

# IN THE COURT OF COMMON PLEAS OF FAYETTE COUNTY, PENNSYLVANIA CIVIL DIVISION

PFM Atlantic Renewable

Appellant

vs.

NO. 1112 of 2008, G.D.

Fayette CO ZBB, Appellee

and

Neil Brown, Estate of Sylvia N Dunham,  
County of Fayette and Thomas J Bozek

Interveners

Denise R Yarnoff

### NOTICE OF ORDER, JUDGMENT OR DECREE

You are hereby notified that the following Order, Judgment or Decree has been entered against you on the

30 day of April, 20 09  
in the above case.

Plaintiff Daniel Rullo  
Thomas A Riley Jr  
 Defendant Richard E Bower

Gary N Altman  
 Gretchen Mundorff  
 Joseph E Ferens  
 Charles C Gentile

- Judgment in the amount of \_\_\_\_\_ Plus costs.
- Decree in Divorce
- Decree Nisi in Equity
- Final Decree in Equity
- Justice of the Peace Transcript of Judgment in Trespass in the amount of \_\_\_\_\_ Plus costs.
- If not satisfied within sixty (60) days, your motor vehicle operator's license will be suspended by the Department of Transportation, Bureau of Traffic Safety, Harrisburg, PA
- Entry of Judgment of
  - Non-Suit or
  - Non-Pros
  - Default
  - Verdict
  - Arbitration Award

- Justice of the Peace Transcript in Assumpsit in the amount of \_\_\_\_\_ Plus costs.
- Order

LANCE WINTERHALTER, PROTHONOTARY

Deanna L Craft

Divorce Acct. Clerk

Deputy

(Applicable blocks have been checked)

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

PPM ATLANTIC RENEWABLE, :

Appellant, :

Vs. :

FAYETTE COUNTY ZONING HEARING BOARD, :

Appellee, :

NEIL BROWN, ESTATE OF SYLVIA N. DUNHAM, COUNTY OF FAYETTE and THOMAS J. BOZEK, :

Intervenors. : NO. 1112 of 2008 G.D.

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**OPINION AND ORDER**

Presently before this Court for disposition is a Land Use Appeal filed by the Appellant, PPM Atlantic Renewable (hereinafter "PPM"). The appeal challenges the decision of the Appellee, Fayette County Zoning Hearing Board (hereinafter "ZHB"), which denied PPM's request for a special exception and related variances to operate a wind powered electricity generating facility. PPM contends that the ZHB abused its discretion and/or committed errors of law. The ZHB argues that PPM failed to meet its burden of proof to obtain a special exception as well as the grant of multiple setback variances. After oral argument, full consideration of the record, applicable laws, briefs,

arguments and submissions of counsel, and for reasons more fully discussed herein, PPM's land use appeal is GRANTED.

### **BACKGROUND**

On or about September 7, 2007, PPM filed twenty separate applications requesting the ZHB grant special exceptions along with a number of variances in order to construct and operate a wind energy project known as the South Chestnut Windpower Project in southern Fayette County, Pennsylvania. The South Chestnut Windpower Project is a proposed windpowered electricity generating project with a planned nameplate capacity of 50.4 megawatts (mw). The project would be spread across an approximate 3.5 mile section of the Chestnut Ridge in Wharton, Georges and Springhill Townships.<sup>1</sup>

PPM is not the owner of any of the subject Chestnut Ridge property. Instead, PPM would be leasing the various tracts of land from properties owned by Coastal Forest Resources Company, Robert F. and Jean E. Ellsworth, Ray W. and Carol S. Fields, Nolan S. Sutton, Harry and Sandra K. Sutton, Gary B. and Marlene Sutton, Ervan D. and Delores J. Sutton, Neil Brown, John A. Kopas III and Raymond D. Smith, Carbon Fuel Resources, Inc., and Sylvia Dunham. All properties are shown on the Fayette County Zoning Map in the "A-1" Agricultural-Rural Zone, District 14, Map 37

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<sup>1</sup> Wharton Township is governed by its own separate zoning ordinance. The Wharton Township Zoning Hearing Board granted PPM's application for special exception on January 23, 2008.

and Lot 13, District 14, Map 41 and Lots 5, 8-2, 8-3, 8-4, 8-5, 8-6, 8-7, 8-8, 9 and 10, District 14, Map 43 and Lot 1 and 2, District 36, Map 21 and Lot 48 and District 36, Map 22 and Lots 1, 21-1, 3, 5, 7 and 8.

The ZHB conducted hearings on PPM's applications on October 17, 2007, October 31, 2007, December 19, 2007 and January 30, 2008. On February 20, 2008, the ZHB voted to deny PPM's request. On March 11, 2008, the ZHB issued Resolution 07-80 in which it denied PPM's request. Resolution 07-80 was comprised of eleven paragraphs of findings of fact and eleven paragraphs containing the ZHB's conclusions of law.

On April 9, 2008, a Notice of Appeal was timely filed by PPM. Oral argument was held before this Court on July 31, 2008. At argument, no additional evidence was presented before this Court. However, this Court granted the parties' request for additional time to file reply briefs.

### DISCUSSION

Initially we note that the law in this Commonwealth is well settled that when the trial court has taken no additional evidence the standard of review of the decision of a zoning hearing board is limited to determining whether the board committed an abuse of its discretion or an error of law. Lombardozzi v. Millcreek Township Zoning Hearing Board, 829 A.2d 779 (Pa. Cmwlth. 2003). An abuse of discretion can be established by showing that the findings of the zoning board are not

supported by substantial evidence. Bailey v. Upper Southampton Township, 690 A.2d 1324 (Pa. Cmwlth. 1997) citing Valley View Civic Association v. Zoning Board of Adjustment, 501 Pa. 550, 462 A.2d 637 (1983). Substantial evidence has been defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Id.

Here, PPM petitioned the Board for special exceptions to operate a windpowered project on the subject properties. A special exception is in fact not an exception to the zoning ordinance, rather it is a use expressly permitted by the ordinance provided specifically enumerated standards are met. Appeal of Dippolito, 833 A.2d 336 (Pa. Cmwlth. 2003); In re: Appeal of Brickstone Realty Corporation, 789 A.2d 333 (Pa. Cmwlth. 2001), petition for allowance of appeal denied, 569 Pa. 723, 806 A.2d 863 (2002); Manor Healthcare Corporation v. Lower Moreland Township Zoning Hearing Board, 139 Pa. Cmwlth. 206, 590 A.2d 65 (1991). When a particular use is permitted in a zoning district by special exception, it is presumed that the local legislature has already decided that such use satisfies local concerns for the general health, safety, and welfare and that such use comports with the intent of the zoning ordinance. In re Appeal of Brickstone Realty Corp., supra at 340.

