

**IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA**

<b>LAUREL HILL WIND ENERGY, LLC :</b>	:	
<b>Appellants</b>	:	
	:	
<b>v.</b>	:	<b>No. 06-01,620</b>
	:	<b>CIVIL ACTION</b>
<b>LYCOMING COUNTY ZONING</b>	:	
<b>HEARING BOARD,</b>	:	
<b>Appellee</b>	:	
	:	
<b>and</b>	:	
	:	
<b>LYCOMING COUNTY PLANNING</b>	:	
<b>COMMISSION,</b>	:	
<b>Intervenor</b>	:	
	:	
<b>and</b>	:	
	:	
<b>ARTHUR PLAXTON,</b>	:	
<b>Intervenor</b>	:	
	:	<b>LAND USE APPEAL</b>

**OPINION AND ORDER**

On January 14, 2005, Laurel Hill Wind Energy, LLC, (“Appellant”) filed an Application for Special Exception (“Application”), pursuant to Section 10130 and Division 10300 of the Lycoming County Zoning Ordinance, (“Ordinance”) setting forth its intent to construct and operate a wind energy project (“Project”) along the

Laurel Hill Ridge in Jackson and McIntyre Townships<sup>1</sup>. Laurel Hill is a private, for profit corporation that does not own land in Lycoming County. The Appellant's application summarizes its comprehensive description of the proposed project as a 70.5 MW wind-powered electric generating, transmitting and interconnecting facility that will consist of 47 1.5 MW individual turbines<sup>2</sup> located along the Laurel Hill Ridge, an approximate 2-mile long 34.5 kV overhead electric transmission line, a new switchyard and substation, and approximately 13.8 miles of access and service road corridors. (Appellant's Application at 1-1, 2-1). Should the Special Exception be granted, Laurel Hill would be leasing 706 acres of land of which 246 acres would be initially disturbed to construct the wind farm. All structures would be built on land leased by multiple land owners located in both Jackson and McIntyre Townships. The properties utilized by the project are primarily located within a Resource Protection Zone<sup>3</sup>, although a portion of the

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<sup>1</sup> Neither Jackson nor McIntyre Township have zoning ordinances, therefore pursuant to 53 Pa. C.S. §10602, the Lycoming County Zoning Ordinance "shall...apply to those municipalities which have no Zoning Ordinances in effect at the time the County Zoning Ordinance is enacted." See, Ordinance, Division 1400 A.

<sup>2</sup> During the course of the hearings, and based in part on the recommendations of the Lycoming County Planning Commission, the Appellant agreed to reduce the number of proposed turbines to 35 2.0 megawatt turbines. This announcement was made at the June 14, 2006 hearing.

<sup>3</sup> Resource Protection Zone (RP) is defined under Section 2310A of the Ordinance. This district is intended to protect the most important and sensitive natural areas as designated in the County Comprehensive Plan, which contribute greatly to the quality of life in Lycoming County. Protection of timber and other forest resources, wildlife habitat, special plant communities, scenic resources, and other natural areas is the primary objective. Continued harvesting of resources such as timber and game is an important activity of this District and can be beneficial to the resource if conducted properly.

The Resource Protection District discourages intensive growth by requiring large site areas and setbacks that also preserve the rural character of the area where it is used. The minimal development which is allowed must be located so as to maximize the amount of undisturbed natural areas. Examples of areas which may fall within the resource Protection District include State Game lands and private Hunting /Fishing preserves.

project site is located in an Agricultural Zone<sup>4</sup>. The purpose of the Project is to generate electricity from wind energy to be sold to suppliers of electricity licensed under the PA Utilities Commission to provide electric power service to the public. Four to six people would be required to operate and maintain the wind farm. A chain link fence will protect the substation and switchyard; gates would restrict traffic on access roads.

Prior to the start of the Special Exception hearings, the Zoning Administrator, Fred Pfeiffer, determined that the use classification of the windmill project would be as a “public use”<sup>5</sup> as windmills are not specifically listed in the Ordinance. Using Section 3110 of the Ordinance, the Officer determined that the Project is “similar to utility substations or transmission and distribution facilities for electric...services” which is a specifically enumerated public service use permitted by special exception.<sup>6</sup> The Zoning Administrator determined that the

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<sup>4</sup> Agricultural District (AG) is defined under Section 2310B of the Ordinance. This rural district is intended to maintain, preserve and protect areas of Lycoming County that are predominantly agricultural in use, and/or have historically demonstrated high agricultural productivity. Lands of this classification should not be used to accommodate County’s growth. These lands are generally rated as Class I, II and III soils by the U.S. Department of Agriculture, Soil Conservation Service. As a matter of policy, it is hereby determined that the highest and best use of these lands is agriculture. The district is intended to prevent or reduce land use conflicts by restricting the type and amount of nonfarm development in farming areas.

The Agricultural district is also intended to encourage farmers to invest in farm improvements and to discourage land speculation. Each area of the County where this district is applied is not intended to accommodate growth in the future and therefore petitions for rezonings shall be discouraged. The Agricultural (AG) District designation also ensures that continuation of the rural character of these areas of the County.

<sup>5</sup>Public Service Use is defined in the Ordinance at Section 3230C.1 as follows: These uses include emergency service facilities, such as heliports, buildings and garages essential to ambulance, fire, police and rescue operations; utility substations or transmission and distribution facilities for fire, electric, telephone and television cable service, excluding communication towers; pumping stations; highway maintenance storage areas; and other similar publicly owned facilities, excluding solid waste facilities as defined by the PA Solid Waste Management Act. Public Service is further defined by the Ordinance at Section 14300. Any facility or service provided by the local or federal government, or duly authorized by the state of Pennsylvania to provide services to the general public.

