

**TOWNSHIP OF ELIZABETH ZONING HEARING BOARD**

Applicant: Allegheny Energy Center, LLC Owner: same (through Option to Purchase)	Joint Application for Use Variance and Noise and Height Variances No. ZHB 16-001
Subject property: 22 acres near Henderson Road	Date of last hearing: April 20, 2016

**DECISION OF BOARD**

The Township of Elizabeth Zoning Hearing Board (the “Board”) renders the following decision in the above captioned case including findings of fact and conclusions of law:

**I. STATEMENT OF THE CASE**

**A. The Application**

Allegheny Energy Center, LLC (“AEC”) is a Delaware limited liability company and a wholly-owned subsidiary of Invenergy Thermal Development LLC, an affiliate of Invenergy, LLC. On January 22, 2016, AEC filed a joint application for a use variance and noise and height variances (“the “Application”). The Application relates to a parcel of approximately 22 acres (the “Project Parcel”), which is entirely within a parcel of approximately 600 acres (the “Large Parcel”) which bears Lot and Block Number (908) 997-H-79. AEC has secured a purchase option for the Project Parcel. Both the Project Parcel and the Large Parcel are part of the R-2 Suburban Residential District under the Elizabeth Township Zoning Ordinance. (Application, page 4)

AEC proposes to construct and operate a natural gas fired electric power generating plant (the “Project”). The Project, assuming AEC obtains a conditional use permit and all other necessary state and federal permits, will consist of a nominal 550 megawatt (“MW”) natural gas fired combined cycle power generating facility, which involves the installation of a combustion turbine/generator, a heat recovery steam generator, and a steam turbine in a combined cycle configuration, a cooling tower, a switchyard, a stormwater basin, a gas yard, administrative, storage and equipment buildings, an access road and ancillary facilities. (Application, p. 4)

AEC requests a use variance based on unnecessary hardship. The use variance is requested as a conditional use rather than as a principal permitted use. AEC requests that the requested use variance be made conditional, and that it require AEC to submit a conditional use permit application under the Elizabeth Township Zoning Ordinance (the “Zoning Ordinance”). The application would be subject to the general standards for conditional uses in Section 1402 of the Zoning Ordinance, and the performance standards

in Section 1501 of the Ordinance. (Transcript of March 17, 2016 hearing before Elizabeth Township Zoning Hearing Board, pages 14-18)

In addition to a use variance, AEC requests variances from the noise and height limitations of the Zoning Ordinance. Section 1501.3 of the Ordinance sets the following noise limits:

No operation or activity shall cause or create noise in excess of the sound levels prescribed below:

a. Residential Districts: At no point beyond the boundary of any lot within these districts shall the exterior noise level resulting from any use or activity located on such lot exceed a maximum of sixty (60) dBA for more than four (4) hours during a twenty-four (24) hour equivalent period.

b. Commercial Districts: At no point on or beyond the boundary of any lot within these districts shall the exterior noise level resulting from any use or activity located on such lot exceed a maximum of sixty (65) dBA for more than eight (8) hours during a twenty-four (24) hour equivalent period.

c. Industrial Districts: At no point on or beyond the boundary of any lot within these districts shall the exterior noise level resulting from any use or activity located on such lot exceed a maximum of seventy (75) dBA for more than eight (8) hours during a twenty-four hour equivalent period.

d. Where two (2) or more zoning districts in which different noise levels are prescribed share a common boundary, the most restrictive noise level standards shall govern.

Zoning Ordinance, Section 1501.3.

AEC requests that, since the Project will be industrial in nature, the industrial noise limit apply to the Project Parcel. The residential noise limit would apply to the remainder of the Large Parcel. (Application, page 11)

Finally, AEC requests variances from the height limitations of the Zoning Ordinance. Section 702 of the Ordinance sets the following height limits in the R-2 Suburban Residential District:

Hospitals:	5 stories but no more than 60 feet
All Other Principal Structures:	2 ½ stories, but no more than 35 feet
All Accessory Structures:	1 story but no more than 15 feet

Zoning Ordinance, Section 702.

Section 1505 of the Ordinance provides the following exceptions to the height limitations in each zoning district:

The height limitations of this Ordinance shall not apply to the following structures: church spires, chimneys, elevator bulk heads and other mechanical equipment that are part of the principal structure, conveyors, flagpoles, silos, standpipes, elevated water tanks, derricks, public utility structures and other structures not intended for human habitation which do not exceed the height limitations of the Zoning District by more than fifteen (15) feet.