When an application for a special exception is made, it is the function of the zoning hearing board to determine that such specific facts, circumstances, and conditions exist which comply with the standards of the ordinance and merit the granting of the exception. Timber Place Associates v. Plymouth Township Zoning Hearing Board, 59 Pa. Cmwlth. 582, 430 A.2d 403 (1981). Credibility determinations and the

weight to be afforded to evidence are matters exclusively left to the zoning hearing board in its role as finder of fact. Accelerated Enterprises, Inc. v. Hazle Township Zoning Hearing Board, 773 A.2d 824 (Pa. Cmwlth. 2001).

An applicant for a special exception has both the duty of presenting evidence and the burden of persuading the zoning hearing board that the proposed use satisfies all of the objective requirements of the zoning ordinance for the grant of a special exception. Manor Healthcare Corporation v. Lower Moreland Township Zoning Hearing Board, supra at 215, A.2d at 70, *citing* Appeal of R.C. Maxwell Company, 120 Pa. Cmwlth. 251, 548 A.2d 1300 (1988); Keystone Chemical Company, Inc. v. Zoning Hearing Board of Butler Township, 90 Pa. Cmwlth. 213, 494 Pa.2d 1158 (1985). These requirements, standards or conditions have to be classified as follows:

1. The kind of use (or area, bulk, parking or other approval) i.e., the threshold definition of what is authorized as a special exception;
2. Specific requirements or standards applicable to the special exception e.g., special setbacks, size limits; and
3. Specific requirements applicable to such kind of use even when not a special exception e.g., setback limits or size maximums or parking requirements applicable to that type of use whenever allowed, as a permitted use or otherwise.

Bray v. Zoning Board of Adjustment, 48 Pa.Cmwlth. 523, 526, 410 A.2d 909, 911 (1980).

Once the applicant for a special exception shows compliance with the specific requirements of the zoning ordinance, a presumption arises that the proposed use is consistent with the health, safety, and general welfare of the community. In re:

windmill/wind turbine is a use permitted by special exception in A-1, C, M-1, M-2 and AH zoning districts. Special exceptions are governed by Article VIII of the Ordinance.

Article VIII Section 1000-800 provides: "All applications for use by special exception shall demonstrate compliance with the applicable express standards and criteria of this Article and the applicable minimum lot area, maximum lot coverage, maximum building height, setback requirements and buffer yard requirements of the zoning district in which the use is proposed." Article VIII Section 1000-876 provides the following:

A windmill/wind turbine shall be a permitted special exception subject to the following conditions and/or standards.

- A. The minimum lot size for a commercial windmill/wind turbine shall be two (2) acres.
- B. A windmill/wind turbine for residential use on a residential lot shall be considered an accessory use.
- C. The top of a commercial windmill/wind turbine shall not exceed two hundred fifty (250) feet not including the blades. The top of a windmill turbine located on a residential lot shall not exceed seventy-five (75) feet in length.
- D. The minimum setback of a windmill/wind turbine from any lot line shall be equal to one hundred percent (100%) of the windmill/wind turbine's height.
- E. Noise from any windmill/wind turbine shall not exceed seventy (70) decibels when measured from property line.
- F. The landowner and/or developer shall complete a viewshed impact analysis as part of all potential commercial windmill/wind turbine development.
- G. The landowner and/or developer shall complete a biological resource survey to identify and determine what conflicts are likely to occur with birds or other sensitive biologic resources.
- H. The owner(s) and operator(s) of a windmill/wind turbine facility shall incorporate Best Management Practices as outlined in the Pennsylvania Handbook of Best Management Practices to minimize negative impacts of erosion, siltation and surface water and groundwater contamination.
- I. All structures more than two hundred (200) feet in height shall have aircraft warning lights and comply with United States Federal Aviation Administration (FAA) requirements.
- J. No windmill/wind turbine facility shall be located within the airport hazard overlay.
- K. The applicant shall submit written evidence of compliance with the National Historical Preservation Act. A letter of consultation from the Pennsylvania Historical and Museum Commission will demonstrate compliance with this consultation requirement.

L. A windmill/wind turbine may not be located within ½ (sic) of a property or a district listed on the National Register of Historic Places. This provision may be waived by the Zoning Hearing Board if the applicant can demonstrate that the installation of a windmill/wind turbine would not be a significant intrusion on the public view of National Register properties, historic buildings or on the historic landscapes surrounding each property. To be eligible for a waiver the applicant must show consultation under the National Historic Preservation Act with the Federal Communications Commission, the Advisory Council on Historic Preservation and/or the Pennsylvania Historical and Museum Commission.

M. If windmill/wind turbine remains unused for a period of twelve (12) consecutive months, the owner or operator shall dismantle and remove the Communications Tower (sic) [windmill/wind turbine], within six (6) month period. Before any construction can commence on any tower, and at all times thereafter, a performance bond shall be posted and maintained with the municipality in the amount of at least \$10,000.00, providing that, if such a tower is not so removed, then the municipality can either direct the bonding company to remove the tower or remove the tower and forfeit the bond.

N. The Zoning Hearing Board may attach additional regulations pursuant to this section in order to protect the public's health, safety and welfare. These conditions may include but are not limited to increased setbacks.

Additionally, Article XI Section 1000-1103 provides:

A. The Zoning Hearing Board shall have the power to decide applications for use by special exception as specified in this Chapter in harmony with its general purpose and intent and in accordance with the standards set forth. The Zoning Hearing Board shall approve a use by special exception only if it meets all applicable requirements of this Chapter and the express standards and criteria set forth in Article VIII of this Chapter. In granting a use by special exception, the Zoning Hearing Board may attach such reasonable conditions and safeguards in addition to those expressed in this Chapter as it may deem necessary to properly implement this Chapter and to protect the public's health, safety and welfare.

B. Applicants for a use by special exception shall submit a land development plan, as defined by Article VIII of this Chapter, and a fee as established from time to time by resolution of the Board of County Commissioners. The land development plan shall be accompanied by a written application in a form prescribed by the county, including an indication of compliance with the express standards and criteria specified in Article VIII of this Chapter.

