind then entered this action as an intervenor on June 5, 2017, and, on July 5, 2017, filed its "Motion of Atlantic Wind, LLC to Strike Motion of Appellee Penn Forest Township Zoning Hearing Board to Strike Notice of Deemed Approval Published on May 5, 2017 for Lack of Standing". For the reasons set forth hereinafter, we find that Atlantic Wind's zoning application is entitled to a deemed approval. As such, we will deny the Zoning Hearing Board's motion to strike and grant the motion of Atlantic Wind.

FACTUAL AND PROCEDURAL HISTORY

On April 4, 2016, Atlantic Wind, LLC, 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 Defendant Zoning Hearing Board commenced on May 12, 2016. Five (5) public hearings were held before Defendant at the Penn Forest Township Volunteer Fire Company No. 1 (hereinafter "fire hall").[1] The hearings were held at the fire hall, rather than at the township building, to accommodate the large number of

[1] The five (5) public hearings before Defendant were held on the following dates: May 12, 2016, June 23, 2016, July 14, 2016, July 21, 2016, and August 25, 2016.

attendees who desired to observe and/or participate in the proceedings.

Alleging that threats of violence had adversely impacted Atlantic Wind's ability to receive a fair and meaningful hearing before Defendant, Atlantic Wind sent a letter dated September 16, 2016, to Defendant offering to waive the time requirements under the Municipalities Planning Code, 53 P.S. § 10908(1.2) (hereinafter "MPC Rule 908"), pending a court determination. Despite these concerns and with little time to reschedule, the next hearing was held on September 20, 2016, as scheduled, but the parties did not attend based on the direction of the Penn Forest Township Zoning Hearing Board Solicitor (hereinafter "Solicitor") that no substantive issues would be discussed. Following this hearing, Defendant expressly denied Atlantic Wind's request for a stay of the proceedings in its order dated September 22, 2016. On September 26, 2016, Atlantic Wind 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, Atlantic Wind filed an "Expedited Petition for Preliminary Injunction" seeking a preliminary injunction barring Defendant from holding further hearings on Atlantic Wind'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 Atlantic Wind's petition for October 18, 2016, Atlantic Wind and Defendant filed a stipulation pursuant to which Defendant agreed to hold no further hearings pending resolution of Atlantic Wind's claims before this Court. On October 18, 2016, we entered an order approving the parties' stipulation and staying further proceedings before Defendant. On that same date, Defendant filed preliminary objections to Atlantic Wind's complaint. On November 7, 2016, Atlantic Wind filed an amended complaint to which Defendant filed 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.

On February 17, 2017, this Court issued a Memorandum Opinion and Order of Court sustaining Defendant's preliminary objections, dismissing Atlantic Wind's amended complaint with prejudice, and lifting the stay on further proceedings before Defendant concerning Atlantic Wind's zoning application. The parties received notice of this order on February 21, 2017.

On February 27, 2017, the Solicitor advised all counsel via email that, pursuant to MPC Rule 908(1.2), the next hearing should be held within forty-five (45) days of our Order. In response, Atlantic Wind communicated with the Sheriff and Commissioners of Carbon County in an attempt to move the public hearings to the

Carbon County Courthouse. Ultimately, the County Commissioners denied Atlantic Wind's request. Nonetheless, Atlantic Wind's counsel sent an email to the Solicitor on March 31, 2017, stating that Atlantic Wind had failed to obtain permission to hold the public hearings at the courthouse, but that his client would not attend any future meetings at the fire hall due to the previous threats. The Solicitor replied that he would advise Defendant to schedule a public hearing at the fire hall as Atlantic Wind had failed to obtain an alternative venue. On April 4, 2017, the Solicitor sent an email to Atlantic Wind's counsel stating that a hearing would be scheduled for April 20 or June 1, 2017, based on the availability of the fire hall and Objectors' witnesses. Defendant did not convene a hearing until May 17, 2017.