Zoning Ordinance, section 1505.

Several structures within the Project exceed the height limitations of Section 702. The tallest of these are the Heat Recovery Steam Generator at 115 feet and the Combustion Turbine Stack at 175 feet. (Application, p. 11-12) AEC maintains that stacks on the Project should be exempt as “chimneys”, and the remaining structures be exempt as “public utility structures”, although AEC is not a public utility under Pennsylvania law.

The Elizabeth Township Zoning Hearing Board (the “Board”) held public hearings on the Application on February 18, March 17 and April 20, 2016. The hearings were attended by all five Board members: Terry Opfer, Wayne Washowich, Keith Kelley, Charles Smith and Larry Vota.

## **B. Environmental Conditions**

Various portions of the Large Parcel were operated as a hazardous and non-hazardous waste disposal facility (“Contaminated Area”) from approximately 1975 to 1983. (Application, p. 4- 5) A remedial investigation identified coal tar materials as the primary source of contamination of the Large Parcel. (Application, p. 5).

Following an extensive remedial investigation, the Pennsylvania Department of Environmental Protection (“PADEP” or “Department”) issued an Administrative Order on March 30, 2010. This order detailed their findings that the Large Parcel was at risk of further release of hazardous substances, and ordered the hazardous substances to be capped with a synthetic liner to prevent any further spread. (Application, p. 7-9)

PADEP placed a restriction on the property prohibiting virtually any use within the Contaminated Area. (Application, p. 8) This restriction also prevented virtually any use of the property within the remaining portions of the Large Parcel (“Adjacent Area”) without, among other things, the approval of the PADEP to insure that construction on the property will not excavate any hazardous substances that may have contaminated the soil. (Application, p. 8-9) These restrictions were recorded within the Large Parcel’s deed on September 2, 2010. (Application, p. 9)

## II. FINDINGS OF FACT

Based on the evidence and testimony in the record, the Board makes the following Findings of Fact:

1. Allegheny Energy Center LLC (“AEC”) is a Delaware limited liability company and a wholly-owned subsidiary of Invenergy Thermal Development LLC, an affiliate of Invenergy LLC. AEC proposes to construct and operate a natural gas fired electric power generating plant (the “Project”).

2. On January 22, 2016, AEC filed a Joint Application for Use Variance and Noise and Height Variances (the “Application”) with Elizabeth Township in connection with the Project.

3. AEC seeks a conditional use variance, subject to a requirement that it apply for and obtain a conditional use permit in accordance with the applicable provisions of the Elizabeth Township Zoning Ordinance (the “Zoning Ordinance”).

4. Hearings in connection with the Application were conducted by the Elizabeth Township Zoning Hearing Board (“ZHB”) on February 18, March 17 and April 20, 2016 (the “Hearings”).

5. The Mountain Watershed Association and Protect Elizabeth Township (“Objectors”) appeared through counsel and participated in the Hearings. Joint Exhibit 1 establishes Objectors’ standing.

6. The Hearings were conducted pursuant to §908 of the Pennsylvania Municipalities Planning Code, 53 P.S. §10908. Testimony and public comment were accepted, various exhibits were entered into the record, and the Hearings were transcribed.

7. The Project would consist of a nominal 550 megawatt (“MW”) natural gas fired combined cycle power generating facility, which involves the installation of a combustion turbine/generator, a heat recovery steam generator, and a steam turbine in a combined cycle configuration, a cooling tower, a switchyard, a stormwater basin, a gas yard, administrative, storage and equipment buildings, an access road and ancillary facilities.

8. AEC has secured an option for approximately 22 acres (the “Project Parcel”) in a larger, approximately 600-acre property (the “Large Parcel”), Lot & Block # (908) 997-H-79, for construction and operation of the Project.

9. The Project Parcel is currently zoned as R-2 Suburban Residential under the Elizabeth Township Zoning Ordinance (the “Zoning Ordinance”).

10. Various portions of the Large Parcel were operated as a hazardous and non-hazardous waste disposal facility from at least 1975 until 1983. Pursuant to the

Pennsylvania Hazardous Sites Cleanup Act (“HSCA”), PADEP conducted a Remedial Investigation (“RI”) for the Large Parcel. The RI identified coal tar materials as the primary source of contamination at the Large Parcel.