<sup>6</sup> Section 3110 provides that the uses permitted in each District are specifically designated in Section 3120. Other than by zoning change, no use which is expressly prohibited shall be built in a District. The Zoning Administrator

wind farm would be considered a “public service use” which is allowed by right in an Agricultural District and by special exception in a Resource Protection District. (Appeal of Zoning Hearing Board decision, Paragraph 11, 7/25/2005.)

After a timely appeal was filed by Grey’s Run Club to the public use designation, the Board held hearings on the matter on April 27 and June 22, 2005. The Board issued its decision on July 25, 2005 affirming the Zoning Administrator’s determination that the use did qualify as a public service use. Counsel for Gray’s Run Club<sup>7</sup> argued that the project was not a public service use; it was “neither authorized by the Commonwealth of PA nor does it offer a service to the general public”. Judge Dudley N. Anderson in his opinion of December 19, 2005, determined that both the Zoning Administrator and the Board acted within their respective authority under the Ordinance. Judge Anderson also found that the Zoning Administrator was authorized to permit uses which are not specifically listed as long as they are similar to those which are, provided that they are not specifically prohibited or excluded. Since Gray’s Run discontinued their appeal to the Commonwealth Court on May 30, 2006, Judge Anderson’s decision as to the public service use determination is final.

On June 14, 2006, after more than twenty-six (26) public hearings, beginning on February 23, 2005 and concluding on June 14, 2006, the Lycoming County Zoning Hearing Board (“Board”) voted to deny the Appellant’s application

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however, may make a determination to permit uses which are not specifically listed but are similar to uses that are expressly permitted in Section 3120.

<sup>7</sup> Gray’s Run Club is a party to this action by virtue of the fact their land is located in Jackson Township, adjacent to the property being leased by Appellant.

by a vote of three to two (3-2). The Board issued its written decision and order consistent with this vote on July 14, 2006.

On August 10, 2006, the Appellant filed the appeal before this Court. On September 18, 2006, the Court granted the September 11, 2006 petitions of both Arthur Plaxton and the Lycoming County Planning Commission (“LCPC”) to intervene. On December 4, 2006, the Court, pursuant to Pa.R.C.P. No. 2327(4) summarily denied Walter and Maureen Wroblewski’s Petition to Intervene. Following this Court’s Order of September 18, 2006, the Appellant, the Board, and the Intervenors submitted briefs; amicus curiae briefs on behalf of Jackson Township, McIntyre Township, and Walter and Maureen Wroblewski were also submitted. On December 18, 2006, the Court heard oral arguments from the above captioned parties.

Because no evidence was presented to the Court beyond the evidence heard by the Board, our review is limited to determining whether the Board’s decision constituted an error of law or an abuse of discretion. [R.K. Kibblehouse Quarries v. Marlborough Township Zoning Hearing Board](#), 157 Pa. Commonwealth Ct. 630, 633, 630 A.2d 937, 940 (1993). The Board abuses its discretion when its findings are not supported by substantial evidence. [Hudachek v. Zoning Hearing Board of Newtown Borough](#), 147 Pa. Commonwealth Ct. 566, 570, 608 A.2d 652 (1992). Substantial evidence is defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Id. Here, where the Board has denied a special exception, our review is limited to determining whether substantial evidence supports the

Board's denial or whether they erred as a matter of law. The Board's findings of fact shall not be disturbed by (this Court) if supported by substantial evidence, and that (this Court) may not simply substitute its own findings for the Board's because it disagrees with them. [Boundary Drive Associates v. Shrewsbury Township Board of Supervisors](#), 507 Pa. 481, 489, 491 A.2d 86, 90 (1985).

A special exception is a conditionally permitted use, legislatively allowed where specific standards detailed in an ordinance are met. [Lafayette College v. Zoning Hearing Board](#), 138 Pa.Commonwealth Ct. 579, 583, 588 A.2d 1323, 1325 (1991). An applicant bears the initial burden of proving that the proposed use complies with all the objective requirements of the zoning ordinance.

[Birmingham Twp. v. Chadds Ford Tavern](#), 132 Pa.Commonwealth Ct. 312, 316, 572 A.2d 855, 857(1990). Thereafter, the burden shifts to those who oppose the application to prove that, if allowed, the use would be detrimental to the public health, safety and welfare. [Bray v. Zoning Board of Adjustment](#), 48

Pa.Commonwealth Ct. 523, 527, 410 A.2d 909, 911 (1980). Once an applicant proves that the proposed use complies with the specific standards in the ordinance, the special exception may not be denied unless the opponents have carried their burden. [Dotterer v. Zoning Hearing Board](#), 138 Pa.Commonwealth Ct. 615, 622, 588 A.2d 1023, 1026 (1991). The objectors to the application have both the duty of presenting evidence and the burden of persuasion, that the use will have a generally detrimental effect on health, safety and welfare or will conflict with expressions of general policy contained in the ordinance.

In the appeal before this Court, the standard which must be met by the Appellant to obtain a special exception is derived from Section 10310 of the Ordinance.

No application for a special exception shall be approved unless the Lycoming County Zoning Hearing Board specifically finds that the proposed Special Exception use is appropriate in the location for which it is proposed. The finding shall be based on the following criteria:

- A. The proposed use and location shall be consistent with the general purpose, goals, objectives, and standards of the adopted Lycoming County Comprehensive Plan, this Ordinance, or any other plan, official map or Ordinance adopted by the County or Municipality.
- B. The proposed use at the proposed location shall not result in a substantial or undue adverse effect on adjacent property, the character of the neighborhood, traffic conditions, parking, public improvements, public sites or right-of-way, or other matters affecting the public health safety, and general welfare.
- C. The proposed use in the proposed area will be adequately served by, and will not impose an undue burden on, any public improvements, facilities, utilities, or services. Where any such improvements, facilities, utilities or services are not available or adequate to service the proposed use in the proposed location, the applicant may, as part of the application for a Special exception, enter into a voluntary agreement with the affected municipality(ies) for the provision of such improvements, facilities, utilities and services in such sufficient time, and in a manner consistent with the Comprehensive Plan, this Ordinance, or other plans, official maps, and ordinances adopted by the County of Municipality to service the development. Approval of the Special Exception may be conditioned upon the provision of such improvements, facilities utilities or services.

