IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

FRANK M. PICCOLELLA, SR.,	:	NO. 08 - 02,232
Appellant	:	
vs.	:	ZONING APPEAL
	:	
ZONING HEARING BOARD OF	:	
LYCOMING COUNTY,	:	
Appellee	:	

OPINION AND ORDER

Before the Court is a zoning appeal filed by Frank Piccolella (hereinafter "Appellant") on September 26, 2008, in which he seeks to overturn a decision issued by the Lycoming County Zoning Hearing Board (hereinafter "the Board") on August 29, 2008, which denied his appeal of the Lycoming County Zoning Administrator's approval of the application for a zoning permit submitted by Laurel Hill Wind Energy, LLC (hereinafter "Laurel Hill"). By Notice of Intervention filed October 8, 2008, Laurel Hill intervened in the appeal. At a conference on October 31, 2008, the parties agreed to proceed on the record below and after the filing of a certified record[1] and briefs, argument was heard December 11, 2008.[2]

On February 14, 2008, Laurel Hill filed an application for a zoning permit for what it calls the "Laurel Hill Wind Energy Project".[3] After review of the application, which review included a request for, and receipt of, further information, the Zoning Administrator approved the application on May 9, 2008. Appellant then appealed that approval, contending that the application was substantively deficient, and a hearing was held before the Zoning Hearing

[1] The certified record was actually filed initially to No. 08-01,895 in response to an appeal filed prematurely by Appellant (after the Board announced its decision but before a written decision was issued). As that appeal became moot with the filing of the instant appeal, such was dismissed and the Clerk of Courts was directed to transfer the certified record to the docket of the instant matter.

[2] By stipulation filed December 8, 2008, Mark and Pauline Facey were also permitted to intervene in this matter. The Faceys did not, however, file a brief.

[3] According to the application, the project "can be briefly described as a 70.5 megawatt (M.W.) wind powered electric generating, transmitting and interconnecting facility that will consist of up to thirty-five (35) individual wind turbines located along Laurel Hill Ridge, a new approximately two (2) mile long, 34.5 k.V. overhead transmission line, and a new switch yard and substation that will provide an interconnection to the existing electric transmission system of the Pennsylvania Electric Company". The project plans to use approximately 706 acres of leased land in Jackson and McIntyre townships. *See* Exhibit ZA#2, page 1.

Board on July 23, 2008. The Board upheld the Zoning Administrator's decision, finding that the application was "sufficiently complete for the issuance of a permit". In the instant appeal, Appellant again challenges the completeness of the application, and also alleges that his due process rights were violated both at the hearing and because of what he terms a conflict of interest based on the same law firm representing both Laurel Hill as well as Lycoming County, and that Laurel Hill lacked standing to apply for the permit in the first instance.

In an appeal from a decision of the Zoning Hearing Board where no additional evidence is taken by the Court, the Court is limited to determining whether the Board abused its discretion or committed an error of law. Limley v. Zoning Hearing Board of Port Vue Borough, 625 A.2d 54 (Pa. 1993). An abuse of the board's discretion may be found only where its findings are not supported by substantial evidence. Valley View Civic Association v. Zoning Board of Adjustment, 462 A.2d 637 (Pa. 1983). As fact finder, the board is the ultimate judge of credibility, Martin Media v. Hempfield Twp. Zoning Hearing Board, 671 A.2d 1211 (Pa. Commw. 1996), and a board's interpretation of its own zoning ordinance is entitled to great weight and deference from a reviewing court. Smith v. Zoning Hearing Board of Huntingdon Borough, 734 A.2d 55 (Pa. Commw. 1999).

With respect to the alleged deficiencies in the application,[4] it is noted that a list of such was provided by Appellant to the Zoning Administrator prior to the appeal hearing before the Board, and the Zoning Administrator responded to Appellant with respect to each one. Both of these lists were provided to the Board on or before the date of the hearing on July 23, 2008.[5] The Court will therefore review the Board's determination that the application was substantially complete by considering each allegation of insufficiency raised at argument and the Zoning Administrator's response thereto,[6] as follows:

1. "Stormwater management and construction site erosion control plans are nonexistent." – The Zoning Administrator responded that stormwater