11. Under the provisions of HSCA, United States Steel Company (“USS”) and 15 other Potentially Responsible Parties (“PRPs”) presented a conceptual remediation plan to PADEP as a voluntary action to remediate the principal impacted areas at the Large Parcel. This conceptual plan was the basis for the remedial design that was ultimately approved by PADEP for implementation at the Large Parcel.

12. The remedial actions were implemented by USS pursuant to an August 30, 2002 Consent Order and Agreement (“COA”) between PADEP and USS (the “2002 COA”). The 2002 COA generally addressed USS’s remedial obligations.

13. PADEP issued an Administrative Order on March 30, 2010 (the “Administrative Order”). The Administrative Order stated that at a minimum the Contaminated Area was contaminated with various volatile organic and inorganic compounds. Those conditions constituted, and they continue to constitute, a “release” or “threatened release” of “hazardous substances.”

14. The Administrative Order further required the Estate of William Fiore to record with the deed for the Large Parcel a Notice of Property Use Restrictions, which would prohibit any commercial, industrial or residential use within the Contaminated Area, as well as a prohibition on use or consumption of groundwater, excavation or removal of soil or waste material, or any disturbance of the remedial cap.

15. The Administrative Order also prohibits in the Adjacent Area where the Project Parcel is located the excavation of soil, construction buildings or any other structure without: (1) complying with all applicable federal, state and local laws, regulations and ordinances, including, without limitation, those pertaining to environmental protection, waste management, and occupational health and safety; (2) securing Department approval of a health & safety management plan prepared in accordance with applicable OSHA requirements; and (3) submitting prior written notification of such planned activities to the Department at least sixty days in advance of the commencement of such activities.

16. Prior to construction or expansion of any existing building on the Adjacent Areas, the Administrative Order also requires either that (1) additional sampling and/or vapor intrusion modeling be submitted to the Department demonstrating to the satisfaction of the Department that the occupation of such buildings or structures will not result in an unacceptable risk of soil vapor exposure to the occupants of such buildings; or (2) engineering measures such as vapor barriers or venting systems or other actions approved by the Department are implemented to limit or prevent vapor intrusion into occupied areas, so as to avoid an unacceptable risk of soil vapor exposure to occupants of such buildings.

17. These restrictions run with the Large Parcel and are effective into perpetuity. They may be modified or terminated only upon written application to and written approval by the Department’s Southwest Regional Hazardous Sites Cleanup Unit.

18. The Declaration of Deed Restrictions mandated by the Administrative Order was recorded on September 2, 2010. The Administrative Order was appealed to the Environmental Hearing Board (“EHB”). PADEP agreed to a modification of the Administrative Order, which modified the restrictions in paragraphs III.B and D (relating to the Adjacent Areas) as follows:

<b>Original</b>	<b>Revised</b>
	<p>Upon notice and reasonable verification, <i>in the event Fiore secures title to or leases the Property, provided he intends to make and ultimately does make lawful use of the Property</i>, Fiore shall be permitted to amend Paragraphs B and D of Section III of the deed restrictions contained in Exhibit A to the Order, such that Section III shall read:</p>
<p>III. B. Any soil excavated or removed from any of the Adjacent Areas shall be evaluated for its suitability for other uses and subsequently managed or transported and disposed of in compliance with all applicable federal, state and local laws, regulations and ordinances including, without limitation, those pertaining to environmental protection, waste management and occupational health and safety.</p>	<p>III. B. Any soil displaced as a result of grading and/or excavation within the Adjacent Areas for the purpose of site preparation or redevelopment of the site involving unoccupied structures shall be authorized, with the understanding that any soils found to be contaminated, or any waste encountered, shall be evaluated for suitability for other uses and subsequently managed or transported and disposed of in compliance with all applicable federal, state and local laws, regulations and ordinances including, without limitation, those pertaining to environmental protection, waste management and occupational health and safety.</p>
<p>D. No person may construct or expand any building or other structure on the Adjacent Areas, unless (1) additional sampling and/or vapor intrusion modeling is submitted to the Department demonstrating to the satisfaction of the Department that the occupation of such buildings or structures will not result in an unacceptable risk of soil vapor exposure to the occupants of such buildings; or (2) engineering measures such as vapor</p>	<p>D. No person may construct or expand any buildings or other structures for occupancy on the Adjacent Areas, unless (1) additional sampling and/or vapor intrusion modeling is submitted to the Department demonstrating to the satisfaction of the Department that the occupation of such buildings or structures will not result in an unacceptable risk of soil vapor exposure to the occupants of such buildings; or (2) engineering measures such as vapor barriers or venting systems or other</p>