In the interim, via correspondence dated April 26, 2017, Atlantic Wind claimed its right to a deemed approval under MPC Rule 908(9) as more than forty-five (45) days had passed since notice of our Order of February 17, 2017. When Defendant refused to publish the deemed approval notice, claiming that any delays were a result of Atlantic Wind's actions, Atlantic Wind published the notice of deemed approval in the Times News on May 5, 2017, due to Defendant's failure to hold a hearing within forty-five (45) days of the prior hearing as prescribed in MPC Rule 908(9). At the conclusion of the May 17, 2017, hearing, the members of the

Zoning Hearing Board voted unanimously to deny Atlantic Wind's zoning application.

On May 22, 2017, Plaintiffs filed the instant land use appeal challenging the Notice of Deemed Approval published by Atlantic Wind. On May 25, 2017, Defendant filed a "Motion to Strike Notice of Deemed Approval Published May 5, 2017". Atlantic Wind, Penn Forest Township, and Bethlehem Authority entered the case as intervenors on June 5, June 7, and June 20, 2017, respectively.

On June 5, 2017, Atlantic Wind filed their own "Motion of Atlantic Wind, LLC to Strike Motion of Appellee Penn Forest Township Zoning Hearing Board to Strike Notice of Deemed Approval Published on May 5, 2017 for Lack of Standing". Briefs were submitted by Plaintiff, Defendant, Atlantic Wind, and Bethlehem Authority on August 11, 2017. Penn Forest Township submitted a brief on August 15, 2017. Oral argument was held on the issue of deemed approval on August 22, 2017.

DISCUSSION

We will first address the validity of deemed approval itself and then turn to the motions to strike.

I. Atlantic Wind's zoning application is deemed approved because Defendant failed to hold a hearing within forty-five (45) days of the prior hearing, excluding the duration of the stay by stipulation and court order

Municipalities Planning Code Rule 908 provides that the zoning hearing board shall conduct hearings and make decisions in accordance with the following requirements:

> (1.2) The first hearing before the board or hearing officer shall be commenced within 60 days from the date of receipt of the applicant's application, unless the applicant has agreed in writing to an extension of time. Each subsequent hearing before the board or hearing officer shall be held within 45 days of the prior hearing, unless otherwise agreed to by the applicant in writing or on the record.
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> (9) . . . . where the board . . . fails to commence, conduct or complete the required hearing as provided in subsection (1.2), the decision shall be deemed to have been rendered in favor of the applicant unless the applicant has agreed in writing or on the record to an extension of time. When a decision has been rendered in favor of the applicant because of the failure of the board to meet or render a decision as hereinabove provided, the board shall give public notice of said decision within ten days from the last day it could have met to render a decision in the same manner as provided in subsection (1) of this section. If the board shall fail to provide such notice, the applicant may do so. Nothing in this subsection shall prejudice the right of any party opposing the application to appeal the decision to a court of competent jurisdiction.

53 P.S. § 10908. The Supreme Court of Pennsylvania has consistently interpreted the procedural provisions of zoning codes, including the time limits of MPC Rule 908, strictly. *See* Wistuk v. Lower Mount Bethel Township Zoning Hearing Board, 925 A.2d 768, 773-74 (Pa. 2007) (holding, through a strict reading of the statutory language, that failure by the applicant to object to the scheduling of zoning hearing board proceedings after the statutory time limit does not waive the time requirements of MPC Rule 908); Humble Oil

& Refining Co. v. Borough of East Lansdowne, 227 A.2d 664 (Pa. 1967) (reaffirming the requirement "that the procedural provisions of zoning statutes be rigidly adhered to" in holding that the expiration of a statutory time limit results in a deemed approval). Additionally, the Commonwealth Court has stated unequivocally that "the language of [MPC Rule 908] which provides that a decision 'shall be deemed to have been rendered in favor of the applicant,' where the board fails to hold the required hearing within [the time limit], is imperative." Grim v. Borough of Boyertown, 595 A.2d 775, 779 (1991).