[4] Although 28 areas of deficiency were alleged in the appeal to the Zoning Hearing Board, at argument in the instant appeal Appellant narrowed the issue to include only four.
[5] Appellant's list was marked Exhibit ZA#5 and the Zoning Administrator's response was marked Exhibit ZA#6.
[6] With regard to these allegations of insufficiency, since the Board found "no substantial error, failure to follow procedures, misapplication of Ordinance requirements, or abuse of discretion by the Zoning Officer", *See* Board Decision of August 29, 2008, at p. 8, the Court will review the Board's decision by reviewing the decisions of the Zoning Administrator.

management and erosion control are handled at the land development stage. As the applicant states in the Site Development Plan that "[t]he stormwater management plan is conceptual in nature" and that "[f]urther detail will be required and provided on the land development plans and the [p]ost-construction stormwater management plans to be submitted to the Lycoming County Conservation District",[7] the Court finds reasonable the Zoning Administrator's determination that more specific stormwater management plans were not required for issuance of the permit.

2. "Representative turbine types are listed but section contains a disclaimer, "but are not limited to", therefore allowing any turbine, regardless of size, to be installed, including the giant 5 mw. or the newly conceived 10 mw. versions." – As the applicant lists as "representative" turbines with capacity ranging from 2.0 MW to 2.5 MW,[8] a 10 MW, or even 5 MW, turbine would *not* be representative and thus could not be constructed under the auspices of the instant permit. The Court wishes to point out that by requiring a listing of representative types of turbines, rather than of exactly those which will be installed,[9] the Ordinance renders redundant the inclusion of the language "but not limited to", as the word "representative" implies that other, similar, types may be installed. Therefore, including the language "but are not limited to" in the application does not violate the ordinance, and the Zoning Administrator did not abuse his discretion in approving of such.

3. "Emergency and safety services needed and arrangements to provide such services are non-existent." – The Community and Environmental Impact Analysis contained in the application does include a section which addresses this requirement of the Ordinance and, as supplemented by the applicant after a request for further information, is in compliance with the Ordinance. Further, as pointed out by counsel for the Board at argument, the Certificate of Occupancy

[7] See Sheet PCSM2 of the Site Plan, part of Exhibit ZA#2.
[8] See Table on page 1 of the permit application, Exhibit ZA#2.
[9] See Section 3230C.1(2)(a)(1) of the Zoning Ordinance.

will not be issued unless the final plans include the requisite information and, therefore, any perceived deficiencies at this stage will be rectified before the project is finalized. The Court thus finds no error by the Zoning Administrator in this regard.

4. "No timeline for completion of project." This particular alleged deficiency was raised at argument but does not appear to have been raised in the 28 allegations of error submitted to the Board in the appeal. The only place the Court is able to find reference to a "timeline for completion" is in the rebuttal statement of Appellant, attached to the Brief in support of his appeal as Exhibit B, paragraph 14 of which states: "The optional timeline for completion must be complete before to (sic) C/O is issued but it is clearly stated in 3230C.3 (sic) that "a" through "j" of this section shall accompany the application. Clearly sections e, g, h, and i are not covered." The Court admits that the Ordinance contains an internal inconsistency, on the one hand stating that the applicant "shall submit" a Community and Environmental Impact Analysis, "[a]s part of the application", which "shall contain" the enumerated information, but on the other hand stating that the Analysis "may include a timeline for completion for the various items listed below" – the enumerated information – "with the understanding that completion must occur prior to issuance of the Certificate of Occupancy." It is apparent, however, that the Ordinance calls for *either* the inclusion with the application of the enumerated information *or* a date by which the applicant plans to submit such, which date must be prior to the certificate of occupancy being issued. The applicant here has included a Community and Environmental Impact Analysis which begins with the following statement: "Pursuant to Section 3230C.1.3, titled "Information Specifications", the Applicant submits the following community and environmental impact which, to the extent necessary, will be supplemented and competed prior to the issuance of the Certificate of Occupancy as set forth in the Ordinance. A …timeline for completion, where applicable, prior to the issuance of the Certificate of

Occupancy is attached hereto and marked as Appendix B."[10] The Court finds this sufficiently addresses the requirements of the Ordinance and thus that the Zoning Administrator did not abuse his discretion or commit an error of law in issuing the permit.

