

**IN THE COURT OF COMMON PLEAS OF THE 39TH JUDICIAL DISTRICT
OF PENNSYLVANIA--FRANKLIN COUNTY BRANCH**

**APPEAL FROM THE GREENE TOWNSHIP
ZONING HEARING BOARD DECISION OF
THE VARIANCE APPLICATION OF
PENN-MAR ETHANOL, LLC,**

: CIVIL ACTION

APPELLANTS:

**DeETTA ANTOUN
CITIZENS FOR A QUALITY ENVIRONMENT
JOHN LUCABAUGH
KRISTI KUSCH-LUCABAUGH
FLORA LaRUE
ROBERTA REDMON
JACKIE SALMON
JOHN SCHOENBERGER
CAROL SCHOENBERGER
DUANE SCHOOLEY
GINA SCHOOLEY**

: NO. 2005-1581

DEPUTY

LINDA L. BEARD
PROTHONOTARY

2005 NOV 23 P 12:42

PROTHONOTARY
FRANKLIN COUNTY

: JUDGE: RICHARD J. WALSH

OPINION AND ORDER

A. INTRODUCTION

Before us for consideration is the statutory appeal filed in this Court by DeEtta Antoun and the other named Appellants from a decision of the Greene Township Zoning Hearing Board entered on May 26, 2005. In their Notice, the Appellants asserted that the Board erred in reaching fifteen (15) specific conclusions of law and that the Board abused its discretion in six (6) instances by making material findings of fact in the absence of substantial evidence to support those findings. In their Notice of Appeal, Appellants request that the Court schedule a hearing on the appeal, pursuant to 53 P.S. §11005-A. In their Brief in Support of their Appeal, the Appellants specifically request, in addition to scheduling a hearing on the merits of the appeal, that the Court determine that the Applicant, Penn-Mar Ethanol, LLC, before the Zoning

Hearing Board, has not met the statutory requirements for the grant of a Variance and determine that the proposed Penn-Mar Ethanol, LLC's use is not a permitted use under the Greene Township Zoning Ordinance in a Heavy Industrial District. For the reasons which follow, we conclude that the use is not a permitted use in the Heavy Industrial District and that the Applicant, Penn-Mar Ethanol, failed to carry its burden of establishing the elements necessary for the granting of a dimensional variance.

B. BACKGROUND

In about late March 2005, Penn-Mar Ethanol, LLC ("PME" or "Applicant") filed with the Greene Township Zoning Hearing Board an Application for Variance. The variance was dated March 28, 2005. *See* Record upon *Certiorari*. In its Application, PME disclosed that it is the equitable owner pursuant to an Agreement of Purchase dated February 7, 2005 by and between Applicant and Letterkenny Industrial Development Authority ("LIDA"). In its Application, PME notes at Paragraph 6 that the zoning classification is Heavy Industrial; that variance is requested from Article IV, Chapter 105, Section 24, Maximum Building Height of 45 Feet. Finally, in its Application for a Variance, PME says that its "reasons for the dimensional variance requested include but are not limited to: the current building height limitation of 45 feet does not allow for the development of the property as a large scale manufacturing facility which is a permitted use under the Zoning Ordinance; because of the unnecessary hardship, the property cannot be developed in strict conformity with the provisions of the Zoning Ordinance; the unnecessary hardship has not been created by the Applicant; the requested variance will not alter the essential character of the Heavy Industrial District and will not be detrimental to the public welfare. The minimum variance that will afford relief is requested. In order to be

developed as a large scale manufacturing facility, structures in excess of 45 feet will be required. The listing of the structure heights necessary for such a facility are attached hereto as Exhibit C.” Record on *Certiorari*, Application for Variance.

On April 18, 2005, the Greene Township Zoning Hearing Board held a hearing on PME’s Application for a Variance. The Appellants participated in that evidentiary hearing.

On April 22, 2005, DeEtta Antoun appealed the Zoning Officer’s permitted use determination. Following the April 18th hearing before the Zoning Hearing Board, the parties entered into a Stipulation as to the effect and disposition of the appeal by DeEtta Antoun from the Zoning Officer’s permitted use determination. Item 7 of the parties’ Stipulations read as follows:

“In the event the Zoning Hearing Board considers and rules upon the issue of whether Penn-Mar Ethanol’s use is a “permitted use” as part of its decision on Penn-Mar Ethanol’s Variance Application, the Opposing Parties agree that there will be no need to hold a hearing on the Opposing Parties’ Appeal and will promptly withdraw their pending Appeal from the Zoning Officer’s permitted use determination.” See Stipulations entered into the record and attached to the Transcript of Proceedings before the Greene Township Zoning Hearing Board dated May 26, 2005.

On May 26, 2005, the Zoning Hearing Board met once again and determined that PME’s facility “is considered large scale manufacturing.” Transcript of Proceedings of May 26, 2005 at 11. The Board further determined that the “stack, silos, etc. are not subject to height limitations.” Transcript of the May 26, 2005 Proceedings at 12. The Board further unanimously voted to grant a height variance. Transcript of the Proceedings of May 26, 2005 at 14. Finally, the Board directed the Solicitor to author a written decision of the Board which decision, dated

May 31, 2005 granted the Application for Variance for Penn-Mar Ethanol and dismissed the appeal of DeEtta Antoun and Citizens for a Quality Environment.¹

On June 13, 2005, the Appellants filed in the Court of Common Pleas a Notice of Appeal of the May 26, 2005 decision of the Greene Township Zoning Hearing Board granting the Variance Application of PME. On July 6, 2005, PME filed its Notice of Intervention. Shortly after the filing of the Notice of Appeal, the Appellants also filed a Petition to stay the Greene Township proceedings relating to land development and this Court issued a stay on June 16, 2005. Evidentiary hearing was held on September 19, 2005 limited strictly and solely to the issue of whether the stay should remain in effect or should be lifted pending resolution of the pending appeal. On October 31, 2005, this Court issued an Order continuing the stay pending resolution of the appeal. Further, the Court heard argument on issues related to the appeal on October 24, 2005. The matter now appears to be ripe for disposition.