In its decision, the Board found that the proposed use was one permissible within the zoning districts in question by either right or special exception. However, the Board concluded the wind farm project did not meet each of the three criteria set forth in the statute. Specifically, the Board stated that the project was 1) not consistent with the general purpose / goals of the Comprehensive Plan; 2) it would create substantial or undue adverse effects, and; 3) both the LCPC and Appellant have both failed as a matter of law, to demonstrate the mitigation of adverse impacts the project would create to the area. Since there is support enumerated in the record by the Board for the findings made, this Court finds those determinations made by the Board, both separately and collectively, are sufficient as a matter of law to sustain the denial of the application for special exception.

**The project is not consistent with the general purpose / goals of the Comprehensive plan**

The Board in its finding number 41 determined that the request to build the project would be located primarily in a Resource Protection (RP) District which is intended to protect the important and most sensitive natural areas as designated in the County Comprehensive plan. The Board cited Section 2310 (A) in pertinent part,

“the protection of timber and other forest resources, wildlife habitat, special plant communities, scenic resources and other natural areas is the primary objective...the Resource Protection District discourages intensive growth...the minimal development which is allowed must be located so as to maximize the amount of undisturbed natural areas (emphasis added).”

In finding 47, The Board found that the mitigating conditions<sup>8</sup> listed by the Planning

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<sup>8</sup> The Mitigation measures, 34 in number, were presented to the Board on May 31, 2006, by the Executive Director of the Lycoming County Planning Commission, Jerry Walls, and were listed as follows.

1. The width of the construction road would be reduced to a final width of the maintenance road after construction is complete. The final surface of the maintenance road will be constructed using the Driving Surface Aggregate Specifications of the PA Dirt and Gravel Road Maintenance Program.
2. Storm water runoff must be managed to encourage infiltration in accordance with the provisions of the DEP Model Storm water Ordinance and to maintain existing hydrologic conditions.
3. Developer shall comply with the National Pollution Discharge Elimination System, NPEDS permit and provide a timely response to inspection reports from the Lycoming County Conservation District and the PA Department of Environmental Protection.
4. The Board require the developer to remove turbine number 1 from the location within the Upper Lycoming scenic area (approximately 107 feet to the west)
5. The turbines must be set back from the North rim of the ridge to the extent that it is feasible.
6. Relocating the tower(s) visible from Buttonwood Covered Bridge, to not be in view from the bridge.
7. Require the evaluation of alternative routing of the power line and alternative design methods to minimize the permanent scar of the power line right of way. Require evaluation of differential impacts of underground vs. overhead power transmission line from turbines to Pennelec main line.
8. Clearing of right of ways shall be minimized and revegetated.
9. Tower height should be no taller than absolutely necessary for economical power generation. Tower, nacelle and blades should be of nonreflective material and finishes.
10. The Z H Board should recognize the exiting agreements [between LHWE and Jackson Township and McIntyre Township] as a condition of approval for Section 10310 that has been satisfied.
11. Applicant shall be required to provide protective design measures at the land development plan stage and provide a surety or specific listing of the McIntyre Water Authority as an additional insured for any damage to the potable water well field owned by the McIntire Water Authority [or the Ralston Area Authority.]
12. Require reasonable response and cooperation with appropriate insurance coverage [naming the McIntyre Township Water Authority, Jackson and McIntyre Township Supervisors as additional insured's] including corrective actions in a prompt manner and redress/reparations for unanticipated or force majeure events.
13. The transportation plan must be completed and approved by the Lycoming County Planning Commission and Penn DOT in conjunction or consultation with Jackson and McIntyre Township officials.
14. The conditions of approval should ensure that the financial obligations of Laurel Hill Wind Energy, LLC and any successor and assign are sufficient to cover any damage to both townships' road network. Applicant shall be required to provide performance bond for road and any property damage to Laurel Hill Road, Williamson Trail, Marshall Road and Red Run Road staging areas including Route 14 at the base of Red Run Road storage/staging areas.
15. Applicant shall be required to instruct and enforce with all construction contractors and suppliers that certain roads as established by McIntyre and Jackson Townships, be avoided by heavy trucks and construction equipment, namely Cross Road and Mountain School Road. Intersections may be accessed.
16. A Hazards Mitigation/Spill Prevention/Response Plan must be prepared and approved by the LCPC, with review and input from the Lycoming County Department of Public Safety (LCDPS) and the Liberty-Ralston Fire Companies.
17. Emergency Plan must address icing conditions on access roads and on rotor blades.
18. Request applicant to assist with funding and educational programming for a safe visitor outlook at an appropriate location not within a residential neighborhood.
19. The number, intensity, and flash frequency of warning lights shall be minimized to no more than what is specified in the FAA permit.