<b>Original</b>	<b>Revised</b>
barriers or venting systems or other actions approved by the Department are implemented to limit or prevent vapor intrusion into occupied areas, so as to avoid an unacceptable risk of soil vapor exposure to occupants of such buildings.	actions approved by the Department are implemented to limit or prevent vapor intrusion into occupied areas, so as to avoid an unacceptable risk of soil vapor exposure to occupants of such buildings.

19. The entire Large Parcel is zoned R-2 Suburban Residential. A power plant is not explicitly identified as either a permitted or a conditional use in the R-2 District of the Elizabeth Township Zoning Ordinance (the “Zoning Ordinance”).

20. Apart from local approval, the Project will be required to obtain a number of county, state and federal permits prior to beginning operations.

21. The entire Large Parcel, including both defined disposal areas and the so-called “adjacent areas”, presents a “threatened release” of “hazardous substances,” as those terms are defined in Section 103 of the Pennsylvania Hazardous Sites Cleanup Act (“HSCA”), 35 P.S. §6020.103, including risks from harmful vapors. This includes a perpetual preclusion on the use of groundwater applicable to the entire Large Parcel.

22. No part of the Large Parcel, including the Project Parcel, can be developed residentially, both because of the nature and extent of the risk posed by the contamination. (2/18/16 Hearing Transcript, 45-47)

23. Even if the proper approval for residential development were granted, all 600 acres of Large Parcel would require remediation in order for residential development to be feasible and the cost of such a remedial effort, not including the substantial cost of groundwater remediation, would be on the order of \$735,000,000. (2/18/16 Tr. 47-48)

### **III. CONCLUSIONS OF LAW**

#### **A. Use Variance**

AEC requests a use variance to permit construction of its proposed Project, subject to the conditional use provisions of the Zoning Ordinance.

The legal standard for granting a use variance is set forth in Section 910.2 of the Municipalities Planning Code. 53 P.S. §10910.2. It reads as follows:

- a) 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 and not the circumstances or 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 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.

These criteria are also set forth in §1905 of the Zoning Ordinance.

The party seeking a variance bears a heavy burden because the reasons for granting a variance must be substantial, serious and compelling. *Catholic Social Services Housing Corp. v. Zoning Hearing Board of Edwardsville Borough*, 18 A.3d 404, 407 (Pa. Cmwlth. 2011), citing *Valley View Civic Association v. Zoning Board of Adjustment*, 462 A.2d 637, 640 (Pa. 1983). The applicant for a variance has the burden of establishing unnecessary hardship. *Hipwell Manufacturing Company v. Zoning Board of Adjustment of the City of Pittsburgh*, 452 A.2d 605, 606 (Pa. Cmwlth. 1982).

Addressing the various legal requirements contained in the variance statute, the Board concludes as follows:

**1. Unnecessary Hardship**

AEC argues that unnecessary hardship attends the property in question because the property cannot be used for residential use, or alternatively that the property can be conformed for a permitted use only at a prohibitive expense. In the context of use variances, “unnecessary hardship is established by evidence that: (1) the physical characteristics are such that it cannot be used for a permitted purpose; or (2) the property can be conformed for a permitted use only at a prohibitive expense; or (3) the property has no value for any purpose permitted by the zoning ordinance.” *Marshall v. City of Philadelphia*, 97 A.3d 323, 329 (Pa. 2014), citing *Hertzberg v. Zoning Board of Adjustment of the City of Pittsburgh*, 721 A.2d 43, 47 (Pa. 1998). The applicant must prove only one of these factors in order to establish unnecessary hardship; the applicant is not required to demonstrate that the property at issue cannot be used for a permitted purpose if the applicant is able to demonstrate that one of the other two factors is applicable. *Marshall*, 97 A.3d at 330.