C. ISSUES RAISED BY APPELLANTS

In their Notice of Appeal, the Appellants ascribe a number of reasons as the basis for the appeal. We quote at length from the Notice of Appeal.

- A. The Board erred in reaching the following conclusions of law:
1. The Board erred in accepting the January 11, 2005 opinion letter from the Township Solicitor as the decision of the Zoning Officer, in the absence of any documents, testimony, or other evidence indicating that the Zoning Officer adopted the Solicitor's opinion.
 2. The Board erred in failing or refusing to conclude that the collaborative decision making process described in the Solicitor's letter of April 8, 2005 exceeded the statutory, ministerial authority

¹ The decision of the Board is 32 pages long and it is without page numbering. For easy reference, the Court has numbered the pages sequentially and may refer to specific pages of the decision of the Board.

of the Zoning Officer, rendering the permitted use determination invalid.

3. The Board erred in basing its decision, in significant part, upon a view of the site conducted by the Board, which excluded the Appellants and counsel for the Appellants.
4. The Board erred in basing its decision upon information independently supplied by the property owner to individual Board Member/s, which information was obtained without knowledge or consent of the Appellants or Appellants' Counsel, and was not subject to review or cross-examination.
 - i. The Board Member/s erred in basing their decision upon information obtained outside of the hearing or appeal record from the property owner, which has a significant financial interest in approval of the application.
5. The Board erred in granting the variance in the absence of any findings or evidence required by 53 P.S. §10910.2(a) that: there are unique physical circumstances or conditions or hardships arising from the land; the Applicant would suffer a hardship or unreasonable financial burden if the requested height variance was not granted; and the requested variance was the minimum necessary.
6. The Board erred in refusing to hear testimony on the issue of detriment to the public welfare, and in failing or refusing to conclude that the requested variance would be detrimental to the public welfare, in violation of 53 P.S. §10910.2(a)(4).
7. The Board decision stated that: "It is true that the Greene Township Ordinance does not specifically reference an ethanol plant or an ethanol manufacturing facility as a permitted use in the Heavy Industrial District." Board Decision, page 21. The Board erred in disregarding Ordinance Section 105-11D, made applicable to Heavy Industrial Districts by Section 105-12C(3), which provides that only the Board of Supervisors, after a public hearing, may determine a use to be permitted or conditional if the use is generally listed but "not specifically listed."
8. The Board's decision was improper in that it was based on an erroneous conclusion by at least one Board Member, announced at

the May 26, 2005 public meeting, that the existence of other buildings or structures in the area around the site violated the Greene Township's 45-foot height limitation. This conclusion was clearly in error, in that much of the area surrounding the site contains facilities on property owned by Letterkenny Army Depot, and not subject to the Greene Township Zoning Ordinance, and/or facilities that were constructed prior to the time the land in question was conveyed out of the U.S. Army's ownership, and thus not subject to Greene Township Zoning Ordinance requirements.

9. The Board erred in concluding that most of the components of the facility were "structures" not subject to the 45-foot "building" height limitation set forth in Section 105-24 of the Greene Township Zoning Ordinance. Conclusions of Law 2, 3, 10.
 - i. The Board erred in failing or refusing to conclude that the "structures" also fit the Ordinance definition of "Building," which includes "structure." Conclusions of Law 3, 17.
 - ii. The Board erred in concluding that components of the facility were separate and distinct structures, as opposed to buildings, or part of the process building, given testimony by the Applicant's Engineer that these components were: fitted with a top, cap or roof, attached to a fixed concrete foundation; all connected to the process building by conveyors, piping, wiring, and central computer control; each essential to the functioning of the process building. Conclusions of Law 3, 17.
10. The Board erred in concluding that the RTO stack, boiler stack, biogas flare, and evaporators were exempt from height requirements as a chimney or tower, under Ordinance Section 105-26B. Conclusions of Law 4, 6, 7, 9.
11. The Board erred in concluding that the eight (8) evaporators permanently affixed to the process building were not part of the building, but "structures" not subject to the height limit. Conclusion of Law 10.
12. The Board erred in concluding that the proposed use of an ethanol distillery is a permitted use under Greene Township Zoning Ordinance Section 105-12B either as "large scale manufacturing" or otherwise. Conclusion of Law 13.

13. The Board erred in concluding that the proposed use of an ethanol distillery was specifically listed as a permitted use in Greene Township Zoning Ordinance Section 105-12B either as “large scale manufacturing” or otherwise. Conclusion of Law 13.
 14. The Board erred in failing to hold that neither the Zoning Hearing Officer nor the Zoning Hearing Board had authority under the Greene Township Zoning Ordinance to determine that a use “not specifically listed” in Greene Township Zoning Ordinance Section 105-12B could be determined to be a permitted use, as that authority is vested exclusively in the Supervisor’s, after a hearing, under Sections 105-12C(3); 105-11D.
 - i. The Board erred in failing to conclude that the methodology used by Greene Township to conclude that Penn-Mar Ethanol’s proposed use was a “permitted use” and the description of the process and conclusions in the Solicitor’s letter of April 8, 2005 provides conclusive evidence that the use was “not specifically listed” in Section 105-12B.
 - ii. The Board erred in not concluding that the Zoning Officer should have turned the Application over to the Greene Township Supervisors, in compliance with Ordinance Section 105-11D, pursuant to Section 105-12C(3).
 15. The Board erred in finding Appellants’ Exhibits at Tab 4 containing references to the proposed use as an “ethanol refinery” to be inadmissible, based on the hearsay rule, despite the fact that they were not offered to prove the truth of the matter asserted, and contrary to the Municipalities Planning Code, 53 P.S. 10908(6), which provides that formal rules of evidence do not apply at Zoning Hearing Board hearings. Conclusion of Law 16.
- B. The Board abused its discretion in making the following material Findings of Fact in the absence of substantial evidence in support thereof.
1. There is no substantial evidence to support the finding that the proposed use is “manufacturing” or that ethanol is manufactured. Findings of Fact 1, 14, 15, 20, 28, 31. The finding directly contradicts statements by the Applicant’s officers that the use is an “ethanol distillery” and that Penn-Mar Ethanol is a distiller, not a manufacturer, and the Applicant’s process description filed with