Commission will not sufficiently guarantee that the project site and the neighboring areas will retain a scenic or natural quality. In fact, the Board specifically found the recommendations of the LCPC such as special paint for the towers or a request (of the

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20. The Applicant shall conduct a scientifically acceptable three year post construction mortality study and analysis to monitor and determine impacts to avian migrants. Appropriate post construction mitigation measures shall be developed, addressing bird impacts if needed; to reduce any identified substantial impacts.
  21. The towers shall be set back at least 50 meters from edge of the escarpment to reduce raptor collision risk unless the applicant demonstrates that the setback is not feasible.
  22. The Applicant shall conduct a fall bat migratory study and evaluate the results prior to the placement and construction of towers.
  23. The Applicant shall conduct a scientifically acceptable three year post construction mortality study and analysis to monitor and determine impacts to bat migrants. Appropriate post construction mitigation measures shall be developed, addressing bat impacts as needed; to reduce any identified substantial impacts.
  24. The Applicant will not create any adverse hydrogeologic impacts when excavating the tower pads. Excavation shall be conducted in consultation with a qualified professional geologist with expertise in hydrology. The professional geologist shall state in writing that the implementation of the excavation plan will produce no impact to the groundwater contribution.
  25. Avoid channeling storm water runoff and utilize overland sheet flow and other infiltration techniques for recharge.
  26. Maintain the natural flow regime throughout the site including wetlands and spring recharge areas by providing conduits beneath the roadway or other means, as necessary.
  27. Geologic testing for pyretic rock or other geologically unstable materials shall be conducted at each tower site, and the tower shall be relocated, as a first alternative, at any site where these materials are encountered. If avoidance is not feasible due to lack of other available sites, then mitigation shall be conducted in accordance with a scientifically accepted protocol.
  28. Further investigation of potential impacts to high value wetlands identified in the Lycoming County Natural Diversity Inventory is needed in order to more fully identify any needed mitigation plans during construction of the access road and towers. This will be addressed prior to Land Development Plan Submittal and Approval.
  29. The revised tower layout and all wildlife studies shall be submitted for review by the USFWS, and any respective associated mitigation measures identified, prior to Land Development review. Land restoration and improvements to enhance biodiversity shall be undertaken.
  30. Require ongoing compliance with the then current noise standards and monitoring of noise, electronic interference, lighting impacts and other operational practices on the general community health safety and general welfare to be reported to the townships and LCPC as conditions or incidents warrant, but no less frequently than once per year upon the anniversary of the Zoning Permit.
  31. Monitoring shall be conducted or directed by the County Zoning Administrator and all complaints shall be responded to by the Applicant and disposition documented.
  32. Develop a Decommissioning Agreement and provide an appropriate financial surety for dismantling and removal of turbines, towers, all associated equipment, and facilities/structures in accordance with the Agreement.
  33. Laurel Hill Wind Energy, LLC (LHWE) and any successor and assign, will play all taxes due and owing under the law.
  34. If the Laurel Hill Wind Energy project is determined to be tax exempt, LHWE and any successor and assign will make an annual payment in lieu of taxes to the County of Lycoming to be negotiated with the current Board of County Commissioners.

FAA) for minimal aircraft warning lights, did not mitigate the impact the manmade towers would have on the scenic landscape. In its finding 48, the Board found, positive aspects of the project notwithstanding, that the manmade structures are inherently inconsistent with the concept of a natural area. It would appear from the emphasis used in its finding 41, along with the other findings aforementioned, the Board determined that the project would fail to protect the scenic resources and other natural areas and would greatly reduce the amount of undisturbed natural areas which exist in the Laurel Hill region, therefore finding the Appellants burden was not met. The Court finds that by basing its decision in any part on this rationale, the Board is in effect amending the ordinance and acting outside the scope of its authority. See, [Zajac v. Zoning Hearing Board of Mifflin Township](#), 41 Pa. Commonwealth Ct. 7, 398 A 2d 244 (1979).

In its argument in defense of its decision, the Board, believes that in the absence of a specific designation that windmills are appropriate for a RP District, it is “within their authority to construe the legislative intent of the drafters of the ordinance and take into account the statements of purpose with regard to the zone in question when applying the criteria for a Special Exception”. (Brief of Board, p. 10) Although not specifically stated in the Board’s decision, Intervenor Plaxton argues that although the Project may be properly a public use, its scope and size is neither what the Ordinance nor the County had in mind when allowing a use by special exception in this district.

In considering this issue, we are mindful that ordinances are to be construed expansively, affording the landowner the broadest possible use and enjoyment of its land. [Rabenold v. Zoning Hearing Bd. of Palmerton Township](#), 777 A.2d 1257,1263 (Pa. Cmwlth. 2001) Moreover, undefined terms are given their plain meaning and any doubt

is resolved in favor of the landowner and the least restrictive use of the land. Kissell v. Ferguson Township Zoning Hearing Bd., 729 A.2d 194,197 (Pa. Cmwlth. 1999). To define an undefined term, we may consult definitions found in statutes, regulations or the dictionary for assistance. Manor Healthcare v. Lower Moreland Township Zoning Hearing Board, 139 Pa. Commw. 206, 212, 590 A.2d 65 (Pa. Cmwlth. 1991). A given phrase must be interpreted in context and read together with the entire ordinance. Borough of Pleasant Hills v. Zoning Bd. of Adjustment of the Borough of Pleasant Hills, 669 A.2d 428, 430 (Pa. Cmwlth. 1995).H.E. Rohrer, Inc. v. Zoning Hearing Bd., 808 A.2d 1014, 1016-1017 (Pa. Commw. Ct. 2002)

The Ordinance provides for the special exception for public use, despite the designation set forth by the Comprehensive Plan as a RP District and its specific concern to maximize the amount of undisturbed natural areas. It is clear to this Court that rather than using the plain language of the Ordinance to determine if the use is in compliance with the Comprehensive Plan, the Board has imposed its interpretation onto both. When this Court reviews the Ordinance, the Public Use exception speaks of “utility substations”. Neither the Ordinance nor the definition of Public Service Use defines specifically what is meant by a utility substation; it does not define utility substations by number or size, or in any other way. The Court must give deference to the “plain meaning” of terms and afford the landowner the broadest possible use and enjoyment of the land. With their decision, the Board has imposed its opinion upon both the Ordinance and Comprehensive Plan. Therefore, the Court finds that Appellant in its presentation of its application along with adopting the additional mitigation measures

proposed by the LCPC<sup>9</sup> has satisfied the first requirement for the special exception. Now the burden shifts to the objectors to present their evidence to rebut that of Appellant.