In its 26-paragraph appeal, PPM argues that the ZHB based its decision on a rationale inconsistent with the governing body's objective standards as set forth for a special exception. A review of the record reveals that the ZHB issued its written decision on or about March 11, 2008. The ZHB's written decision titled Resolution 07-80 contained the following findings of fact:

1. Under the Zoning Ordinance of Fayette County, a wind-powered electricity generating facility is a use which permitted by special exception requiring Zoning Hearing Board approval in an "A-1" Agricultural-Rural Zone.
2. The Petitioner plans to erect twenty-seven (27) wind towers along the Chestnut Ridge, said wind towers to be located in the Townships of Georges, Springhill and Wharton. Twenty-four (24) of the wind towers are proposed to be located in the Townships of Georges and Springhill, which townships fall under the jurisdiction of Fayette County for zoning.
3. The wind towers which the Petitioner is requesting the Zoning Hearing Board approve by special exception are as follows: Wind towers numbered 1, 2, 3, 4A, 5, 6, 7, 8, 9, 10, 11, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26 and 27.
4. The Petitioner is requesting a height variance of 12.5' for all 24 wind towers. Representatives of Petitioner testified that the height variance is necessary as a result of a change in industry standards which now call for wind towers of 262.5 feet.
5. The Petitioner is requesting setback variances for ten (10) towers as follows:

Tower 5 (Fields) 150' from the property line of the Pennsylvania State Game lands

Tower 11 (Brown) 115' from property line of Brown

Tower 19 (Coastal) 95' feet property line of Carbon Fuel

Tower 21 (Brown) 100' and 120' to property line of Coastal

Tower 33 (Brown) 55' from line of Coastal and 145' to line of Dunham

Tower 23 (Dunham) 245' from property line of Coastal

Tower 24 (Brown) 90' from property line of Coastal

Tower 25 (Brown) 165' from the property line of Coastal

Tower 25 (Coastal) 195' from the property line of Brown

6. The Petitioner did not present any testimony to constitute a hardship which would necessitate the setback variance requests. The Petitioner testified that a denial of its request for multiple setback variances would result in less profit being realized by Petitioner.

7. The Petitioner testified that setback variances would not be needed for some wind towers because the adjacent property was owned by the same owner. In other words, the Petitioner was requesting that the Board treat two adjacent properties as one property, thus eradicating a property line such that the setback requirements would not be applicable.<sup>2</sup>

8. The Petitioner has lease agreements with the owners of the subject properties, who will place into their deeds, an acknowledgement by the owners and successive owners regarding the placement and sound levels of the wind turbines.

<sup>2</sup> During the final hearing before the ZHB, Richard Bower, who is the attorney for Neil Brown, stated that Mr. Brown is having all of his 1,687.30 acres of property combined into one parcel. (N.T. 1/30/08, pp. 14-15). This would alleviate the need for a variance for Tower 11. See Daley v. Zoning Hearing Board of Upper Moreland Township, 770 A.2d 815 (Pa.Cmwth. 2001)

9. The Petitioner testified that the proposed wind turbines on the subject properties would operate within the sound levels as specified by the Zoning Ordinance.

10. The Petitioner testified that it has conducted decibel readings in several areas along the perimeter of the subject property and all readings were within acceptable standards.

11. Several individuals who attended the hearings to object to Petitioner's request for a special exception expressed concerns regarding how the proposed wind turbines on the subject properties would negatively impact the viewshed of the Chestnut Ridge area, tourism and sound levels in the area, and present a danger to wildlife, birds and bats (both of the area and migrating) and present the danger of ice throw from the blades of the turbines.

In Resolution 07-80 of the ZHB made the following conclusions of law:

1. The Board finds that in deciding all zoning cases they are charged with balancing the property owner's right to use his property as he deems fit with the public's health, safety, welfare, and the expressions of general policy contained in the Zoning Ordinance and the County's comprehensive plan.
2. The objective standards which must be met by the Petitioner to obtain a special exception are set forth in the Zoning Ordinance at Sections 1000-1103 and 1000-876 governing special exceptions.
3. Generally, for the grant of a special exception, the location and size of the use requested may not be hazardous, inconvenient, or conflict with the general character and intensity of development of the area. In addition, the location and height of the structures must not hinder or discourage the appropriate development and/or use of adjacent land. The proposed use should be viewed as to its relationship to and effect upon surrounding land uses and existing environmental conditions.
4. The Petitioner in the instant matter has requested a special exception for the construction and placement of 24 wind turbines across the top of Chestnut Ridge. The height, number, and configuration of the suggested wind turbines across the top of Chestnut Ridge does not fit within the general character and intensity of development of the area. Additionally, the location,

number, and height of the structures will hinder or discourage the appropriate development and use of the adjacent land and, will have a negative impact generally upon the surrounding land uses and will pose a general detriment to the public's health, safety, and welfare.

5. The Petitioner has failed to meet its burden with regard to the objective criteria and expressions of general policy as set forth in the Zoning Ordinance and the County's comprehensive plan to obtain a special exception. The Petitioner for a special exception must persuade the Zoning Hearing Board that the proposal complies with all of the objective requirements of the Zoning Ordinance and expressions of general policy and planning in order to obtain approval of the special exception. Because the Petitioner has failed in meeting its burden, its petition for special exception must be denied.

6. Even if the Petitioner was successful in meeting its burden for a special exception pursuant to the objective requirements of the Zoning Ordinance, the suggested use, because of the placement, number, and configuration of the wind turbines, would conflict with the expressions of general policy contained within the Zoning Ordinance. The general policy of the Zoning Ordinance is for the protection of timber and other forest resources, wildlife habitat, special planned communities, scenic resources, and other natural areas such that the minimal development which is allowed must be located so as to maximize the amount of undisturbed natural areas.

7. In the instant matter, the erection of 24 wind turbines across the highest portion of Chestnut Ridge will certainly produce an overall general negative effect on the scenic beauty of the area and the tourism which the natural beauty generates for the County, the wildlife habitat, and the timber forest resources.

8. The Petitioner admitted during presentation of its case that the placement of the wind turbines in a line across the highest portion of Chestnut Ridge would be visible for numerous miles in many directions. The Petitioner also admitted that wind turbines have killed birds and bats. Additionally, there was testimony regarding the need for red blinking lights to be placed on the wind towers pursuant to the Federal Aviation rules and regulations. Thus, the Petitioner failed to demonstrate any type of mitigation efforts to mitigate the undue adverse impacts upon the viewshed and scenic beauty of the mountain ridge and its subsequent impacts on

tourism or the killing of birds and bats. In other words, the Petitioner has no mitigation measures in place to mitigate the detrimental effects upon the health, safety and general welfare of the public.<sup>3</sup>

9. Even if the Petitioner has been successful in meeting its burden for a special exception, the Board could not grant its requests for multiple variances from setback requirements as the Petitioner failed to demonstrate the requisite element of hardship required to allow the Board to grant said variances. The diminution of profits, as testified to by Petitioner, does not meet Petitioner's burden to demonstrate a hardship pursuant to the Zoning Ordinance.