the Pennsylvania Department of Environmental Protection at Appellant's Board Hearing Exhibit Tab 5.

2. There is no substantial evidence to support the finding that the proposed ethanol distillery is a "large-scale manufacturing plant." Finding of Fact 16, 30.
3. There is no substantial evidence to support the finding that the structures identified in Finding 18 A through T are not part of a principal building, except the evaporators which are located on top of the process building. Findings of Fact 22, 28. The finding is contradicted by: a) the testimony of Applicant's Engineer that these components are all connected to the process building by conveyors and/or piping, and wiring, and central computer control; b) the testimony of Applicant's Engineer that each component is essential to the functioning of the process building; and c) the Applicants process description at Appellant's Board Hearing Exhibit Tab 5.
4. The statement in Finding 23 that the components are "separately attached" is contradicted by the drawings and plans submitted to Greene Township by the Applicant, and by the testimony of the Applicant's Engineer.
5. There is no substantial evidence to support the finding that all of the structures described in Finding 18 "are removable from the premises without affecting any other building or structure." Finding of Fact 24. The finding is contradicted by the testimony of Applicant's Engineer that these components are all connected to the process building by conveyors and/or piping, and wiring, and central computer control; and each is essential to the functioning of the process building, and by the Applicants process description at Appellant's Board Hearing Exhibit Tab 5.
6. There is no substantial evidence to support the finding that the "methanator, fermentors, tanks, columns, elevator, grain cleaning and milling, silos, stacks, dryers, evaporators, and flares, are not buildings as defined by the Ordinance but are structures." Finding of Fact 29.

D. GOVERNING AUTHORITY

The framework for our analysis begins with a review of the Pennsylvania Municipalities Planning Code, 53 P.S. §§10101-11202. Specifically, those provisions governing Zoning Hearing Boards are found at 53 P.S. §10901-10918. The Zoning Hearing Board shall have exclusive jurisdiction to hear and render final adjudications in certain matters including applications for variances from the terms of the Zoning Ordinance and Flood Hazard Ordinance or such provisions within a Land Use Ordinance pursuant to 53 P.S. §10910.2. 53 P.S. §10909.1(a)(5). Further, the Board shall hear requests for variances where it is alleged that the provisions of the Zoning Ordinance inflict unnecessary hardship upon the Applicant. 53 P.S. §10910.2(a). The same statutory section sets forth the requisite findings that must be made, where relevant, before the Board may grant a variance. *Id.* The authority of the Zoning Officer is set forth at 53 P.S. §10614 and includes, among other things, that “the Zoning Officer shall administer the Zoning Ordinance in accordance with its literal terms, and shall not have the power to permit any construction or any use or change of use which does not conform to the Zoning Ordinance.”

Chapter 105 of the Code of Greene Township entitled “Zoning” is Greene Township’s Zoning Ordinance and purports to implement in the township the statutory scheme above referenced. For example, at Article VIII, Enforcement, the Greene Township Zoning Ordinance (“Zoning Ordinance”) at §105-49 defines the duties of the Zoning Officer. Importantly, that section describes the duties of the Zoning Officer only with regard to enforcement proceedings; but other sections of the Zoning Ordinance impose other duties, responsibilities and restrictions upon Greene Township’s Zoning Officer.

The Zoning Ordinance at §105-57 describes the Zoning Hearing Board's power and functions by the following language: "the Zoning Hearing Board shall have exclusive jurisdiction to hear and render final adjudications in accordance with Article IX of the Pennsylvania Municipalities Planning Code." It appears that the Zoning Ordinance seeks not to enlarge in any way the power and functions of the Zoning Hearing Board beyond that defined in the statute.

Permitted uses, if not specifically listed as permitted uses in the applicable subsections of the Zoning Ordinance, may only be determined to be permitted uses by the Board of Supervisors. Zoning Ordinance, §105-11(D). More specifically, the referenced section of the Zoning Ordinance removes from the authority of the Zoning Officer any determination of permitted use that is "not specifically listed" and further directs that the Zoning Officer collect necessary information, including a detailed site plan with accompanying documentation for review by other agencies (presumably, for example, the Township and/or County Planning Commissions) whose remarks and recommendations are then to be delivered to the Township Supervisors who "shall make an objective determination within thirty (30) days of the hearing."

It is against that backdrop of state statute and township ordinance that we address the issues in this proceeding.

E. ISSUES DISCUSSION

Two of the major issues raised by Appellants at this stage relate to the Zoning Hearing Board's permitted use determination and to the Zoning Hearing Board's grant of a variance. In addition, there loom additional issues with regard to the taking of additional evidence, which the appellants insist we must do to complete the record; and whether we should, or should not,

consider the evidence we have already heard at the stay hearing on September 19, 2005. With regard to evidence we heard at the stay hearing, appellants take the position that we must consider it and the applicant takes the position that we need not consider it, and should render our decision based only upon the record certified to us by the Zoning Hearing Board. We will discuss each separately, beginning with the matter of additional evidence.