Witnesses who testified to the projects lack of compliance with the Comprehensive plan were Walter Wroblewski and Richard Nassberg<sup>10</sup>. Nassberg testified that he believed that a major portion of our state's economy rests on tourism. (N.T. 4/26/06 at p.69) As a result, the current administration has seen fit to create both the Pennsylvania Wilds Program as well as the Lumber Heritage Region Project. These projects were designed to highlight the very areas which are being discussed as the location for the Project. He further testified that in 2004, the subject of wind towers (wind farms) was discussed when considering amendments not only to the Ordinance but also the County Comprehensive plan. Most importantly, in its proposal for Phase II of the County's Comprehensive Plan is the concept that uncontrolled steep slope and ridge top development is creating negative environmental impacts in Lycoming County. Id. As a result, it will be recommended in the Comprehensive Plan that ridge top development shall be discouraged. (Id. at p.73) Wroblewski, a land owner who would be one of the closest located to the Project, presented photographs which challenged the testimony of Craig Wolfgang, who testified for Appellant that the ridgeline was a "strong and somewhat monotonous element" in the landscape. (N.T. 3/8/06 at p.74) He also testified that based upon his experience, someone located in Montour County might be able to observe the turbines, a contrast from the limited views presented by the

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<sup>9</sup> The 34 Mitigation measures were formally adopted by Appellant at the June 14, 2006 hearing (p. 24)

<sup>10</sup> Currently a Lycoming County Commissioner, Nassberg appeared before the board in "his individual capacity and none other." (N.T. 4/26/2006 at p. 66)

Appellant. (Id. at p.75) The original Project of 47 towers would require at FAA minimum, 94 blinking lights. The flashing lights would disrupt the dark rural night sky. Wroblewski believed property values would decrease. He was also concerned about the potential impact that the wind farms might create in the way nature buffers the effects of extreme weather by use of the ridge top vegetation, as the most flood prone areas include those in which the Project would be located along with many others directly downstream. (Id. at p.84)

The governing body abuses its discretion when its findings of fact are not supported by substantial evidence. Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." [Valley View Civic Association v. Zoning Board of Adjustment, 501 Pa. 550, 555, 462 A.2d 637, 640 \(1983\).](#) Taken as a whole, the Court finds Objectors purpose in presenting all of their evidence was to establish the fact that the wind farm shared none of those same characteristics with the more traditional public service use. In fact, without specifically stating, it appears to the Court the Board found that wind farms, unlike a string of utility substations or other similar public service uses, would carry a very **high probability** that adverse impacts of a sort not normally generated by a specifically enumerated public service use would be created and that these impacts would pose a substantial threat to the health and safety of both the human and wildlife community. As the Court finds that the objectors have carried their burden, the Appellants have failed to satisfy the first criterion of the special exception.

### **The project would create substantial or undue adverse effects**

The Board in its findings determined that by granting the Special Exception, the Project would have an adverse impact on the adjacent property owners and the character of the neighborhood not satisfying Part B of the objective requirements of the special exception. Specifically the Board found that the windmills would introduce a mechanical visual effect (finding 52) as well as noise (finding 46) to what is a rural and primarily natural area. The erection of the windmills would remove extensive wildlife habitat and adversely impact wildlife (findings 42 and 44, respectively) along with jeopardizing public water sources (finding 49). Finally in finding 51, the Board found that should they grant a special exception for this project, there is nothing in place to reduce or eliminate the opportunity for expansion. In fact, the Board specifically found that if this project should be approved, that it would likely be expanded in the future by similar projects or by eminent domain.

The testimony presented by Appellant established that the noise generated by the Project would be within the requirements of the Ordinance. Through its witness, Anthony Agresti, a noise analysis and noise assessment expert, Appellant demonstrated that there would be no impact on the residential areas from this project. (N.T. 4/13/2005 at p.49) However, Agresti did state that as the wind increases, the sound from the turbines would be very audible (Id.) He further opined that he did believe that they “should be able to comply” the levels set by the ordinance (N/T. 9/17/2005 at p.67). The Board also made its own finding that the noise produced would be “at low levels which, when combined with ambient noise in the vicinity, would for most locations, likely not be noticeable.” (Finding 28)

In establishing the visual effect on the area, Appellant presented the testimony of Craig Wolfgang through a visual resource assessment asserting that the visual impacts of the project would be minimal. (N.T. 5/18/2006 at p.44) Wolfgang testified the nature of the area along with the existing forests would block or limit the view of the Project. In addition, Wolfgang believed that based upon his analysis, the Project would not be visible from any viewpoint along Route 14 or 15 to the south of the project. (Id.) The Board could find that with Appellant further reducing the number of towers and modifying placement according to the recommendations as set forth in the LCPC's Mitigation measures (color, placement and number of lights), Appellant established that the Project's visual effects would be as minimal as possible. Wolfgang, however, indicated that this was the first wind farm project analysis that he has completed. (N.T. 9/14/2005 at p.4)

As to the possible effect on indigenous wildlife, Appellant presented the testimony of a Certified Wildlife Biologist, Jeffrey Wallin. Through Wallin's testimony, Appellant established the destruction of the forested regions of the Laurel Hill area from an outbreak of elm span worm which left much of the forest inhospitable for deer and other wildlife, along with the lack of thermal cover for deer (N.T at 4/20/2005 at p.9, 12). By using Wallin's expertise, the Project as presented to the Board, is designed with wildlife in mind; placement of the towers to minimize disturbance of wildlife habitat as well as revegetating and eliminating hardwood over story to support existing and encourage new wildlife.(Id. at pp.13-17)