The permitted uses within the R-2 District are as follows:

- a. Essential Services
- b. Forestry, subject to Section 1511
- c. Public Recreation
- d. Single Family Dwelling

Elizabeth Township Zoning Ordinance, Section 701 A.

AEC has met their burden as to all permitted uses but Forestry. AEC has presented evidence that the property in question cannot be developed for residential use and that if such a development were possible, it could only be conformed for such a use at a prohibitive expense. Daniel Leandri of Pennoni Associates, an engineering consulting firm, testified that the hazardous materials the Department believes to be present within the Adjacent Area would create a health hazard within any residential structure that may be built on the property and that the limitations imposed by Department prohibit the removal of these hazardous materials. (2/18/16 Tr. 46-47). Additionally, Mr. Leandri testified that even if the Department allowed the removal of the hazardous materials, the estimated cost of remediation of the Adjacent Area would be approximately \$735,000,000. (2/18/16 Tr. 47-48) This evidence is similar to that which justified a variance in the case of *Allegheny West Civic Council v. Zoning Board of Adjustment*, 689 A.2d 225, 226 (Pa. Cmwlth. 1996).

Of the other permitted uses, use for Public Recreation by the Applicant is not possible as the definition of Public Recreation in the Zoning Ordinance requires that the enterprise be “owned and operated by a public entity.” Zoning Ordinance, Section 201. Similarly, Essential Services as defined by the Zoning Ordinance requires operation by a

“public utility.” *Id.* AEC is not a public entity or public utility, and therefore cannot utilize the Large Property for either of these uses.

This analysis leaves only one possible permitted use: Forestry. AEC’s brief recognizes Forestry as a permitted use within the district, but only states that there is “no evidence in the record to support the proposition that [Forestry] is any more possible than the primary permitted use - single family residential.” AEC Brief, p. 24, fn. 10. While this may be true, there is no evidence in the record to support the proposition that this use is not viable. Opponents of the Application do not bear the burden of demonstrating that a permitted use is possible; the burden of proof lies with AEC to show that the use is not possible or only possible at a prohibitive expense.

## **2. Uniqueness of the Hardship**

A variance may only be granted “where a property is subjected to a hardship unique or peculiar to itself as distinguished from one arising from the impact of the zoning regulations on the entire district.” *Appeal of Michener*, 115 A.2d 367, 371 (Pa. 1955). A hardship that burdens all of the neighboring properties will not be considered unique to the parcel in question. *Larsen v. Zoning Board of Adjustment of the City of Pittsburgh*, 672 A.2d 286, 291 (Pa. 1996).

All 600 acres of the Large Parcel are affected by this hardship, not merely the 22-acre parcel for which AEC seeks the variance. AEC’s expert witness testified on cross examination at the second hearing that the power plant could be placed in any portion of the adjacent area. (3/17/16 Tr. 12-13) Fair Shake Environmental Legal Services (“Fair Shake”) argues in a brief submitted to the Board that because the hardship equally burdens all neighboring acreage to the Project Parcel, the hardship is not peculiar to the particular parcel for which the variance is sought. Fair Shake Brief, p. 3.

Unlike *Larsen*, however, the 600 acres of the Large Parcel comprise one piece of property that is affected by the unnecessary hardship and not several separate tracts of property. AEC is requesting a variance for only the 22-acre Project Parcel in order to seek the minimum variance required to effectuate the proposed power plant’s use. Such a request does not sever the 22-acre Project Parcel from the remainder of the Large Parcel, which as a whole is a unique property.

## **3. Hardship Must Not Be Created by the Applicant**

AEC has not created the unnecessary hardship. Various portions of the Large Parcel were operated as a hazardous and non-hazardous waste disposal facility (“Contaminated Area”) from approximately 1975 to 1983. (Application, p. 5) During this time, the Large Parcel was owned and operated by Municipal and Industrial Disposal Company (“MIDC”). (Application, p. 4) Areas within the Large Parcel were already contaminated by 1983.

(Application, p. 5) AEC's interest in the Large Parcel arose long after the cessation of hazardous waste disposal on the property.

#### **4. Variance Must Not Alter Essential Character of the Neighborhood**

AEC must show that if granted the variance 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 or development of adjacent property, nor be detrimental to the public welfare. The parties disagree as to what the appropriate "neighborhood or district" to which the variance is to be measured. AEC argues that the "neighborhood" should be the land that is adjacent to and surrounding the proposed use, which in this case would be the area of the Large Parcel. AEC's Brief, p. 23. The Fair Shake Brief argued that the Board should consider the character of "the suburban district as a whole." Fair Shake Brief, p. 5.