1. Evidence before the trial court

Although the evidentiary hearing of September 19, 2005 was focused in its inquiry and the issue was limited specifically to the continuation of the stay based upon the evaluation of factors identified by the Supreme Court in Pennsylvania Public Utility Commission v. Process Gas Consumers Group, 467 A.2d 805 (Pa.1983), we believe that some of the evidence we heard that day relates to the merits of the Appellants' zoning appeal.² It is clear, for example, that in their production of evidence at the September 19th hearing, the Appellants produced evidence tending to show the Appellants' likelihood of prevailing on the merits of their appeal, one of four (4) elements necessary for the Court to consider under the rationale of Process Gas.

Appellants argue that an additional evidentiary hearing on the merits of this appeal is necessary in order to allow the Appellants to present their case and to provide a complete record necessary for the finding of facts because, Appellants claim, the appeal must be decided *de novo*. Further, the Appellants have asserted that the receipt of any additional evidence relevant to the issue on the merits of the Zoning Appeal requires the trial court to make its own findings. Rogalski v. Township of Upper Chichester, 406 Pa. 550, 178 A.2d 712 (1962). Further, where

² For the resolution of the issues raised at the September 19, 2005 evidentiary hearing, see our Opinion and Order filed November 1, 2005.

the trial court does take additional evidence, it must decide the case de novo; and in such case it must set forth appropriate findings of fact to allow the Commonwealth Court properly to review the trial court's decision. De Cray v. Zoning Hearing Board of Upper Saucon Township, 143 Pa. Commw. 469, 599 A.2d 286 (1991). See also Mitchell v. Zoning Hearing Board of the Borough of Mount Penn, 838 a.2d 819 (Pa.Cmwlt. 2003). Finally, the Municipalities Planning Code provides guidance as well. "If the record does not include findings of fact *or if additional evidence is taken by the court or by a referee, the court shall make its own findings of fact based on the record below as supplemented by the additional evidence, if any.*" 53 P.S. §11005-A (italics supplied). Additional evidence, even if it could be characterized as inconsequential or adding nothing new to a zoning case, requires us to decide this case on its merits, since the posture of this case with new evidence is not the same as without it. Boss v. Zoning Hearing Board of the Borough of Bethel Park, 66 Pa. Cmwlt. 89, 443 A.2d 871 (1982).³ Since this Court took additional evidence at the September 19th stay hearing, we have an obligation to determine the case de novo rather than to review it for an abuse of discretion. Boss, supra.

Having considered all of the foregoing, we will consider both the record from the ZHB and the additional evidence which we heard and we will decide the remaining issues on their merits. Because of our resolution of the two remaining issues, we further conclude that there is no need for the taking of any additional evidence.

³ We do note, however, that there is authority for the proposition that the trial court may, after taking additional evidence, conclude that such evidence is not proper for its consideration, and limit itself to review the record before the Board below without consideration of the evidence proffered at the trial court level. Pyzdrowski v. Board of Adjustment of the City of Pittsburgh, 437 Pa. 481, 263 A.2d 426 (1970).

2. Permitted Use

In their Brief in Support of the Appeal, the Appellants characterize the question presented as follows:

“Whether based on the current record before the Court, it is clear that the ZHB erred in determining that PME’s proposed ethanol distillery is a “permitted use” under the Greene Township Zoning Ordinance?”

a. Zoning Ordinance and Municipalities Planning Code Language

In our analysis of this issue, we turn first to specific and relevant language of the Greene Township Zoning Ordinance and of the Municipalities Planning Code.

With regard to permitted uses in the Heavy Industrial (HI) District, we turn to Section 105-12. The purpose is set forth in subsection (a) as follows:

Purpose: To provide appropriate locations for the development and continued operation of uses engaged in the basic processing and manufacturing of materials or products predominantly from extracted or raw materials, or uses engaged in the storage of or manufacturing processes using flammable or explosive materials, or storage or manufacturing processes that potentially involve hazardous conditions or require special environmental protections.

Zoning Ordinance §105-12(A).

The subsection on permitted uses, in applicable part, reads as follows:

3. Permitted Uses. A building may be erected, used or occupied and a lot may be used or occupied for any of the following purposes:

...

(4) Industrial parks and large-scale manufacturing plants.

...

Zoning Ordinance §105-12(B).

In order to discern the mechanism for deciding whether a proposed use is a permitted use or is not a permitted use, reference is made to §105-11(D). It reads, in pertinent part, as follows:

4. Documentation Required. To determine whether or not the proposed use is a permitted use, if not specifically listed in §105-11(B), or if it is listed as a conditional use in §105-11(C), a detailed site plan with accompanying documentation shall be submitted to the Township Zoning Officer, who will distribute copies of the plan to all the review agencies mentioned in Chapter 85, Subdivision and Land Development. Based upon their remarks and recommendations, the Township Supervisors shall make an objective determination within thirty (30) days of the hearing. This decision shall be furnished, in writing, not later than ten (10) days after the decision is rendered, to the person, persons or corporation requesting certification of the use in this district.

Zoning Ordinance §105-11(D).

The applicability of §105-11(D) to permitted use determinations in the Heavy Industrial District is confirmed by reference to §105-12 (C)(3) which reads as follows:

A building may be erected, used or occupied and a lot may be used or occupied for any use not specifically listed in §105-12(B) [if] sufficient documentation is presented in accordance with §105-11(D) that demonstrates similarity to one or more of the permitted uses above and compliance with the performance standards enumerated in §§105-11(E) and (F) and 105-12(D).

Zoning Ordinance §105-12(C)(3).