Wetland and Water impact experts, Colin Duncan (N.T. 4/20/2005) and Robert M. Hershey (N.T. 7/20/2005) presented expert testimony that neither the wetlands nor

the groundwater flow would be effected by the construction of the Project. (N.T. at 4/20/2005 at p.92) Duncan opined that the layout of the project is adjusted to avoid wetland entirely for the turbine layout and the roads. (Id. at p.88) In the proposed clearing and filling of the turbine areas, no wetlands will be affected. (Id. at p.89). In addition, in the transmission line no poles or other structures would be placed within the wetlands (Id.) The majority of the turbines occur just to the north side of the watershed line. (Id. at p.90). There would be no clearing or filling of the wetlands, nor would it receive storm water runoff. Hershey testified that there would be no loss to the ground water flow system by the wind turbine foundations. (N.T. 7/20/2005 at p.29) Larson Design Group will be constructing detention ponds to capture the runoff created by the turbines. These pools would allow the water to be reabsorbed into the ground. The net effect may be to increase the amount of water in the ground, but it would not cause a decrease. If there were blasting at the site which would be needed to construct the towers, he opined that the depth needed would not likely be more than 7 feet. (Id. at p. 30) If there was a water table that close to the surface, any blasting would not “fracture” impact or divert the ground water at all. (Id.). The Court notes that Hershey did offer mitigation to the construction and placement of one tower noting concern for the potential for acid runoff due to the composition of the rock below. (Id. at pp. 19-23)

Al Boyer, McIntyre Township Supervisor, since 1982, chairman of the supervisors since approximately 2000, helped pass a resolution by McIntyre Township to support the construction of the windmills at the February 6, 2006 meeting. (N.T. 3/8/2006 at p.103) He testified that he believed the windmills would be a great opportunity for his community; upon the commissioning of the first windmill the

Township could receive anywhere between \$32,000- \$54,000. (*Id.* at p.124) Since the Township was approximately 80% state owned the township is dependent upon taxes and state funding. (*Id.*) Due to the limited amount of opportunities based upon its location at the bottom of a steep mountain, Boyer described the township as “impoverished.” (*Ibid.*) Having a contract with the windmills would enable the Township to divide the income between the Water Company, the Fire Company and the Township which could be used for paving, stream improvements or setting up a resource protection fund for future generations to help provide for emergencies. (*Id.* at pp.124-125) Boyer also explained his understanding about the opportunity for the company to expand the fields—only by going back through the zoning hearing board approval process. (3/22/06 at p. 21 and 3/8/2006 at p.108) There is nothing in the contract between the Township and the Appellant that changes that process. (*Id.*)

Clarence Matthews, a lifelong Jackson Township resident and Chairman of the Jackson Township Supervisors also testified. (N. T. 4/26/2006 at p.5) He has participated in studies to determine how to develop this area of Jackson Township. Despite an exit directly to the community off Route 15 they have been unable to bring business or industry to the Township. (*Id.* at p.7) Approximately July 2004, Matthews traveled to Waymart to see a wind farm first hand. The Waymart farm is equipped with one and one half megawatt General Electric turbines. (*Id.* at p.13) In April, 2005 all three Jackson Township supervisors traveled to Waymart. In February 2006, Matthews traveled to the newest Pennsylvania wind farm, Bear Creek Project in Luzerne County. The turbines were manufactured by Gamesa with the transmission lines installed underground. (*Id.* at p.16) All in all, Matthews estimates he has seen 9 different farms.

(Id. at p.17) In October, 2005, Jackson Township entered into a financial agreement with Laurel Hill Wind Energy, LLC. In the agreement, LHWE would be responsible to either a) divide \$100,000.00 between the two townships based upon the number of turbines in each township (with an additional \$5000.00 to Jackson for winter road maintenance; or, b) if the legislature removes tax liability for wind farms, a prorated portion of \$41,000.00; or, c) if a partial tax exemption is granted by the legislature the \$41,000.00 would be reduced by the amount of the exemption. (Id. at p.24) Matthews believes the wind farm in the Township's best interest, since 93.8 percent of the township is in the Clean and Green program.<sup>11</sup> As a result, large tracts of land pay almost no property taxes.<sup>12</sup> Should the deal be realized, Matthews says the Township intends to set up a special wind farm fund which would not be changed without voter approval. (Id. at p.26)

Finally, despite the assertion of the Board that there is the potential for expansion in this area, based upon either additional projects or eminent domain<sup>13</sup>, this Court could not find any evidence presented in the record by the Appellant showing its desire to

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<sup>11</sup> Pennsylvania Farmland and Forest Land Assessment Act of 1974, commonly known as "Clean and Green" is a preferential tax program which provides a lower tax rate appropriate for land devoted to farming and forest reserve purposes.

<sup>12</sup> Matthews gave the following examples: Bear Hollow Hunting Club, 1038 acres has a face value township tax of \$63.05, Masciantonio properties of 1036 acres has a face value of their township property tax of \$28.73.

<sup>13</sup> Eminent Domain is the power of a governmental entity (federal, state, county or city government, school district, hospital district or other agencies) to take private real estate for public use, with or without the permission of the owner. The usual process includes passage of a resolution by the acquiring agency to take the property (condemnation), including a declaration of public need, followed by an appraisal, an offer, and then negotiation. If the owner is not satisfied, he/she may sue the governmental agency for a court's determination of just compensation. The government, however, becomes owner while a trial is pending if the amount of the offer is deposited in a trust account.

expand in the future or convey its interest to an entity which may expand by eminent domain.

Based upon its initial presentation, it is clear to this Court Appellant established its burden that the proposed use satisfied the objective requirements of the ordinance for the grant of a special exception; the burden then shifts to the objectors to the application to present substantial evidence and persuade the Board that the proposed use will have a generally detrimental effect on the health, safety, and general welfare. The evidence presented by objectors must show a **high probability** that the use will generate adverse impacts not normally generated by this type of use and that these impacts will pose a substantial threat to the health and safety of the community.