10. Conversely, the objectors sustained their burden to show that the wind turbine project would generally have detrimental effects on the health, safety and general welfare of the adjacent community and Fayette County.

11. Accordingly, after review of the Fayette County Zoning Ordinance, the testimony presented by the Petitioner as well as the Objectors and relevant case law, the Board concludes that the breadth and depth and overall scope of the suggested project, the number, height, configuration, and placement of the wind turbines would produce too great of a negative impact upon Fayette County's scenic Chestnut Ridge and would generally have a detrimental effect upon the health, safety, and general welfare of not only the adjacent communities, but all of Fayette County and therefore the request of the Petitioner for a special exception for a wind powered electricity generating facility containing 24 wind towers and variances from height and setback requirements is denied.

As stated above, the law is clear that the ZHB has the discretionary power to determine whether a party has met its burden of proof. Accelerated Enterprises, Inc. v. The Hazle Township Zoning Hearing Board, supra. However, if the ZHB's determination is not supported by substantial evidence then the ZHB has abused its

<sup>3</sup> We note that the Article VIII §1000-876(l) of the Ordinance requires the turbines to be equipped with aircraft warning lights.

discretion. Here, in its written decision the ZHB made a general statement that PPM did not meet its burden with regard to the objective criteria of the Ordinance. No where in Resolution 07-80 does the ZHB indicate which specific provisions PPM failed to satisfy. However, in its Brief In Opposition to Appeal of the Denial of Special Exception and Multiple Height and Setback Variances the ZHB stated that PPM had not met its burden to demonstrate compliance with the criteria set forth at subparagraphs C, D, F and G of Section 1000-876 of the Ordinance.<sup>4</sup>

Subparagraphs F and G required PPM to complete a viewshed impact analysis and a biological resource survey. It is undisputed that PPM completed and introduced into evidence before the ZHB a viewshed impact analysis and a biological resource survey. However, the ZHB argues that it is their responsibility to review the results of both the viewshed impact analysis and biological research survey to determine whether a special exception should be granted under the requirements of the Ordinance. The ZHB contends that PPM had not met the requisite criteria set forth at subparagraphs F and G because of the negative impact on viewshed and the bat kill as testified to by representatives of PPM.

When statutory language is not explicit, great weight and deference should be given to the interpretation of a statute or regulation by the administrative agency that is charged with the duty to execute and apply the provisions at issue. Greth Development Group, Inc. v. Zoning Hearing Board of Lower Heidelberg Township, 918 A.2d 181, 187 (Pa.Cmwlth. 2007), citing In re Thompson, 896 A.2d 659, 669

(Pa.Cmwlth. 2006). Since a zoning hearing board is not a legislative body, it lacks the authority to modify or amend the terms of a zoning ordinance. Id., citing Hill v. Zoning Hearing Board of Maxatawny Township, 142 Pa.Cmwlth. 539, 597 A.2d 1245, 1251 (1991). "[Z]oning boards ... must not impose their concept of what the zoning ordinance should be, but rather their function is only to enforce the zoning ordinance in accordance with the applicable law." Id., quoting Ludwig v. Zoning Hearing Board of Earl Township, 658 A.2d 836, 838 (Pa.Cmwlth. 1995) (quoting In re Kline Zoning Case, 395 Pa. 122, 125, 148 A.2d 915, 916 (1959)). Therefore, the ZHB is required to apply the terms of the Ordinance as written and is not to deviate from those terms based on an unexpressed policy. Id.

Throughout its Reply Brief in Opposition to Appeal the ZHB emphasizes that it is not empowered to rewrite the Ordinance, while at the same time arguing that the results of the viewshed impact analysis and biological resource survey should be reviewed and weighed by the ZHB even though the Ordinance is silent on the matter. The Ordinance does not set forth any criteria to establish what the analysis or survey should contain. Nor does it provide any guidance to the ZHB on what to do with the results. Clearly, the ZHB erred in substituting its version of what it believed the Ordinance should state for that which was actually legislated by the County.<sup>5</sup> Id., citing

<sup>4</sup> We note that there is substantial evidence of record to indicate that PPM satisfied the remaining applicable subparagraphs of Section 1000-876 of the Ordinance.

<sup>5</sup> The law is clear that it is the function governing of the municipality to enact laws to regulate land use pursuant to its police power. Greth Development Group, Inc. v. Zoning Hearing Board of Lower Heidelberg Township, 918 A.2d 181, (Pa.Cmwlth. 2007). Since argument on this matter, §1000-876 of the Ordinance has been amended. The amendment was adopted on 1/29/09 and became effective on 2/1/09. In the amendment, the provisions relating to the viewshed impact analysis and the biological research survey remain unchanged.

Piscioneri v. Zoning Hearing Board of Borough of Muhall, 523 Pa. 597, 599-600, 568 A.2d 610, 611 (1990).

Additionally, in its Reply Brief In Opposition to Appeal of the Denial of Special Exception and Multiple Height and Setback Variances, the ZHB states the following:

After a review of all of the testimony and documentary evidence submitted with regard to subparagraphs F and G of Section 1000-876 of the Fayette County Zoning Ordinance, the Board concluded that while PPM met its burden to complete a view shed impact analysis and a biological research survey, that the results of said analysis and survey indicated a negative impact on the health, safety and general welfare of the adjacent community such that PPM failed to meet its burden to demonstrate compliance with said subparagraphs.

Thus, it appears that the ZHB is arguing that PPM met its initial burden of completing the viewshed analysis and biological resource survey but due to what the ZHB perceived as negative results PPM failed to meet its burden to demonstrate compliance with said subparagraphs. However, the only requirements contained in subparagraphs F and G that PPM needed to comply with was the completion of a viewshed analysis and biological resource survey. "By showing compliance with the specific requirements of the Ordinance, an applicant identifies the proposal as one which the local legislature has expressly designated to be appropriate in the district and, therefore, presumptively consistent with the promotion of health, safety and general welfare." Tennyson v. Zoning Hearing Board of West Bradford Township, 952 A.2d 739, 746 (Pa.Cmwlth. 2008), citing Bray v. Zoning Board of Adjustment, 48 Pa.Cmwlth. 523, 410 A.2d 909, 911 (1980).

Once PPM met its initial burden under the ordinance then the burden shifted to the objectors to show that the proposed use would have a negative impact on the health, safety and general welfare of the community. The ZHB stated in Resolution 07-80 that the Objectors sustained their burden to show that the wind turbine project would generally have detrimental effects on the health, safety, and general welfare of the adjacent community and Fayette County.