We also look to the Municipalities Planning Code to ascertain the powers of the Zoning Officer.

For the administration of a Zoning Ordinance, a Zoning Officer, who shall not hold any elective office in the municipality, shall be appointed. The Zoning Officer shall meet qualifications established by the municipality and shall be able to demonstrate to the satisfaction of the municipality a working knowledge of municipal zoning. *The Zoning Officer shall administer the Zoning Ordinance in accordance with its literal terms, and shall not have the power to permit any construction or any use or change of use which does not conform to the Zoning Ordinance.* Zoning Officers may be authorized to institute civil enforcement

proceedings as a means of enforcement when acting within the scope of their employment.

53 P.S. §10614, Appointment and Powers of Zoning Officer (emphasis supplied).

b. Review of the Record Below

We turn next to the evidence before the Zoning Hearing Board.

i. Evidence Before the Zoning Hearing Board

The record created by the Greene Township Zoning Hearing Board includes the following items:

1. PME's Application for Variance with attachments;
2. Hearing transcript from the April 18, 2005 hearing before the Zoning Hearing Board;
3. PME's Exhibits 1-9;
4. Appellants' Exhibits 1-17;
5. DeEtta Antoun's April 22nd appeal from the permitted use decision of the Zoning Officer;
6. May 16, 2005 Stipulation of the parties;
7. Transcript of the May 26, 2005 Zoning Hearing Board proceeding announcing its decision; and
8. The written decision of the Zoning Hearing Board dated May 31, 2005.

In addition, the record delivered to the Prothonotary by Greene Township upon the *Writ of Certiorari* contained miscellaneous other papers including proofs of publication of meeting notices, various correspondence and similar items.

The record below reflects the following things:

1. The parties further stipulated that if the [Zoning Hearing] Board chooses to decide whether or not the operation of an ethanol plant is a permitted use as part of its decision on the Application for Variance by Penn-Mar

there will be no need to hold a[n additional] hearing on the Appellants' appeal. Decision of the Board, Page 3, Last Paragraph.

2. Among the major issues for decision by the [Zoning Hearing] Board were the following: Is an ethanol manufacturing plant a permitted use in a Heavy Industrial District as defined under the Greene Township Zoning Ordinance? Decision of the Board, Page 4.
3. The Board noted that "the testimony taken at the hearing addresses both Penn-Mar's Application for a Variance and the Appellants' appeal from the decision of the Zoning Officer. Decision of the Board, Page 5.
4. Among its Findings of Fact, the Board included the following:
 - a. On April 22, 2005, DeEtta A. Antoun, individually, and on behalf of Citizens for a Quality Environment, filed a timely appeal of the decision of the Greene Township Zoning Officer that an ethanol facility is a permitted use in a Heavy Industrial Zoning District. Decision of the Board, Finding of Fact No. 6.
 - b. By letter dated April 8, 2005, the Greene Township Solicitor, Welton J. Fischer, Esq. confirmed that the Township Zoning Officer had determined that the proposed use by Penn-Mar was a permitted use in the Heavy Industrial Zoning District. Decision of the Board, Finding of Fact No. 12

- c. The Applicants [sic] proposed ethanol production facility is a large-scale manufacturing plant. Decision of the Board, Findings of Fact Nos. 16 and 30.
5. As a conclusion of law, the Board determined that the proposed ethanol plant is a permitted use under the Zoning Ordinance of Greene Township as a “large-scale manufacturing plant.” Decision of the Board, Conclusion of Law No. 13.
6. A review of the transcript of the proceedings before the Zoning Hearing Board discloses the following additional facts:
 - a. The height of the evaporators is 50 feet. Transcript, April 18, 2005 Hearing, Page 51.
 - b. The transcript reflects a lengthy statement by Mr. Antoun in which he reviewed the process up to the point of the April 18th hearing much if not all of which was supported by Appellants’ Exhibits 1-3 and 5-17. Transcript, April 18th Hearing, Pages 89-105.
 - c. The record further reflects that the assertions of Mr. Antoun, supported and substantiated by his exhibits, remain largely uncontradicted at the conclusion of the proceedings. Transcript, April 18, 2005 Hearing, Page 91, Lines 18-20 and Page 136, Line 19 through Page 137, Line 16.
 - d. Despite assertions to the contrary, it appears not to have been the “determination” of the Zoning Officer that PME’s ethanol production

facility is a permitted use in the Heavy Industrial District. Rather, it appears that such determination “was a decision resulting from discussions involving [the Township’s Solicitor], the chairman of the Board of Supervisors and the Zoning Officer. Appellants’ Exhibit 8, Page 1.

- e. Greene Township acknowledged that the Greene Township Ordinance does not specifically reference an ethanol plant and the Greene Township Ordinance does not reference either an ethanol facility, a distillery or a brewery, *per se*. Appellants’ Exhibit 8, Pages 1 and 2.

ii. Discussion of the ZHB Record

Appellants ask us to determine if the Zoning Hearing Board erred in concluding that PME’s ethanol production facility is a permitted use in the Heavy Industrial District. Because we are charged with deciding the matter on its merits and reaching our own legal conclusions, we will determine if PME’s ethanol production facility is a permitted use in the Heavy Industrial District.

By implication, a use is a permitted use in the Heavy Industrial District if it is specifically listed in §105-12(B). Zoning Ordinance, §105-11(D). It may be helpful to slightly rearrange the language of §105-11(D), without changing its meaning, in order to clarify it.

Documentation required. If it is not specifically listed in § 105-11B, to determine whether or not the proposed use is a permitted use, a detailed site plan with accompanying documentation shall be submitted to the Township Zoning Officer, who will distribute copies of the plan to all the review agencies mentioned in Chapter 85, Subdivision and Land Development. Based upon their remarks and recommendations, the Township Supervisors shall make an objective determination within 30 days of the hearing.