(Emphasis added) [Greaton Props. v. Lower Merion Twp.](#), 796 A.2d 1038, 1046 (Pa. Commw. Ct. 2002) Mere speculation as to possible harm is insufficient. *Id.* Our Courts have defined substantial evidence as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." [Candela v. Millcreek Township Zoning Hearing Board](#), 887 A.2d 335, 340 (Cmwlth. Ct. 2005), (citing, [Hertzberg v. Zoning Board of Adjustment of City of Pittsburgh](#), 554 Pa. 249, 721 A.2d 43 (1998)).

The majority of the testimony presented by those objecting to the Project was by neighboring property owners, including Gray's Run Club and Bear Hollow Club. Objectors to the project, Bear Hollow Hunting Club presented testimony by Jon Boone (on 11/9/2005) and Thomas Hewson (on 10/19/2005). Boone testified that he has a PhD from the University of Maryland in American History, and has been an environmentalist almost all of his life. (N.T. 11/9/2005 at p.8) He has also read many articles and testified before the Maryland Public Service Commission on wind plant

applications. (Id. at p.9) He testified that Pennsylvania has less than one half of one percent of the nation's wind potential. (Id. at p.37) As part of his presentation, Boone presented visual evidence of the strobe effect created by the wind turbine. (Id. at p.47)

Thomas Hewson, a Civil engineer and a principal at Energy Ventures Analysis where he is in charge of the environmental practice presented testimony on the effects of wind. (N.T. 10/19/2005 at p.20) Specifically he tracks all of the wind projects for the Department of Energy. Hewson opined that this wind project would emit noise at the property line which will exceed the sound level in the local ordinance. (Id. at p.54) Despite the expert testimony presented by Appellant, Hewson believed that no measurements were taken at the property line. (Id.) He also opined that with the trends that he has seen, it is more likely the turbines will grow larger in the future rather than smaller. (Id. at p.59) He also opined that the best wind sites were Class 4 and above, and this location was less than a class 4 site (Id. at p.68)

Oguz Soysal testified on behalf of Bear Hollow Club regarding the noise which would be emitted from the project. He testified that at a distance of about one-half mile away, he tested the noise levels at the Meyersdale wind farm in Pennsylvania. (N.T. 12/14/2005 at p. 53) Using the methodology or standard number 61400 for windmill power generation, he determined that at a 6 mile per hour wind speed, the sound produced was between 60 and 70 decibels. (Id.) These levels would have been the audible plus low frequency C levels; he testified in the evening there is more than a 20 dB difference between the weighted A and weighted C levels. (Id. at p. 65) As a result although we may hear the weighted A levels the weighted C levels due to their low frequency component carries much further from the source which would effect the body

differently than would the weighted A levels. (Id. at p. 69, 73) Soysal also believed that the sound information provided by Appellant did not use the same standard (IEC 61400, part 11) so that its testing of the noise effects is not complete. (Id. at p.119)

Robert Larivee, PhD Professor of environmental Chemistry at Frostburg State University, who lives approximately 2925 feet from the wind farm in Meyersdale, PA also testified. Over the course of time that the windmills have been constructed, he has noticed a number of effects. First, he and his wife have noticed that there are substantially fewer bats and many more insects than before the windmills. (N.T. 10/26/05 at pp.74-76). He believed that the bats are drawn to the sounds of the windmill. (Id. at p.78) With the three to four acres per windmill that were cleared, Larivee has noticed greater storm run off from the area. The runoff has washed out roads and caused the repair of the road and culverts several times (Id. at p.75) He further testified that the windmills even effect the reception on his TV. (Id. at p.92)

Bear Hollow also called residents of Meyersdale PA, the site of the Somerset County wind farm, Todd Hutzell, Karen Irvin and Roger Hutzell to share their personal experiences of living under a wind farm. This testimony provided the Board with a personal, non expert opinion of the effects the Project would have on the area. Todd Hutzell, a resident of Rockwell, PA works on his parents' farm in Myersdale, Somerset County, PA. The windmill facility is located about 3000 to 4000 feet from the Hutzell farm. (N.T. 10/26/05 at p.6) There are 20 windmills in the project that are constructed on a ridge top, laid out in a horse shoe configuration around the Hutzell farm. He described the sound as a jet engine or as an old time threshing machine. (Id. at p.9) The wind mills cause his ears to pop; if he is at a different angle (30 degree or so)

behind the turbine, he tends to hear it more. (Id. at p.11) Hutzell stated that the specific changes to his health that he has noticed have been a ringing in his ears or a buzzing which will last about two to three hours after going home from the farm. (Id. at p.12) As for effects to the area, he notices that there is now much more water runoff from a substantial rain storm than there has ever been. (Id. at p.15) Karen Irvin, sister of Todd Hutzell also testified before the board. She lives several hundred feet from her parent's farm, and testified to the noise effects from the turbines. Irvin stated that even inside the house she can hear a whoosh type sound which makes it very difficult to sleep at night. (Id. at p.53) She also has experienced the ringing in the ears effect that has also bothered her brother. (Id.) Turbines have also affected her ability to continue to have windows open at a time when she would normally have them open, due to the noise from the windmills. (Id. at p.60). Finally, Roger Hutzell, father of Todd and Karen also testified to his perception of the effects of the wind farm. Hutzell stated that the turbines were noisy making it difficult to sleep at night. (Id. at p.64) He stated that his children took a decibel reading inside his house with the windows closed which resulted in a decibel reading of 75. He described the sound the turbines made as a "B52 bomber starting up". (Id.) Cattle stay away from the property line closest to the wind farm; he can't say if the aborted calves from his farm are directly related to the wind farm (Id. at p.66).