The Supreme Court of Pennsylvania recognized the severe consequences of MPC Rule 908 in Wistuk v. Lower Mount Bethel Township Zoning Hearing Board, but noted that the courts' task is to apply the law as prescribed by the General Assembly. 925 A.2d at 775. As such, the Supreme Court recommended in future cases where there is any doubt concerning the commencement of the forty-five (45) day period, "the matter should be addressed openly and directly on the record, and that zoning hearing boards should apply a conservative approach where no agreement can be reached, in light of the serious consequences of a deemed approval." *Id.* at 775 n.6. The Commonwealth Court further expounded on Wistuk in Nextel Partners, Inc. v. Clarks Summit Borough/ Clarks Summit Borough Council, holding that solicitors must obtain clear extension agreements on the record. 958 A.2d 587 (Pa. Cmwlth. 2008). An

agreement to extend the deadline for a hearing must be definite as to the length of the extension in order to be enforced by a court. *Id.* at 594.

Here, the most generous view of when the clock begins to run would grant Defendant the full forty-five (45) days from the end of the stipulated stay to hold the next hearing, but a strict reading of the MPC would start the forty-five (45) day timer on the day of the last hearing, September 20, 2016, pause the timer for the duration of the stay by stipulation, and, absent a specific agreement to the contrary, restart the timer once the stay was lifted. However, the decision of when to start the timer is irrelevant in this case because there was no hearing until eighty-five (85) days after the parties' agreed stay of the statutory timer had ended. Thus, Atlantic Wind is entitled to a deemed approval of their zoning application.

Defendant claims that Atlantic Wind waived all time requirements in the letter dated September 16, 2016. But when read in its full context, the letter only offered to grant an extension until the resolution of Atlantic Wind's case in equity before this Court. Additionally, Defendant expressly rejected that letter on September 22, 2016, and scheduled the next hearing for thirty (30) days later, well within the statutory limit. Defendant cannot both reject the letter's proposal and hold it up as evidence of an agreement. It was not until the stipulation on October 14, 2016,

that Defendant and Atlantic Wind agreed to a stay of the proceedings on the record until the resolution of the case in equity, and there is no indication that Defendant relied upon the proposal in Atlantic Wind's letter in agreeing to the stipulation.

Defendant also claims that Atlantic Wind's conduct and communications after the stay had been lifted by order of this Court implied an agreement to waive the timing requirement of MPC Rule 908 for the next hearing. As stated above, an agreement to extend the time in which to hold a hearing under the MPC must be set forth on the record and unambiguous as to the length of the extension in order to be enforced by a court. Nextel Partners, Inc., 958 A.2d at 594. The communications between the parties evince neither an agreement to waive the timing requirement nor a definite length for such a waiver. While Atlantic Wind attempted and failed to secure an alternative location for the hearings, the onus was on Defendant to schedule and convene a hearing within the statutory time allotment regardless of either the outcome of those attempts or Atlantic Wind's continued objections after those attempts failed.

Defendant next argues that the purpose of the deemed approval mechanism is to avoid dilatory conduct while ignoring the fact that the timing requirement is a blackletter rule, not a standard under which we may consider the parties' intent or the purpose of the statute.

Defendant also claims that the end of a stay by stipulation in this case is analogous to the court-ordered remand to the zoning board in Northeastern Gas Co. v. Karpowich. 656 A.2d 590 (Pa. Cmwlth. 1995). We disagree. The Commonwealth Court in Northeastern Gas Co. held that following a court-ordered remand of the zoning hearing board application, the timing requirements of MPC Rule 908 do not apply. However, our order of February 17, 2017, was not a court-ordered remand of the zoning application. Our order dealt with a separate issue, namely Atlantic Wind's action in equity seeking a change of venue for the public zoning hearings in this matter. Additionally, as the duration of the parties' stipulated stay was contingent upon when that action in equity ended, we lifted the stay in that same order because Atlantic Wind's complaint in equity had been dismissed with prejudice. Our order is not analogous to cases in which a zoning application has been remanded to the zoning hearing board after the trial court or the appellate court has issueed a ruling in the appeal of that zoning decision. We have yet to address Atlantic Wind's zoning application appeal in Case No. 17-1589. Further, MPC Rule 908 explicitly provides for stays of zoning hearings by agreement of the parties, unlike a remand of the zoning application. The stay in this case, while of sufficiently definite duration, did not provide when Defendant would be required to hold a hearing after the stay was

lifted. Therefore, we defer to the default timing requirement in MPC Rule 908.