Greene Township Zoning Ordinance, §105-11(D).

For something to be specific, it must be stated or set forth explicitly or definitely. *Webster's II New College Dictionary, 1995*. "Specific" means to be precisely formulated or restricted; definite, explicit; of an exact or particular nature; tending to specify, or to make particular, definite, limited or precise. *Black's Law Dictionary, Sixth Edition, 1990* West Publishing Company.

The conclusion that a use is permitted only if it is specifically listed is drawn from the language of the Ordinance itself which provides the mechanism for determining a permitted use when the proposed use is not specifically listed. There are several reasons why this is so. First, even the Applicant does not argue that an ethanol production facility is specifically listed as a permitted use in §105-12(B). That section of the Ordinance contains a list of twenty-five (25) uses, many of which are highly specific (e.g. manufacturer of plastic products, manufacturer of fabricated metal products, transfer stations, etc). There is mention of neither an ethanol production facility nor a distillery as a permitted use in the Heavy Industrial District. The Applicant's proposed use simply is not specifically listed §105-12(B). Second, so far as we can determine from the record, even the applicant did not suggest that the proposed use is similar or analogous to any listed permitted use. Third, we are hard-pressed to conclude that that which is described as a "large-scale manufacturing plant" is in any way specific.

By its very nature, and because of the highly specific other uses listed in this section, it is apparent that the category of "large-scale manufacturing plant" is a general catch-all requiring the exercise of judgment and interpretation which is precisely what the Township Solicitor suggested happened in this case. Appellants' Exhibit 8. In fact, it seems anomalous that the list

set forth in §105-12(B) is characterized by the ordinance itself as a list of specific uses yet contains a category among its long list of specific uses as general, as broad and as vague as “a large-scale manufacturing plant.” There simply is nothing specific at all about such categorization.

We believe it is because of the need to exercise an informed judgment and interpret the meaning of the words “large-scale manufacturing plant” that the Zoning Ordinance itself directs that an abundance of information be collected by the Zoning Officer, funneled through the Planning Commissions, and their recommendations made to the Township Board of Supervisors who shall make an objective determination. Zoning Ordinance, §105-11(D). Uses not specifically listed are reserved for consideration by the elected officials of the governing body. We believe that permitted uses are uses subject to the simple issuance of a permit by the Zoning Officer. Permitted uses are those uses set forth in the specific language of the ordinance that may proceed upon the simple issuance of a permit without more; and that is nothing more than a ministerial function performed by an appointed official, the Zoning Officer. The language of the ordinance itself does not vest matters of broad discretion in the Zoning Officer.

The purpose of the Heavy Industrial District contemplates uses engaged in the storage of, or manufacturing processes using flammable or explosive materials, or storage or manufacturing processes that potentially involve hazardous conditions or require special environmental protections. Zoning Ordinance, §105-12(A). The very nature of the uses contemplated in the district—flammable or explosive materials, hazardous conditions, special environmental protections—is the strongest indication that decisions involving such matters be made in a deliberative way, based upon an abundance of information, after public hearing by elected

officials and not as a ministerial function by an appointed officer. That the zoning officer could not himself determine whether the proposed use was a large-scale manufacturing plant, necessitating discussions with others including legal counsel is the very best evidence that the proposed use did not fit neatly into any of the specifically permitted uses. In this case below, the procedure was fraught with difficulty. After much massaging of the matter involving legal counsel and one or more of the supervisors, in apparently informal discussions, the group effort, after struggling with interpreting the section and exercising their collective judgment, managed to “conclude” that the use was a permitted one. Arguably, there are countless numbers of uses that might be determined to be “large-scale manufacturing plants” that would escape the very kind of review which §105-11(D) channels directly to the Township Supervisors for determination, after receipt of planning commission recommendations and after public hearing, *if the use is not specifically listed*.

The Municipalities Planning Code requires the Zoning Officer to administer the Zoning Ordinance in accordance with its literal terms, 53 P.S. §10614 and further specifically provides that the Zoning Officer “shall not have the power to permit any construction or any use or change of use which does not conform to the Zoning Ordinance.” *Id.* It is apparent that the drafters of the Municipalities Planning Code intended to vest in the Zoning Officer effectively a ministerial function, not permitting a Zoning Officer to exercise substantial judgment or to become involved in difficult matters of interpretation of a Zoning Ordinance. Hill v. Zoning Hearing Board of Maxatawny Township, 142 Pa.Commw. 539, 555; 597 A.2d 1245, 1252-53 (1991). Because neither a distillery nor an ethanol production facility is specifically listed as a permitted use in the Heavy Industrial District, the Zoning Officer, in administering the Zoning

Ordinance in accordance with its literal terms set forth at §105-11(D) was obligated to put the matter on track for determination by the Township Board of Supervisors. *Id.* This the Zoning Officer did not do.

c. Trial Court Evidence of September 19, 2005

We will next consider and comment on the evidence we heard on September 19, 2005 related to the permitted use determination below. It appears that, in every material respect, the evidence we heard on September 19 was similar to that heard by the ZHB itself on April 18, 2005. We find the following facts⁴:

1. Travis Brookens testified that he was at all relevant times the Zoning Officer for the Greene Township Board of Supervisors.
2. Mr. Brookens acknowledged that a lawyer for the applicant wrote a letter to the township inquiring as to the applicant's proposed use and what was involved to make a determination as to permitted use. He further testified that he did not receive the letter in his capacity as Zoning Officer, but that it was received by "the township."
3. Mr. Brookens acknowledged that Appellants' Exhibit A-4 (Exhibit 9 before the ZHB) was the township solicitor's letter responding to the applicant's inquiries, and that A-4 represents "the position of the zoning office." Brookens testified that they all got together to discuss after they got the solicitor's thinking; and

⁴ As this opinion is prepared, there is as yet no transcript of the September 19, 2005 hearing. These findings, accordingly, are based upon bench notes.