The law is clear that the objectors bear the duty and burden to rebut the presumption by proving that the proposed use will adversely affect the welfare of the community. Tennyson v. Zoning Hearing Board of West Bradford Township, supra, citing H.E. Rohrer v. Zoning Hearing Board of Jackson Township, 808 A.2d 1014, 1018 (Pa.Cmwth. 2002). When presenting evidence, the objectors must "raise specific issues concerning the proposal's general detrimental effect on the community before the applicant is required to persuade the fact finder that the intended use would not violate the health, safety and welfare of the community." Id., quoting Manor Healthcare Corp. v. Lower Moreland Township Zoning Hearing Board, 139 Pa.Cmwth. 206, 590 A.2d 65, 71 (1991). The objectors cannot meet their burden by setting forth mere speculation as to possible harm. Id. The objectors must prove there is a high degree of probability that the use will substantially affect the health, safety and welfare of the community. Id., quoting In re Archbishop O'Hara's Appeal, 389 Pa. 35, 53-54, 131 A.2d 587, 596 (1957). Additionally, the objectors must show that impact would be greater than would normally be expected from that type of use. In re Appeal of Martin, 108

Pa.Cmwth. 107, 111, 529 A.2d 582, 583 (1987), citing Kern v. Zoning Hearing Board of the Township of Tredyffrin, 68 Pa.Cmwth. 396, 449 A.2d 781 (1982).

In Resolution 07-80 the ZHB stated that the Objectors sustained their burden to show that the wind turbine project would generally have a detrimental effect on the health, safety and welfare of the community without indicating which specific issues were proven. However, in its Brief and Reply Brief, the ZHB cites to the testimony of David Cale, Mark Ickes, and Donna Holdorf regarding the impact on the viewshed and tourism. The ZHB points out that David Cale contrasted the height of the turbines at 262.5 feet and 407.5 feet with the blades with the Jumonville Cross at 65 feet. In its brief, the ZHB quoted the testimony of Mark Ickes as follows:

We are pleased to share with you that tourism is the second leading industry not only in the Commonwealth of Pennsylvania, but also within the Laurel Highlands region.

Our region host 1.4 million overnight visitors who spend nearly one billion dollars, with 300 million of this amount being spent in Fayette County alone on an annual basis. This spending supports more than 24,000 tourism-related jobs with over \$719,000,000 in annual tourism-related wages. (See hearing transcript of 12/19/07 at page 56 attached hereto as Appendix 3.)

Also, in its Brief the ZHB quoted the following testimony from Donna Holdorf, Executive Director of the National Road Heritage Corridor:

What this is about, from the perspective of the National Road Heritage Corridor, is the natural resources, the history that happened on this landscape, and the scenic beauty that has drawn visitors here to the Laurel Highlands and the Historic National Road for decades and will continue to do so for decades to come. This is also not about 150 temporary jobs or 3 to 4 full-time positions, and everything to do with thousands of direct and indirect jobs that are created and sustained by the tourism industry that is directly related to this place with its pristine landscape and amazing vistas.

People for generations have looked at this part of southwestern Pennsylvania as a destination that offers an escape from a landscape peppered with smokestacks and cell towers, skyscrapers, and congestion. The petitioners can argue that these wind turbines will not influence visitor numbers and can report that Somerset County and others have heard little in the way of complaints, but that can neither be qualified nor quantified, but it can be proven that close to 2 million visitors come to Fayette County and Ohio pyle every year. And while there's no way to predict how many will stop coming, can this County afford to take that risk?

The petitioners presented a viewshed study limited to 5 miles; and of course, there was minimal effect on the National Road because of the topography. In our opinion, the scope of the viewshed study was too limited. The viewshed will be affected from an even greater distance, and the turbines will be in clear view. I have a photo here today that was taken from the corner of Dinner Bell Road and Route 40 where Mystic Rock Golf Course is located, and you can see the wind turbines from that area. (See hearing transcript of 12/19/07 at pages 80-82 attached hereto as Appendix 3.)

The ZHB also states that it was cognizant to contrast the three or four permanent jobs created by the turbines with the numbers provided by Mark Ickes both as to potential tourism related jobs and income lost as a result of the negative impact on the viewshed. Mark Ickes, who was Vice President of Membership Services for the Laurel Highlands Visitors Bureau, testified that the Laurel Highlands Visitors Bureau has not taken an official position relative to wind turbines. (N.T. 12/19/07 p.59). Mark Ickes testified "they" were here to testify on behalf of one of their members, a former board chairman of theirs, David Cale. (N.T. 12/19/07 p.60). During Mark Ickes' testimony the following exchange took place:

Q. (by Mr. Rullo) But you're here to suggest that these wind turbines may have a detrimental effect upon tourism in this area; is that correct?

A. We are here really to express our concern as to how significant it would affect the viewshed.

Q. Oh, the viewshed. Are you suggesting that it would have a deleterious effect upon tourism?

A. That really, probably is unknown, to be honest.

(N.T. 12/19/07, pp.63-64).

Q. (by Mr. Bower) That's not what I asked you. I asked you do you have a resolution on the books -

A. No.

Q. - by your board that says to come here and oppose and state that there's a problem with the viewshed just because there's 24 windmills?

A. No.

Q. And that is your personal opinion about a viewshed; you haven't done any studies or been commissioned by anybody to do any studies? You don't have the expertise to determine whether or not there's any impact on the viewshed?

A. Myself personally?

Q. Yes.

A. No.

Q. So, that was your personal opinion when Ms. Mundorff asked you that question?

A. Yes, it was my personal opinion.

(N.T. 12/19/07, pp.67-69).

Q. (by Mr. Rullo) As Mr. Bower has indicated, you have no scientific basis to determine whether or not this would have any type of detrimental effect upon tourism at all?

A. No.

(N.T. 12/19/07, pp.70-71).

Clearly, the Objectors' testimony regarding the adverse impact to the viewshed and tourism amounts to nothing more than mere speculation. It is undisputed that due to their height and proposed location the turbines will be visible. It is also

undisputed that the turbines are known to kill bats.<sup>6</sup> The Objectors have not set forth any evidence to show that the impact on the viewshed and to the bats would be greater than would normally be expected from this type of use. The Objectors seem to assume that just because the turbines would be added to the Chestnut Ridge viewshed that this would cause a negative impact. The Objectors presented no expert testimony to support their position and they admit that there is no way to predict if people will stop coming to the area due to the turbines. While the concept of the general welfare of a community in zoning matters includes a consideration of aesthetics, aesthetics alone cannot support a determination that the health, safety and general welfare of a community would be adversely affected by the grant of a special exception. Heck v. Zoning Hearing Board for Harvey's Lake Borough, 39 Pa.Cmwlth. 570, 577-578, 397 A.2d 15, 19 (1979), *citing* County of Fayette v. Holman, 11 Pa.Cmwlth. 357, 315 A.2d 335 (1973); Soble Construction Co. v. Zoning Hearing Board, 16 Pa.Cmwlth. 599, 329 A.2d 912 (1974). Therefore, we believe the ZHB's decision regarding the viewshed analysis and biological resource survey is not supported by substantial evidence and that the ZHB made an error of law. Further, the record does not contain substantial evidence to support the ZHB's finding that the Objectors met their burden of proof.