In addition, Keith Edler, a Lycoming County resident testified to what he personally observed at the site of the Waymart, PA wind farm. He testified that the huge towers looked very out of place on the crest of the mountain range (N.T. 3/22/06 at p.49) Once he approached the turbines, at a distance of about 200 yards, he related

the grinding and groaning sound of the blades, sounding like a jet engine, along with their shadows. Then, from a different vantage point approximately one and one-half miles away, you could still hear them “moaning and groaning.” (Id. at p.50). He estimated that the sound was there and “it would definitely be a nuisance to me if I was living around it.” (Id. at p.53) George Kepler, a member of the Bear Hollow Hunting Club and retired realtor and real estate appraiser, testified about the history of the Laurel Hill region. (N.T. 12/14/2005 at p.6) In 1792, the Williamson Trail, which travels through the Club’s property, was the first major highway connecting Central Pennsylvania with New York State. (Id. at p.11) Peddler’s Rock, a monument noting the site of a murder back around the time Lycoming County was formed, is still located along side the road. The Project would build a western access road which would greatly increase the use of Williamson Trail. Kepler believed that the sounds of the windmill would interfere with his ability to hunt at the Club as well as negatively impact the value of the land. (Id. at pp.17-18, 24) He opined that if the visual aesthetics were affected it would have a negative impact on the value of a property; in this case, he believed the wind farm would greatly detract from the property values. (Id. at p.22)

On behalf of the local residents, an expert on wildlife spoke to bird and bat mortality. Greg Turner, employed by the PA Game Commission, was called to testify by Walt and Maureen Wroblewski. (N.T. 5/31/2006) Turner opined that a significant bat kill could result from the project. (Finding 39) The loss of that many bats over the length of time the project would be operational would have the potential to cause a negative impact on the local insect population. He also believed that what Appellant has done by way of testing has been inconclusive. (Id. at p.27) Turner also believes that any post

construction mortality studies would not help this site but might help others with wind farm siting in the future. (Id. at p.37)

Dave Ferry appeared as the President of the Lycoming Audubon Society and read a letter to the Board with the groups concerns as to the effect of the Project on bird mortality. (N.T. 11/9/2005 at pp. 97-99) The Society believes that too few studies of the effects on migrants and raptor have been completed, and should be completed before the towers are constructed. He also testified about a significant bird kill at a stationary tower in the area where fog and low ceiling clouds confused the birds and instead of flying over, they flew into a structure or tower. (Id. at p.107). Ferry also reminded the group that hawks, Golden Eagles and Bald eagles fly over the Project site, (Id. at pp. 107,109) The Project site is the greatest risk to Neotropical nighttime migrants. (Id. at p.110)

Jeanne Edler, also a Lycoming County resident discussed problems with flooding and sedimentation. She reminded the Board of the 1996 flood which caused six deaths as well as about 100 million in property damage, much of it in or near to the project area. (N.T. 2/8/06 at p.11). In September of 2004, Hurricane Ivan came through and caused 57 million in property damage. (Id. at p.12) On January 19, 2006, she noted almost to the day of the catastrophic 1996 flood, the area had nearly two inches of rain in an 18 hour period. (Id.) As a result, the County saw flooding in the same places, many of them originating in the vicinity of the Project. Ms. Edler also testified that Les Gruver, EMA Coordinator has stated that flooding is the most “disastrous prone” situation that we have in this County. Even the Hazard Reduction Planner has stated that flood emergencies have been activated 50 times since the flood of 1972. (Ibid.)

Along with the effects of flooding, the rain could cause a potentially hazardous situation with pyrite if it is released from the land during construction of the towers. With pyrite exposed to rain and surface, the combination causes a deadly mix when added to streams and rivers will kill existing plant and aquatic life. As she quotes Jerry Walls, “if areas are at risk from flooding, then identify the areas and restrict development.” (Id. at p.13)

As many of the witnesses were actually experiencing the effects of a wind farm rather than speculating as to the physical effects created by a wind farm, the Court finds the Board made a finding of credibility in favor of the Objectors. Even with Appellant recalling Anthony Agresti (on 6/14/2006) to rebut the Objectors testimony regarding how the noise levels attributable to the turbines were calculated, the Board could find that the Objectors established with high probability that adverse impacts not normally generated by a public service use would be created posing a substantial threat to the safety of the community. Therefore, Appellant has failed to meet the second criteria of the application for special exception.

**The Planning Commission and Laurel Hill have failed as a matter of law, to demonstrate the mitigation of adverse impacts the project would create to the area**

The Board found as a matter of law that both the LCPC and Appellant, although attempting to demonstrate the mitigation of undue adverse impacts, failed to provide sufficient proof that they have plans in place which are adequate to meet the needs of the region. No specific findings were set forth by the Board to substantiate the findings made as a matter of law. Upon the review of the mitigation measures, the Court finds

that they were designed in large part to remediate conditions which affected the health, safety and welfare of the citizens of the Laurel Hill region. The Court also notes that no evidence was presented by Appellants to specifically address the additional and substantial traffic effects on Williamson Trail. No township Supervisor or representative of Appellant addressed how the construction traffic would impact the road and any provisions for the Township for improvements consistent with the Comprehensive Plan or Section C of the Ordinance governing the grant of a special exception. As the Board had the opportunity to listen to all of the evidence presented and make its finding as to the credibility of the witnesses as it relates to Section C, the Court will not disturb the finding. Even with the adoption of the mitigation measures, the Court agrees that the Objectors have sustained their burden to show that the Project would generally have a detrimental effect on the health safety, and general welfare of the community. Accordingly, the Board properly found that Appellant has failed to prove its project complies with the third objective criteria.

### **Conclusion**

Based upon a complete review of the record, the Court finds that Appellant has failed to meet its burden with regard to the three objective criteria set for the in the ordinance to obtain the special exception. As the Appellant for the special exception must persuade the Board that the proposal complies with all of the objective requirements of the Zoning Ordinance to obtain approval of a special exception, Laurel Hill Wind Energy, LLC's appeal must be denied.

**ORDER**

**AND NOW**, this \_\_\_\_\_ day of May, 2007, the Court hereby **AFFIRMS** the decision of the Lycoming County Zoning Hearing Board dated July 14, 2006.

By the Court,

Nancy L. Butts, Judge

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