Exhibit A-4 itself confirms discussions between the solicitor and the township supervisors.

4. Mr. Brookens testified that the documents he was given when he was asked to determine if the proposed use was a permitted use consisted of “some explanation of the function of their particular structures.”
5. Mr. Brookens acknowledged that Mr. Fischer’s letter, Exhibit A-4, represented the position and the opinion of the township.
6. When he was asked if he knew if the proposed use were a permitted use or a conditional use, Mr. Brookens did not answer.
7. Mr. Brookens testified that Mr. Jamison was involved with some of the discussions and that “they interpreted it as a large scale manufacturing operation.”
8. Mr. Brookens testified that the solicitor, the zoning officer and the board of supervisors had discussions on the matter, but that it did not come up at a supervisor’s public meeting and that there was never a hearing held on it.
9. Mr. Brookens conceded that he was unaware of any authority that permitted him to work with other lawyers, and others, outside of public meetings to formulate a decision on whether the proposed use was a permitted use in the heavy industrial district.

We have erred on the side of considering evidence we heard on September 19th in our resolution of this issue, whether an ethanol production facility is a permitted use in the Heavy Industrial District. Our consideration of the evidence we heard on September 19, 2005 and the

factual findings we have made based on that evidence only serve to support, and not to change, our conclusion based upon our review of the record below.

Having considered the law, the Zoning Ordinance, the briefs and arguments of the parties, the full record below, and the evidence we heard on September 19, 2005, we conclude that the applicant's proposed use is not a permitted use in the Heavy Industrial district.

3. Variance

In its May 26, 2005 Decision, the Zoning Hearing Board of Greene Township granted Penn-Mar's application for a variance. This variance applies to the 45-foot height restrictions on buildings in the Township. Specifically, the Zoning Hearing Board granted a variance to Penn-Mar for evaporators on top of the process building, which would exceed the 45-foot limitation by five (5) feet.⁵ The Zoning Hearing Board granted the variance based, in part, upon its conclusion that the height of the evaporators over the 45-foot restriction would be *de minimis*.

a. Legal Standard

The granting or denial of a variance by a zoning hearing board is governed by 53 P.S. § 10910.2.⁶ In order to obtain a variance, the party seeking the variance must establish all of the following elements:

⁵ The written decision of the Zoning Hearing Board states that the evaporators would exceed the height restriction by four (4) feet. However, the testimony and exhibits at the hearing on April 18, 2005 support a conclusion that the total height of the process building with evaporators would be fifty (50) feet, or five (5) over the height restriction. Transcript, April 18, 2005 Hearing, Page 51.

⁶ 53 P.S. § 10910.2 provides:

(a) The board shall hear requests for variances where it is alleged that the provisions of the zoning ordinance inflict unnecessary hardship upon the applicant. The board may by rule prescribe the form of application and may require preliminary application to the zoning officer. 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

- (1) Unnecessary hardship;
- (2) No possibility of development of the property in strict compliance with the zoning ordinance;
- (3) Applicant did not cause the unnecessary hardship;
- (4) Granting of the variance would not alter the essential character of the neighborhood, nor substantially impair use or development of adjacent property, nor be detrimental to the public welfare; and
- (5) Variance sought is the minimum that will afford relief.

However, in certain circumstances, a variance may be granted to a party applying for a dimensional variance even if all of the above elements have not been met. In these limited cases, a zoning hearing board may grant a variance under the *de minimis* exception to the applicant. The *de minimis* exception is a relatively new concept in Pennsylvania, first being recognized explicitly in Pzydrowski v. Pittsburgh Board of Adjustment, 236 A.2d 426 (Pa. 1970). These exceptions are governed by case law.

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.

b. The record below

We reviewed the record below and we found it devoid of evidence and factual findings to support granting a variance for the evaporators and we found no support in the record or the law for granting a variance based on the *de minimis* exception. During our review of the record below, we found no evidence on any of the following elements: unnecessary hardship; no possibility of development of the property in strict compliance with the zoning ordinance; and applicant did not cause the unnecessary hardship.

Further, there was scant evidence that the five (5) feet the evaporators will extend above the height restriction is the minimum to afford relief. At the April 18, 2005 hearing, the ZHB took testimony from Mike Buckland, a project engineer with Lurgi PSI, Incorporated, engineers who will be designing and building PME's project. He testified that the height of the evaporator is dictated by heat transfer and process requirements. April 18, 2005 R. at 27. On cross-examination, Mr. Buckland clarified that some of the buildings could be reduced in height if production amounts were decreased. April 18, 2005 R. at 69. Thus, it appears that five (5) feet may not be the minimum variance needed to afford relief.

Penn-Mar produced no evidence at the April 18, 2005 hearing as to whether the variance would be detrimental to the public welfare or alter the essential character of the neighborhood. On the other hand, Appellants presented a substantial amount of evidence that the variance would destroy the scenic beauty of the neighborhood and obstruct views. April 18, 2005 R. at 110, 114, 122, and 124. Also, Glenn Trego, who represented Letterkenny Army Depot, testified that the variance might adversely impact the mission at Letterkenny, next to whom Penn-Mar hopes to build its ethanol facility. April 18, 2005 R. at 117.