<sup>6</sup> Many of the Objectors who were concerned about potential bat kill were not opposed to the grant of the special exception. They were simply asking the ZHB to impose conditions on the project to help protect the bats. (N.T. 12/19/07, pp. 32, 109; 1/30/2008, pp. 23-24).

In its Brief in Opposition, the ZHB also contends that the special exception was denied because PPM failed to satisfy the requirements contained in subparagraphs C and D of Section 1000-876 of the Ordinance. PPM does not dispute that the plan when viewed in its entirety does not satisfy the requirements contained in subparagraphs C and D. PPM argues that this was the reason it sought the approval of various setback and height related variances from the ZHB. Specifically, PPM was seeking the approval by special exception of 24 wind turbines. Due to the location of the turbines on the various tracts of land, PPM sought setback variances for the following 10 turbines:

Tower 5 (located on property owned by Ray and Carol Fields) 150 feet from the property line of the Pennsylvania State Gamelands.

Tower 7 (located on property owned by Neil Brown) 100 feet from the property line of Nolan Sutton and 40 feet from the property line of Robert and Jean Ellsworth.

Tower 11 (located on property owned by Neil Brown) 115 feet from the property line of Neil Brown.

Tower 19 (located on property owned by Coastal Lumber) 95 feet from the property line of Carbon Fuel).

Tower 2 (located on property owned by Neil Brown) 100 feet and 120 feet from the property line of Coastal Lumber.

Tower 33 [also identified as Tower 22] (located on property owned by Neil Brown) 55 feet from the property line of Coastal Lumber and 145 feet to the property line of Sylvia Dunham.

Tower 23 (located on property owned by Sylvia Dunham) 245 feet from the property line of Coastal Lumber.

Tower 24 (located on property owned by Neil Brown) 90 feet from the property line of Coastal Lumber.

Tower 25 (located on property owned by Neil Brown) 165 feet from the property line of Coastal Lumber.

Tower 26 (located on property owned by Coastal Lumber) 195 feet from the property line of Neil Brown.<sup>7</sup>

The law regarding the function of a zoning hearing board and its power to grant variances can be found in §910.2 of the Municipalities Planning Code (hereinafter "MPC") which reads as follows:

(a) The board shall hear requests for variances where it is alleged that the provisions of the zoning ordinance inflict unnecessary hardship upon the applicant. The board may by rule prescribe the form of application and may require preliminary application to the zoning officer. The board may grant a variance, provided that all of the following findings are made where relevant in a given case:

(1) That there are unique physical circumstances or conditions, including irregularity, narrowness, or shallowness of lot size or shape, or exceptional topographical or other physical conditions peculiar to the particular property and that the unnecessary hardship is due to such conditions generally created by the provisions of the zoning ordinance in the neighborhood or district in which the property is located.

(2) That because of such physical circumstances or conditions, there is no possibility that the property can be developed in strict conformity with the provisions of the zoning ordinance and that the authorization of a variance is therefore necessary to enable the reasonable use of the property.

(3) That such unnecessary hardship has not been created by the appellant.

(4) That the variance, if authorized, will not alter the essential character of the neighborhood or district in which the property is located, nor substantially or permanently impair the appropriate use

<sup>7</sup> Since argument on this matter, PPM has notified this Court that it is no longer requesting a setback variance for Tower 5 because the location of the turbine has been adjusted to eliminate the need for any setback variance.

or development of adjacent property, nor be detrimental to the public welfare.

(5) That the variance, if authorized, will represent the minimum variance that will afford relief and will represent the least modification possible of the regulation in issue.

(b) In granting any variance, the board may attach such reasonable conditions and safeguards as it may deem necessary to implement the purposes of this act and the zoning ordinance.

53 P.S. §10910.2. Similar to the provisions set forth in the MPC, the Ordinance provides the following:

**Variances**

A. The applicant must provide evidence to the Zoning Hearing Board regarding the need for the variance based upon the following criteria:

1. That there are unique physical circumstances or conditions, including irregularity, narrowness or shallowness of lot size or shape, or exceptional topographical or other physical conditions peculiar to the particular lot and that the unnecessary hardship is not financial and is due to such unique physical conditions and not the circumstances or conditions generally created by the provisions of this chapter in the zoning district in which the lot is located.
2. That because of such physical circumstances or conditions, there is no possibility that the lot can be developed in strict conformity with the provisions of this chapter and that the authorization of a variance is therefore necessary to enable the reasonable use of the lot.
3. That such unnecessary hardship relating to unique physical circumstances of the property has not been created by the applicant.
4. That the variance, if authorized, will not alter the essential character of the neighborhood or zoning district in which the lot is located, nor substantially or permanently impair the appropriate use or development of adjacent lot, nor be detrimental to the public welfare.

5. That the variance, if authorized, will represent the minimum variance that will afford relief and will represent the least modification possible of the regulation in issue.

B. The grant of a variance will expire six (6) months after the date of the Board's written decision unless:

1. The applicant has applied for an obtained a building permit and commenced construction, or
2. In a case where the variance does not require the issuance of a building permit, the applicant has applied for and obtained an occupancy permit and has commenced the use which is the subject of the variance.

C. In granting a variance, the Zoning Hearing board may attach such reasonable conditions and safeguards as it may deem necessary to implement the purposes of this chapter and the Pennsylvania Municipalities Planning Code.

Fayette County Zoning Ordinance, Article XI §1000-1102.

Generally, variances are granted only under exceptional circumstances and only when an applicant satisfied all criteria necessary for the grant of a variance. Pektor v. Zoning Hearing Board of Williams Township, 671 A.2d 295, 298 n.3 (Pa.Cmwth. 1996), *citing* Gateside-Queensgate Co. v. Delaware Petroleum Co., 134 Pa.Cmwth. 603, 580 A.2d 443 (1990). "The reasons for granting a variance must be substantial, serious and compelling." *Id.*, *citing* Valley View Civic Association v. Zoning Hearing Board of Adjustment, 501 Pa. 550, 462 A.2d 637 (1983).

