Circuit Court for Allegany County
Case No. C-01-CV-19-499

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1177

September Term, 2020

ALLEGANY NEIGHBORS & CITIZENS FOR HOMEOWNER RIGHTS, LTD., *et al*,

v.

DAN'S MOUNTAIN WINDFORCE, LLC, *et al*.

Berger,
Friedman,
Eyler, James R.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Friedman, J.

Filed: August 16, 2021

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Dan's Mountain Wind Force, LLC, seeks to construct 17 wind turbines and an electrical substation on leased property on Dan's Mountain in Allegany County. The Allegany County Code permits the construction of wind turbines as a special exception in the zoning districts where the project is proposed but requires that they be constructed subject to separation and setback requirements. Unable to meet those requirements, Wind Force and its neighbors sought variances from the separation and setback requirements at the same time that it sought the special exception. The Allegany County Board of Zoning Appeals denied the application. Wind Force appealed. This Court, in a reported opinion that we will call *Dan's Mountain I*, held that the Board had not applied the proper standards for its review of Wind Force's application. *Dan's Mountain Wind Force LLC v. Allegany County Board of Zoning Appeals*, 236 Md. App. 483 (2018). We remanded the matter for the Board to try again.

On remand, the Board conducted a site inspection and entertained argument from the parties but declined (as was its right) to receive additional evidence. The Board wrote a detailed and thorough opinion, and this time granted the separation and setback variances and the special exception.[1] A group calling itself Allegany Neighbors & Citizens for Homeowner Rights, LTD,[2] and individual protestors Kathryn and Michael Russo, C. Phillip and Carolyn Bush, Dale Allen, and Edith Bohanan noted a timely appeal.[3]

[1] The opinion reports that the vote on the separation variance was 2-1, the vote on the setback variances was 3-0, and the vote on the special exception was 2-1.

[2] A name apparently crafted to yield the acronym, ANCHOR.

[3] Appellees have also moved to dismiss the appeal because, in their view, the Appellants were not sufficiently aggrieved. Nevertheless, Appellees concede that, at least

ANALYSIS

In *Dan's Mountain I*, we instructed the Board:

> On remand, the Board must conduct the appropriate analysis on each property, each factor, and each application. The proper analysis requires the following inquiry: *first*, the Board must determine whether the unusual factors identified by the applicant are, in fact, features of that particular property; *second*, the Board must determine whether the effect or effects those features have on the property, taken together, have a nexus with the part of the zoning law from which a variance is sought; and *third*, the Board must determine whether the effect of those factors on the property is unique as compared to similarly situated properties. The Board must conduct this analysis for each property, each factor, and each application. There are multiple applicants (Wind Force and the ten co-applicant property owners), requesting multiple variances (twenty-six in total), and alleging that each property is unusual as compared to the other properties in various ways. The Board must consider each of these individually to determine whether each property is unique in a way that has a nexus with the setback and minimum separation distance requirements so as to require a variance.

236 Md. App. at 498-99. We said—twice, in fact—that the Board must consider "each property, each factor, and each application." And that's precisely what the Board did.

It turns out, in retrospect, that maybe we told them to do too much. The Board had to—and, in fact, did—consider "each application" for a variance. But it did not have to consider literally "every property." Rather, it had to consider "every property" for which there was an application for a zoning variance. That is, the Board had to consider the uniqueness of "every property" on which Wind Force wanted to put a wind turbine too close to the property line. It did not have to consider those properties for which Wind Force

Edith Bohanan has standing to seek judicial review of at least some of the Board's decisions. Given that, and given our resolution of the principal issue, we decline to dismiss the appeal.

did not apply for a variance. The Board did not have to consider the uniqueness of those properties on which Wind Force did not intend to put a wind turbine (but which would have turbines closer to their property line than anticipated). That's what we should have said.

The Board did exactly what we told them to do. They evaluated "every property" for uniqueness, not just those for which a variance was sought. That wasn't a legal error, it was just more work than we meant for them to have to do (and more work than the law requires). For example, Wind Force has proposed to put Turbine #5 on leased property in a spot 1,696 feet (304 feet closer to the property line than would be permitted without a variance) from the Keiter property. The proper legal question is whether the property on which it is proposed that Turbine #5 will be placed is unique. The Board found that Turbine #5 can only be placed in a "very limited 'footprint'" on that property because of the existence and location of wetlands, the slope and grade of the property, and the location of the other turbines. The Board then found that those features that make the property unique have a nexus to the proposed variance and absent a variance, create a practical difficulty to the use of the property. Those findings are perfectly sufficient. Any finding about the uniqueness of the Keiter property is merely surplusage and legally irrelevant. So to is the Board's decision to organize its opinion around the names of the adjoining properties rather

than organize its opinion around the names of the properties on which the turbines will be sited.[4]

JUDGMENT OF THE CIRCUIT COURT FOR ALLEGANY COUNTY AFFIRMED. APPELLANTS TO PAY COSTS.

[4] The same is also true with respect to the Board's findings regarding the properties on which Turbines #6, #7, #8, #9, #11, #12, #13, #14, #15, #16, and #17 are proposed to be placed.