Finally, if we were to adopt Defendant's argument, then following a stay of zoning hearing board proceedings for a set period of time, without an agreement as to when the hearings will resume following that stay, a zoning board could simply delay, whether purposefully or negligently, without consequence. As our Supreme Court has noted

> The Legislature recognized the existence of this inertia in the orderly disposition of pending governmental matters, and, accordingly, wisely provided that when a board of adjustment indolently allows 45 days to go by without a decision following a hearing, the complaining party shall have the benefit of that slothful inattention and gain the requested permit. Without this kind of coercive determination, a board could effectively prevent the erection of needed structures through the simple process of luxurious lolling while spiders of inattention spin webs of indifference over pending public problems.

Humble Oil and Refining Co. v. East Landsdowne Borough, 227 A.2d 664, 666 (Pa. 1967).

While we do not believe that the failure to timely schedule and convene the final zoning hearing in this matter was the result of indifference on the part of the zoning hearing board and may have occurred due to the unavailability of the fire hall or the extension of professional courtesy to the parties' counsel, the fact remains that it was incumbent upon Defendant to schedule and convene the public hearing in a timely manner. Having failed to do

so and having also failed to obtain Atlantic Wind's consent to an extension of the forty-five (45) day hearing requirement, Defendant must now face the harsh consequences of a deemed approval.

II. Atlantic Wind's motion to strike is granted because Defendant is not a party opposed to Atlantic Wind's zoning application and does not have standing to file a motion to strike the notice of publication of deemed approval

Defendants, in filing their "Motion to Strike Notice of Deemed Approval Published May 5, 2017", are attempting to act as a party opposing Atlantic Wind's zoning application, when they are in fact a quasi-judicial body tasked with objectively deciding the outcome of zoning applications. *See* Board of Supervisors of East Rickhill Township v. Mager, 855 A.2d 917, 920 (Pa. Cmwlth. 2004), *petition for allowance of appeal denied* 863 A.2d 1149 (Pa. 2004). In Board of Supervisors of East Rickhill Township v. Mager, the Commonwealth Court held that the board cannot be considered a "party opposing [a zoning] application" and as such cannot appeal a deemed approval under the statute.[2] The deemed approval is the board's decision by operation of law that resulted from its own delay. *See* Mager, 855

[2] While the Commonwealth Court in Mager was referencing 53 P.S. § 10913.2(b)(3) regarding a conditional use decided by a governing body (township board of supervisors) and this case refers to § 10908(1.2) regarding a special exception decided by a zoning hearing board, the language regarding appeals is identical in both sections and both sections apply the same hearing schedule requirements or result in the deemed approval of the application.

A.2d at 920. A board cannot appeal from its own decision approving the application. *Id.*

Here, Defendant's motion to strike the notice of deemed approval is, in effect, an appeal of Atlantic Wind's claim to a deemed decision because the effect of Defendant's motion to strike would be the same as a successful appeal, namely overturning the deemed approval. Defendant lacks standing to challenge the deemed decision because the zoning hearing board is the adjudicative body tasked with objectively considering and ruling upon the zoning application, not a party opposing that application. Thus, Defendant can neither appeal directly nor appeal by another mechanism through a motion to strike the notice of deemed approval.

Therefore, the motion of Atlantic Wind to strike Defendant's motion concerning the deemed approval will be granted, and Defendant's motion to strike Atlantic Wind's notice of deemed approval will be denied accordingly.

CONCLUSION

For the reasons set forth hereinabove, we are constrained to hold that Atlantic Wind's zoning application is deemed approved and that Defendant lacks standing to strike the notice of deemed approval published on May 5, 2017.

BY THE COURT:

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Steven R. Serfass, J.