The law is clear that an applicant seeking a variance must show that unnecessary hardship will result if a variance is denied and that the proposed use will not be contrary to the public interest. Hertzberg v. Zoning Board of Adjustent of the City of Pittsburgh, 554 Pa. 249, 721 A.2d 43 (1998), *citing* Allegheny West Civic Council.

Inc. v. Zoning Board of Adjustment of the City of Pittsburgh, 547 Pa. 163, 167, 689 A.2d 225, 227 (1997). When determining whether unnecessary hardship has been established, courts should examine whether the variance sought is use or dimensional. Id. When seeking a dimensional variance within a permitted use, the applicant is requesting only a reasonable adjustment of the zoning ordinance in order to utilize the property in a manner consistent with the applicable regulations. Id. "Thus, the grant of a dimensional variance is of lesser moment than the grant of a use variance, since the latter involves a proposal to use the property in a manner that is wholly outside the zoning regulation." Id. at 257, A.2d at 47. Therefore, the quantum of proof required to establish unnecessary hardship is less stringent when the variance sought is dimensional. Township of East Caln v. Zoning Hearing Board of East Caln Township, 915 A.2d 1249 (Pa.Cmwlt. 2007), quoting Hertzberg v. Zoning Board of Adjustment of the City of Pittsburgh, supra. When determining whether a dimensional variance should be granted, courts may consider multiple factors such as the economic detriment to the applicant if the variance was denied, the financial hardship created by any work necessary to bring the structure into strict compliance with the zoning ordinance, and the characteristics of the surrounding neighborhood. Id.

Additionally, in cases where the requirements for a variance have not been met, the zoning hearing board may nonetheless grant a de minimis variance where the applicant is seeking only a minor deviation from the zoning ordinance and rigid compliance is not absolutely necessary to protect the public policy concerns inherent in the ordinance. Township of Middletown v. Zoning Hearing Board of

Middletown Township, 682 A.2d 900 (Pa.Cmwth. 1996). An applicant seeking a de minimis variance does not have to meet the heavy burden for obtaining a variance. Bailey v. Zoning Board of Adjustment of the City of Philadelphia, 569 Pa. 147 n. 21, 801 A.2d 493 (2002), citing Stewart v. Zoning Hearing Bd. Of Radnor Township, 110 Pa.Cmwth. 111, 531 A.2d 1180, 1182 (1987). There is not set criteria for a de minimis variance and the de minimis variance is to be granted according to the particular circumstances presented in each case. *Id.* (citations omitted).

PPM first argues that the language contained in Section 1000-1102(A)(1) of the Ordinance requiring that the unnecessary hardship justifying a variance "is not financial" is invalid because it conflicts with Section 910.2 of the MPC as well as established case law. The ZHB states that it is not empowered or authorized to make a decision to invalidate the ordinance or to rewrite the ordinance when making a decision in a zoning case.

One of the many intents of the MPC is to accomplish coordinated development and to permit municipalities to minimize such problems as may presently exist or which may be foreseen. 53 P.S. §10105. The MPC provides that "zoning ordinances may contain provisions for special exceptions and variances administered by the zoning hearing board, *which provisions shall be in accordance with this act.*" 53 P.S. §10603(c)(1) (emphasis added). The law is clear that the provisions set forth in the MPC take precedence over and invalidate, to the extent of their inconsistency, all local zoning ordinances. Boyd v. Zoning Hearing Board of Churchill Borough, 83 Pa.Cmwth. 110, 114, 476 A.2d 499, 501 (1984), citing 53 P.S. §10103; Atlantic Richfield Co. v. Della

Vecchia, 69 Pa.Cmwlth. 235, 450 A.2d 792 (1982); Cohen v. Ford, 19 Pa.Cmwlth. 417, 339 A.2d 175 (1975). It should be noted that the language of the ordinance does not have to be identical to that of the MPC in order to be consistent with its provisions; it is enough that the application of the Ordinance language creates no conflict with the provisions mandated by the MPC. Id. at 114, A.2d at 502. Therefore, the MPC provisions would take precedence over the Ordinance to the extent that the "is not financial" language contained in the Ordinance conflicts with the MPC.

The ZHB argues in its Reply Brief that it is not necessary to invalidate that portion of the Ordinance because the remaining specific language of the Ordinance regarding the need for an applicant to demonstrate a unique physical condition of the property in order to allow the ZHB to grant a variance is exactly the same language found in the MPC and PPM failed to present evidence establishing the same.

However, we note in its Resolution, the ZHB only found that PPM did not present testimony to constitute a hardship which would necessitate the setback variance request and that a denial of its request for multiple setback variances would result in less profit being realized by PPM. No where in Resolution 07-80 nor during the February 20, 2008, voting proceedings, did the ZHB consider the testimony presented by PPM and how it related to the requisite criteria needed to obtain a variance. It appears that the ZHB determined that the hardship was financial in nature and stopped its analysis there. In doing so the ZHB ignored the testimony of Gary Verkleeren when addressing the need for the variances. A few of the relevant portions of Mr. Verkleeren include the following:

And when we come up with proposed locations for turbines where we're basing that on separation distance from the location that is to the North and South of it, because we generally have a westerly wind operation and also because we locate them in an east-west orientation such that we're capturing the highest elevations. So, it's sometimes the case that they fall pretty close to a property line; and we do that to maximize the performance of the machine and the output. (N.T. 10/17/07, p. 51).

Mainly what we look for is ground surface elevation is indicative of better performance. So, if we can locate a turbine on the same property, usually the highest elevation on that property in that east-west direction is what we seek. But again, that location, was mainly selected for wind resource assessment and location, separation of distances between dwellings along Skyline Drive. It was pushed as far west as possible on that parcel because of dwellings to the east. (N.T. 10/17/07, p. 70).

Clearly, the reason for seeking the variances is more involved than simply loss of profits.

Also, not all criteria must be satisfied in every case and the quantum of proof necessary is not as stringent when seeking a dimensional variance. See 53 P.S. §10910.2; Wilson v. Plumstead Township Zoning Hearing Board, 894 A.2d 845 n.13 (Pa.Cmwlth. 2006); Hertzberg v. Zoning Board of Adjustment of the City of Pittsburgh, supra. We believe that the ZHB committed an error of law by relying solely on the "hardship is not financial" language contained in the Ordinance without regard to any of the other provisions of the Ordinance.