Next, Appellant asserts that his due process rights were violated by the procedures employed at the hearing. Appellant references Section 908(5) of the Municipalities Planning Code, which provides that the parties "shall be afforded the opportunity to respond and present evidence and argument and cross-examine adverse witnesses on all relevant issues." 53 P.S. 10908(5). Appellant contends he was denied the opportunity to present evidence and argument because partway through his presentation the solicitor for the Board "requested that [Appellant] not present his entire testimony".[11] A review of the transcript of the hearing indicates, however, that Appellant began his presentation by simply reading the document he had previously submitted to the Board, his list of the 28 allegations of deficiencies,[12] and as he began number 7, Mr. Baldys asked "would it be fair to say that you want to read through the rest of the balance of the exhibit?"[13] to which Appellant responded, "If time allows, I would like to."[14] Mr. Baldys then stated: "Yeah. And the thing is I don't want to really limit you to be quick. But I think the Board would probably be interested in those things which you think are clearest examples of error in the approval of the permit." He also explained: "I assume we can all read through this …"[15] and asked Appellant to "highlight to the Board what you think are the key elements, that would be helpful if that's okay with you."[16] Appellant indicated "That's okay with me Mr. Baldys" and stated, "If I could go through this whole thing it might take a half hour. So I will cut it down. But I would – I am not asking that this be a requirement but I am just asking if you would allow five or ten minutes for the Board to actually sit and read through this?"[17] Mr. Baldys responded "Absolutely."[18] Appellant then continued his

[10] See Exhibit ZA#2, page 2.
[11] Appellant's Brief in Support of Appeal at page 9.
[12] See Exhibit Piccolella-1.
[13] N.T., July 23, 2008 at p. 18.
[14] Id. at p. 19.
[15] Id.
[16] Id. at p. 20.
[17] Id.

presentation by highlighting those issues he felt most important, and concluded without further curtailment. As the Municipalities Planning Code also provides that "unduly repetitious evidence may be excluded",[19] the Court believes this procedure was in keeping with due process requirements, and although Appellant complains that the Board never read through his list as was promised, the Court notes the list was provided to the Board prior to the hearing, and also that the Board did deliberate for a period of time after the hearing, prior to rendering its decision. This claim is thus without merit.

Appellant also asserts that his due process rights were violated by the Board's solicitor's announcement at the beginning of the hearing that "cross examination of witnesses would be done exclusively by the Board",[20] which resulted in his inability to cross-examine witnesses. Appellant does not identify any witnesses whom he wanted to cross-examine, however. Therefore, this claim is also without merit.

Next, Appellant alleges a violation of his due process rights by what he terms a "conflict of interest".[21] Specifically, Appellant alleges that throughout the pendency of the permit application process the law firm of McNerney, Page, Vanderlin & Hall has represented both Laurel Hill and the Lycoming County Commissioners (who amended the Zoning Ordinance to include wind energy facilities as a permitted use in resource protection zones). The Court is not here to determine whether this dual representation in general represents a conflict of interest under the Rules of Professional Conduct, however. With respect to Appellant's particular claim here, the Court notes that the Zoning Hearing Board, *not* the County Commissioners, is the relevant entity, and the Board was and is represented by counsel *not* a member of McNerney, Page, Vanderlin & Hall. The Court finds, therefore, that no conflict such as could raise due process concerns, exists.

Finally, Appellant contends that Laurel Hill lacked standing to apply for the permit at issue, as "Laurel Hill is neither a landowner nor a developer",[22] relying on the Ordinance's

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[18] Id.
[19] 53 P.S. Section 10908(6).
[20] N.T., July 23, 2008, at p. 4.
[21] Although there has been objection raised to the fact that Appellant raised neither this issue nor the one following before the Board, and thus waived such, the Court has chosen to address them on their merits.
[22] Appellant's Brief in Support of Appeal at p. 14.

definition of "applicant" in Section 14300. The Court notes, however, that Section 10100 of the Ordinance allows "*all persons* desiring to undertake any new construction, substantial improvement of an existing structure, or change in the use or increased intensity of use of a building or lot" to apply for a zoning/development permit, and does not limit such persons by its definition of "applicant" in the definition section. Therefore, regardless of whether Laurel Hill can be classified as a landowner or developer, it was clearly entitled to apply for the permit at issue and Appellant's claim to the contrary is without merit.

In conclusion, as the Court finds no abuse of discretion or error of law in either the granting by the Zoning Administrator of the permit or the upholding of that decision by the Board, the Court enters the following:

ORDER

AND NOW, this 24th day of December 2008, for the foregoing reasons, the appeal filed by Frank Piccolella is hereby DENIED, and the decision of the Lycoming County Zoning Hearing Board is hereby AFFIRMED.

BY THE COURT,

Dudley N. Anderson, Judge

cc: Christian Frey, Esq.
Karl K. Baldys, Esq.
Thomas Marshall, Esq.
Gary Weber, Esq.
Hon. Dudley Anderson