IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

ARTHUR and ELKE PLAXTON,	:	NO. 08 - 02,240
Appellant	:	
vs.	:	SUBSTANTIVE VALIDITY CHALLENGE
	:	
ZONING HEARING BOARD OF	:	
LYCOMING COUNTY,	:	
Appellee	:	

OPINION AND ORDER

Before the Court is a zoning appeal filed by Arthur and Elke Plaxton (hereinafter "Appellants") on September 29, 2008, in which they seek to overturn a decision issued by the Lycoming County Zoning Hearing Board (hereinafter "the Board") on August 29, 2008, which denied their substantive validity challenge to the amendment of the Lycoming County Zoning Ordinance on November 15, 2007.[1] That amendment provided for wind energy facilities as a permitted use in resource protection zones, whereas such use had previously been permitted in a resource protection zone only by special exception.[2] By Notice of Intervention filed October 8, 2008, Laurel Hill Wind Energy, LLC (hereinafter "Laurel Hill") intervened in the appeal.[3] At a conference on October 31, 2008, the parties agreed to proceed on the record below and after the filing of a certified record and briefs, argument was heard December 11, 2008.[4]

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

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[1] Lycoming County Zoning Ordinance 2007-3.

[2] It should be noted that such use was not specifically provided for in the pre-amendment ordinance but, rather, that such had been determined to be a "public service use", and was allowed by special exception in a resource protection zone based on that designation.

[3] Laurel Hill is currently planning to construct "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, p.1, filed to No. 08-02,232.

[4] 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.

Borough, 625 A.2d 54 (Pa. 1993). In the instant case, the Board determined that the amendment to the Zoning Ordinance was not "fatally inconsistent" with the Zoning Ordinance as a whole, was not an "irrational deviation" from the overall zoning plan, was not an "unlawful confiscation" of, or "impermissible interference" with, real property rights, and "adequately considered" environmental factors, including the environmental, constitutional rights of the Commonwealth's citizens.[5] Appellants contend the Board erred in ignoring a prior judicial determination that "the Project would have a detrimental effect on the health, safety and general welfare of the community", in ignoring the "fact that the Ordinance was passed simply to circumvent a judicial decision", in ignoring the inconsistency of the use with the purpose and nature of a resource protection zone, in ignoring the "fact that the amended ordinance failed to satisfy" the requirements of various statutes and Article 27 of the Pennsylvania Constitution that zoning laws promote, protect and facilitate the preservation of the natural, scenic and historic values of the community, and, finally, that their due process rights were violated by the hearing procedures employed. These issues will be addressed seriatim.

With respect to Appellants' assertion that the Board erred in ignoring a prior judicial determination,[6] in other words, that that prior determination is res judicata in the instant case, the Court notes that for the doctrine to be applicable, there must be a concurrence in the prior and subsequent proceedings of the identity of the thing sued upon and the identity in the cause of action, as well as identity of the parties. Bell v. Zoning Board of Adjustment of City of Pittsburgh, 479 A.2d 71 (Pa. Commw. 1984). The "thing sued upon" or the "cause of action" in the instant matter is not identical to that in the prior matter, however. Under the previous version of the Zoning Ordinance, wind energy facilities were allowed only by special exception, and thus the determination of whether that use promoted the health, safety and

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[5] *See* August 29, 2008, decision of the Board at p. 8.

[6] The "prior determination" referred to by Appellants is contained in an opinion issued by the Honorable Nancy Butts on May 22, 2007, in which she upheld the Board's decision to deny Laurel Hill's request for a special exception (under the prior version of the Ordinance). The particular holding relied on by Appellants herein is the following statement: "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." Laurel Hill Wind Energy v. Lycoming County Zoning Hearing Board, No. 06-01,620 (Butts, J., May 22, 2007).

general welfare of the community was left by the legislative body (the County Commissioners) to be determined by a judicial body (the Zoning Hearing Board and the Courts). In the instant case, the legislative body has instead provided for that use by right, apparently having determined such to best serve the public interest, *as it may properly do*,[7] and the Court is called upon only to say whether the Ordinance as amended is unreasonable, arbitrary or confiscatory. *See* Anstine v. Zoning Board of Adjustment, 190 A.2d 712 (Pa. 1963), *citing* Bilbar Construction Co. v. Easttown Twp. Board of Adjustment, 141 A.2d 851 (Pa. 1958). These issues are *not* the same and thus Appellants' attempt to apply the principle of res judicata cannot prevail.