AEC's position has more authoritative support. AEC cites to several cases where courts have examined only the immediate surrounding areas to determine if granting a variance will disrupt the essential character of the neighborhood. See *Valley View*, 462 A.2d at 640 (take-out restaurant would not change the essential character of the residentially-zoned neighborhood where other commercial uses such as a convenience store, bank, dental office, and beer distributor among other things are located in the immediate vicinity); *Taliaferro v. Darby Tp. Zoning Board*, 873 A.2d 807, 810 (Pa. Cmwlth. 2005) (despite its location in a residential neighborhood, the property in question lies in a commercial area and is adjacent to a four-lane highway). In contrast, the Fair Shake brief has offered no judicial opinions supporting their broader interpretation that AEC must show that the plant will not alter the essential character of the entire zoning district. The Board finds AEC's interpretation more persuasive.

John R. Varaly, a professional planner, testified that the proposed use would not alter the essential character of the neighborhood or district in which the property is located, nor substantially or permanently alter the use or development of adjacent properties, nor be detrimental to the public welfare. In making this determination, he considered the relevant neighborhood or district to be the 600-acre Large Parcel property and the properties bordering the exterior of that site. The primary use of this district has been that of a hazardous waste dump. Locating a gas fired power plant will not disrupt the already industrial nature of the neighborhood's use. (3/17/16 Tr. 93-95)

#### **5. Variance Must Be the Minimum Necessary to Grant Relief**

The variance requested must also be the minimum variance required to effectuate the power plant use. AEC's brief as to this criterion focuses on physical dimensions and scope of the use. See *Haverford Township v. Zoning Hearing Bd. of Haverford Township*, 439 A.2d 1299, 1300 (Pa. Cmwlth. 1982). As noted above, AEC has specifically requested a variance for the 22-acre Project Parcel rather than a larger variance to fulfill the physical

dimensions portion of this requirement. Such a power plant cannot be operated on a smaller parcel of land. (2/18/16 Tr. 58)

Opponents argue, however, that the “minimum variance” language also requires the use permitted to be the least intensive use possible on the property. The Pennsylvania Supreme Court has affirmed that where the “applicant’s relief can be alleviated by one of several variances the lesser variance should be granted.” *East Torresdale Civic Ass’n v. Zoning Bd. of Adjustment of Philadelphia*, 481 A.2d 976, 980 (Pa. Cmwlth. 1984), aff’ 499 A.2d 1064 (Pa. 1985). In *East Torresdale*, the grant of a variance permitting commercial use of property within a single-family or semi-detached residential district was reversed by the Commonwealth Court in part because the board of adjustment refused to receive evidence showing that a variance permitting multi-family use would grant adequate relief to the applicant. *Id.* at 981.

*East Torresdale* suggests that intensity of use must be considered when determining if a lesser variance may grant relief. As noted above, the burden of proof is always on the applicant in a variance proceeding. *Hipwell*, 452 A.2d at 606. Here, AEC has presented no evidence showing that a variance permitting a less intensive use than the proposed power plant, such as light manufacturing, would be insufficient to grant relief.

On the basis that AEC has failed to show that the property cannot be used in conformity with the provisions of the Zoning Ordinance and that the proposed variance does not represent the minimum variance that will afford relief, the Board concludes that AEC has not met their burden of proof as to the requested use variance.

## **B. Height and Noise Variances**

AEC also requests height and noise variances incidental to its conditional use variance. Standards and dimensional variances generally are not held to as harsh of a standard as use variances, and are more liberally granted. *Hertzberg*, 721 A.2d at 47-48. Pennsylvania courts generally have allowed such variances where an implementation of a change in use would require a corresponding change in standards or dimensions regardless of the underlying zoning. *Vitale v. Zoning Hearing Board of Upper Darby Tp.*, 438 A.2d 1016, 1019 (Pa. Cmwlth. 1982). Where an otherwise proper use would be precluded by a height restriction, Pennsylvania courts will generally grant a height variance to allow the use. *Appeal of Johna Holtz*, 8 A.3d 374, 378 (Pa. Cmwlth. 2010).