Further, it is important to note that each application for a variance must be judged on its own merits. North Huntingdon Township Board of Adjustment v. Drop, 6

Pa.Cmwltth. 64, 293 A.2d 144 (1972). Here, a separate application was filed for each parcel of land. Yet the ZHB considered all the applications as a whole not individually.<sup>8</sup>

Additionally, the setback variances sought by PPM only applied to 10 of the 24 turbines. Nonetheless, the ZHB cites to PPM's failure to comply with subparagraph D for the denial of all 24 turbines. Clearly, the 14 turbines not requiring a setback variance complied with subparagraphs D.

The ZHB also cited PPM's failure to comply with subparagraph C for the denial of the special exception. As stated above, subparagraph C of the Ordinance provides that the height of the turbine (excluding blades) shall not exceed 250 feet.<sup>9</sup> PPM sought a variance to allow them to build the turbines to the current industry standard of 262.5 feet. The ZHB contends that PPM failed to comply with subparagraph C even though the record shows that the ZHB neither approved nor denied the request for a height variance. In fact, the ZHB admitted in its Brief in Opposition that it did not reach the question of whether it could grant the request for multiple height variances based on a de minimis theory. Further, Gary Verkleeren from PPM testified that if necessary they could special order the smaller turbines for the project.<sup>10</sup> (N.T. 10/17/07, pp. 32, 37). Therefore, with or without the variance PPM established that they would comply with subparagraph C. Accordingly, the ZHB should

<sup>8</sup> During the January 30, 2008, hearing ZHB member Mark Rafail stated that he intended to vote on one tower at a time. (N.T. 1/3/08, pp. 71-72) However, the transcript of the February 20, 2008, voting proceedings does not indicate that the voting was done in this fashion.

<sup>9</sup> Under the January 29, 2009, amendment to §1000-876, the height of a wind turbine (excluding blades) shall now not exceed 300 feet.

<sup>10</sup> However, Samuel E. Enfield testified that he did not believe the project would be cost-effective if it had to obtain shorter towers. (N.T. 10/31/07, pp.44-45).

have at least approved the special exception for the turbines not requiring setback variances.

Finally, the ZHB argues that even if it found that PPM satisfied all the objective criteria contained in Section 1000-876 of the ordinance that PPM failed to meet its burden of proof with regard to expressions of general policy set forth at Sections 603(g)(2) and 604(1) of the MPC and Article XII of the Fayette County Zoning Ordinance to obtain a special exception.

We find the ZHB's reliance on Article XII to be misplaced. Article XII of the ordinance provides the following:

#### ARTICLE XII

##### Heritage Preservation

The purpose of this Article is for future amendments that will address economic development through tourism, and put in place appropriate code language to protect, enhance and develop Fayette County's natural, cultural, historic and heritage assets in accordance with the Pennsylvania Municipalities Planning Code, citations for which are included below.

##### Municipalities Planning Code Section 603. Ordinance Provisions.

(g)(2) zoning ordinances shall provide for protection of natural and historic features and resources.

##### Section 604. Zoning Purposes. The provisions of zoning ordinances shall be designed:

- (1) To promote, protect and facilitate any or all of the following: the public health, safety, morals, and the general welfare; coordinated and practical community development and property density of population; emergency management preparedness and operations, airports, and national defense facilities, the provisions of adequate light and air, access to incident solar energy, police protection, vehicle parking and loading space, transportation, water, sewerage, schools,

recreational facilities, public grounds, the provision of a safe, reliable and adequate water supply for domestic, commercial, agricultural or industrial use, and other public requirements; as well as preservation of natural, scenic and historic values in the environment and preservation of forests, wetlands, aquifers and floodplains.

**Section 605. Classifications.**

(2) For the regulation, restriction or prohibition of uses and structures at, along or near:

- (vi) places having unique historical, architectural or patriotic interest of value; or
- (vii) flood plain areas, agricultural areas, sanitary landfills, and other places having special character or use affecting and affected by their surroundings.

Clearly, nothing contained in Article XII pertains to an applicant's burden of proof regarding compliance with expressions of general policy. The sections of the MPC cited in Article XII merely provide the purpose of zoning and provisions local zoning ordinances must contain.<sup>11</sup>

As for expressions of general policy concern, the law is clear that the Objectors bear the initial evidence presentation duty and the persuasion burden. Bray v. Zoning Board of Adjustment, supra at 530-531, A.2d 912-912. The zoning ordinance cannot place the burden on the applicant or shift the duty to the applicant. Id.

In paragraph 5 of the conclusions of law contained in Resolution 07-80, the ZHB states, "[t]he Petitioner for a special exception must *persuade* the Zoning Hearing Board that the proposal complies with all of the objective requirements of the zoning ordinance *and expressions of general policy* and planning in order to obtain

<sup>11</sup> We note that one of the purposes of the MPC itself is to "promote the conservation of energy through the use of planning practices and to promote the effective utilization of renewable energy sources. 53 P.S. §10103.

approval of the special exception." (emphasis added) Clearly, the ZHB improperly shifted the burden on to PPM. This is an error of law.

Accordingly, we find that the ZHB abused its discretion and committed errors of law in denying PPM's requests for special exception. Since the ZHB has exclusive jurisdiction to hear and render final adjudications in applications for variances and upon consideration that the ZHB has failed to do so in this case, we remand this action back to the ZHB for further proceedings consistent with this opinion. The ZHB shall consider and grant each special exception as required by law and may impose whatever conditions they deem fit to protect the health, safety and general welfare of the community.

BY THE COURT:

  
RALPH C. WARMAN, JUDGE J.

ATTEST:

  
PROTHONOTARY

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

PPM ATLANTIC RENEWABLE, :

Appellant, :

Vs. :

FAYETTE COUNTY ZONING  
HEARING BOARD, :

Appellee, :

NEIL BROWN, ESTATE OF  
SYLVIA N. DUNHAM, COUNTY OF  
FAYETTE and THOMAS J.  
BOZEK, :

Intervenors. : NO. 1112 of 2008 G.D.

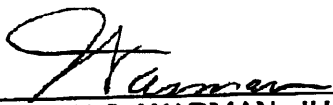
FILED  
MAY 01 2009 P 3 53

ORDER

AND NOW, this 30<sup>th</sup> day of April, 2009, upon consideration of the Land Use Appeal filed by Appellant, PPM Atlantic Renewable, and after argument thereon, it is hereby ORDERED and DECREED that the appeal is GRANTED. The decision of the Fayette County Zoning Hearing Board is REVERSED and this matter is REMANDED


back to the Fayette County Zoning Hearing Board for proceedings consistent with the foregoing Opinion.

BY THE COURT:

  
\_\_\_\_\_  
RALPH C. WARMAN, JUDGE

ATTEST:

  
\_\_\_\_\_  
PROTHONOTARY

TRUE AND ATTESTED COPY  
  
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PROTHO NOTARY