Next, Appellants contend the Board erred "when it ignored the fact that the Ordinance was passed simply to circumvent a judicial decision." The motive for the amendment is irrelevant, however, and thus not a proper consideration for the Board. *See* In re Appeal of Apgar, 661 A.2d 445 (Pa. Commw. 1995)(the state of mind of the legislative body in enacting a zoning ordinance is irrelevant to a determination of its validity). In any event, even were Appellants correct in their assumption, the Commissioners were entitled to "circumvent" the prior judicial decision for, as was stated above, it is the prerogative of the legislative body, and not the Courts, to determine in the first instance what best serves the public interest. Anstine v. Zoning Board of Adjustment, *supra.*

Next, Appellants contend the Board erred in ignoring "the inconsistency of the use … with the purpose and nature of a resource protection zone." The Board considered the Ordinance's requirement that an applicant submit hydrologic and geologic analyses and impact statements respecting land use, transportation, and wildlife, and its prescription of certain supplemental controls, as well as its provision for review and analysis of the information submitted which would allow for supervision of the implementation of the facility, and decided that the amendment was not fatally inconsistent with the Ordinance. "Protection of timber and

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[7]*See* Anstine v. Zoning Board of Adjustment, 190 A.2d 712 (Pa. 1963), *citing* Bilbar Construction Co. v. Easttown Twp. Board of Adjustment, 141 A.2d 851 (Pa. 1958)(The question of what best serves the public interest is primarily a question for the decision of the appropriate legislative body.), and In re Appeal of Apgar, 661 A.2d 445 (Pa. Commw. 1995)(It is fundamental that the court may not substitute its views for those of legislative bodies as to whether the means employed by enactment of zoning ordinance is likely to serve the public health, safety, morals or general welfare.).

other forest resources, wildlife habitat, special plant communities, scenic resources and other natural areas is the primary objective" of the resource protection zone.[8] Inasmuch as the Ordinance requires that any wind tower not be located within any mapped "scenic area", or state designated "Natural" or "Wild" area,[9] and contains criteria designed to protect the habitat, the Court cannot find that the Board abused its discretion in finding the amendment not fatally inconsistent.

Next, Appellants contend the Board erred in ignoring the "fact that the amended ordinance failed to satisfy" the requirements of Section 603(g)(2) and 604 of the Municipalities Planning Code and Article 27 of the Pennsylvania Constitution that zoning laws promote, protect and facilitate the preservation of the natural, scenic and historic values of the community. For the same reasons as the Court found no abuse of discretion in the Board's finding that the amendment is not fatally inconsistent with the purpose of a resource protection zone, however, the Court also finds that the amendment does *not* "fail to satisfy" the referenced requirements of the Municipalities Planning Code and the Constitution. Thus, the Board did not err in this regard.

Finally, Appellants assert that their due process rights were violated by the procedures employed at the hearing. Appellants reference 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). Appellants conceded at argument that inasmuch as the presentations were in the nature of legal arguments, rather than testimony, any curtailment of their right of cross-examination was of no moment, but do argue that they were prevented from fully "responding" to the presentations of Laurel Hill and the Planning Commission. The Court has reviewed the transcript of the hearing before the Board, however, and finds that Appellants were afforded a full opportunity to "respond and present evidence and argument" on the issues they wished to pursue. Appellants' assertion that their due process rights were violated, and their consequent request for a hearing de novo before this Court, are thus without merit.

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[8] Section 2310(A) of the Zoning Ordinance.
[9] Section 3230C.1(4)(e) of the Zoning Ordinance.

In conclusion, as the Court finds no abuse of discretion or error of law in the Board's denial of Appellants' substantive validity challenge, the Court enters the following:

ORDER

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

BY THE COURT,

Dudley N. Anderson, Judge

cc: Arthur and Elke Plaxton, 411 Laurel Hill Road, Liberty, PA 16930
Thomas Marshall, Esq.
Karl Baldys, Esq.
Gary Weber, Esq.
Hon. Dudley Anderson