AEC may have met its burden as to the height and noise variances, but it is not necessary for the Board to decide this issue. AEC’s expert testified that the industrial 75 dbA noise limit at the outer boundary or the Project Parcel was reasonable. (2/18/16 Tr. 58) The same expert testified that there is no feasible way to build a power plant of the size contemplated without the requested height variances. (2/18/16 Tr. 60) As AEC has failed to meet its burden of proof for a use variance and cannot construct the power plant on the Project Parcel, the issue of the height and noise variances on the Project Parcel is not necessary to the Board’s decision, and the Board does not draw a conclusion on the issue.

If a power plant cannot be built on the Project Parcel at all, it is not necessary to decide the proper height and noise standards for the plant.

### **C. Exclusionary Zoning**

AEC asserts that the Elizabeth Township Zoning Ordinance fails to provide for the operation a power plant, and is invalid as exclusionary and confiscatory. Pennsylvania law states that where “an ordinance fails to provide for a legitimate use and the municipality fails or is unable to adequately justify that exclusion by demonstrating its substantial relationship to the promotion of the public health, safety and welfare, that ordinance is not a rational exercise of the zoning power and is therefore invalid.” *Allegheny Energy Supply Co., LLC v. Township of Blaine*, 829 A.2d 1254, 1260 (Pa. Cmwlth. 2003).

AEC argues that the ordinance does not on its face allow for the development of a power plant in any zoning district and is therefore exclusionary. It has been well-established under Pennsylvania law that “a zoning ordinance may make adequate provision for its ‘fair share’ of a required use even though the use is available only by special exception or as a conditional use.” *See* Ryan, *Pennsylvania Zoning Law and Practice*, §3.5.5.; *Kratzer v. Board of Supervisors of Fermanagh Township*, 611 A.2d 809 (Pa. Cmwlth 1992); *New Bethlehem Borough Council v. McVay*, 467 A.2d 395, 399 (Pa. Cmwlth. 1983); *Zajac v. Zoning Hearing Bd. of Mifflin Tp.*, 398 A.2d 244, 246 (Pa. Cmwlth. 1979).

The Zoning Ordinance does not explicitly allow power plants as either a permitted or conditional use anywhere in the Township. The M-1 Light Industrial District, however, permits “Heavy Manufacturing” as a conditional use. Heavy Manufacturing is defined as:

The mechanical or chemical transformation of raw materials or substances into new products or other raw materials or any manufacturing process not included in the definition of “Light Manufacturing” or “High Technology Industries.”

(Elizabeth Township Zoning Ordinance, Section 201) The Project is described in AEC’s own application as a “natural gas fired power generating plant.” The transformation of natural gas into electricity seems to fall within this definition. The Board concludes that the proposed plant is within the definition of Heavy Manufacturing, and is allowed as a conditional use in the M-1 Light Industrial District, so the Zoning Ordinance does not exclude this use.

### **D. The Propriety of a Conditional Use Variance**

AEC is seeking a conditional use variance. Unlike a standard use variance, the relief sought by AEC would allow the use of a power plant on the Project Parcel as a conditional use rather than a permitted use. This distinction would require AEC to obtain approval

through the conditional use process before the power plant could be constructed and operated on the Project Parcel. AEC Brief, p. 8.

Section 910.2(b) of the Municipal Planning Code gives the Board broad authority to set conditions on variances. 53 P.S. §10910.2(b). While neither this provision nor case law specifically allows a condition triggering the conditional use process, it does not preclude such a condition. A legal conclusion on this issue is not necessary to the Board's decision, which is against the variance. The Board does note, however, that the conditional use process is useful in this case because it retains some municipal control over development of the Project Parcel.

**E. Time Extension**

Section 908(9) requires the Board to render a written decision within 45 days of the last hearing. 53 P.S. §10908.9. AEC has granted a time extension to the Board to render a decision up until June 17, 2016. (5/25/2016 Letter from AEC Counsel)

**IV. RULING**

On the basis of the foregoing, the Board denied the Joint Application for Use Variance and Noise and Height Variances at a public meeting on June 14, 2016. Board members Wayne Washowich, Keith Kelley, Charles Smith and Larry Vota voted to deny the Joint Application. Board Chairman Terry Opfer voted against the denial.

Date of written decision:  
June 15, 2016

ELIZABETH TOWNSHIP  
ZONING HEARD BOARD