Penn-Mar seems to argue that it was not required to present evidence on the traditional elements of a variance because the Zoning Hearing Board granted a *de minimis* exception. We note that Penn-Mar presented its argument on this issue to this Court regarding the variance or the *de minimis* exception in its *Brief of Penn-Mar Ethanol, LLC in Opposition to Appellants' Notice of Appeal*. Penn-Mar stated that the issue of the variance and the *de minimis* exception should be decided upon a review of the record below. See *Penn-Mar Ethanol, LLC's Written Closing Following the September 19, 2005 Hearing on Appellants' Petition for Stay of Greene Township Proceedings Relating to the Land Development of Penn-Mar Ethanol, LLC* at 5. We will address the matter of the *de minimis* exception below.

c. Findings of Fact

Based up a review of the record below and the evidence presented at the September 19, 2005 hearing, we make the following Findings of Fact related to the issue of the variance:

- (1) Penn-Mar Ethanol seeks a variance for evaporators on top of the process building.
- (2) The evaporators would exceed the 45-foot height restriction by five (5) feet, making the height of the process building 50 feet.
- (3) This would be an eleven (11) per cent increase over the 45-foot height restriction.
- (4) The height restriction does not place an unnecessary hardship on the property upon which Penn-Mar hopes to build its facility.
- (5) There is the possibility of development of the property in strict compliance with the zoning ordinance. Mike Buckland testified that heights of the buildings and structures could be decreased if production were decreased. Also, Mr. Buckland testified that the buildings could be sunk into the ground, though he stated that

this might cause safety concerns. Thus, we cannot conclude that strict compliance in this case prevents the proposed development. In addition, this land is absolutely undeveloped and a 45-foot height restriction does not prohibit development of this parcel even if we were to find that it prohibits the proposed development.

- (6) Since we found no hardship, we cannot address whether the applicant caused the unnecessary hardship.
- (7) The grant of the variance may alter the essential character of the neighborhood and substantially impair use or development of adjacent property. Glenn Trego, representing Letterkenny, testified that the height of buildings proposed by Penn-Mar could impact the use of the helipad at Letterkenny. April 18, 2005 R. at 119-120. He also testified that the facility as whole, including the evaporators for which the variance is sought, might adversely impact the mission of Letterkenny. April 1, 2005 R. at 117-118. Specifically, he stated that the height of buildings might affect certain radar tests conducted at Letterkenny. April 18, 2005 R. at 117-118.
- (8) The grant of the variance would be detrimental to the public welfare. The Zoning Hearing Board and the Court received evidence from adjacent property owners, including John Lucabaugh, Duane Schooley, Flora LaRue, Carl McAfee and DeEtta Antoun, that the height of proposed buildings would destroy the scenic beauty of the neighborhood and obstruct views.

- (9) The variance sought is not the minimum that will afford relief. Mike Buckland testified that heights of the buildings and structures could be decreased if production were decreased. Also, Mr. Buckland testified that the buildings could be sunk into the ground, though he stated that this might cause safety concerns. Further, he testified that he had not been asked by Penn-Mar to decrease, or to consider decreasing, the height of the evaporators in the plan. Thus, we cannot conclude that the variance sought is the minimum that will afford relief.
- (10) The Zoning Hearing Board granted Penn-Mar a variance, under the *de minimis* exception, for the evaporators on top of the process building and it placed no restrictions or conditions on that variance.

d. Grant of a Variance

Appellants argue that if one assumes that the ethanol plant is a permitted use, then Penn-Mar failed to meet its burden in seeking a variance. We agree. As we discussed above, the Zoning Hearing Board made no Findings of Fact related to the five elements for a variance. Further, there was no evidence in the record below to support such Findings, had any been made. No evidence in support of a variance was presented before this Court at the September 19, 2005 hearing. Thus, we find as a matter of law that Penn-Mar failed to meet its burden for the grant of a variance and we deny its request for one. We will next review Penn-Mar's request under the *de minimis* exception.

e. De minimis Exception

The Zoning Hearing Board granted the variance under the *de minimis* exception. The *de minimis* exception allows for the grant of a variance when a party is unable to meet the

traditional elements of a variance when the variance sought is *de minimis*. “Almost everyone involved in zoning has had the sense that application of the normal variance standards is sound in the usual case, but not when a very small dimensional variance will solve a significant problem.” Robert S. Ryan, *Pennsylvania Zoning Law and Practice*, § 6.6.1. *De minimis* exceptions only apply to dimensional variances, not use variances. See Application of Burroughs Corp., 422 A.2d 1183 (Pa. Commonw. Ct. 1980). We have a dimensional variance before us.

Determination of the question of a *de minimis* variance begins with whether the relief requested is *de minimis*. Here, we have a request of a variance of five (5) feet above a 45-foot height restriction. This is a variation of eleven (11) per cent. This is not *de minimis*. In Leonard v. Zoning Hearing Board of the City of Bethlehem, 583 A.2d 11 (Pa. Commonw. Ct. 1990), the Commonwealth Court held that a deviation of six and twenty-five hundredths (6.25 %) percent was too large to be considered *de minimis*. The Commonwealth Court found a deviation of six and seventy-six hundredths (6.76%) percent *de minimis* where the zoning hearing board imposed express conditions in response to concerns of adjacent property owners and to prevent any negative impact on the community. Township of Middletown v. Zoning Hearing Board of Middletown Township, 682 A.2d 900 (Pa. Commonw. Ct. 1996). There, the conditions eliminated any impact from the variance. Here, the Zoning Hearing Board put no conditions on the variance, even in light of testimony before it from adjacent property owners, which included Letterkenny. The Zoning Hearing Board put nothing in place to eliminate the impact of the variance and a deviation of eleven (11) per cent is too large to assume it is too small to have an impact. Thus, we cannot conclude that a deviation of eleven (11) per cent is *de minimis*.

Assuming, arguendo, eleven (11) per cent is *de minimis*, the grant of a variance under the *de minimis* exception is not appropriate in this case. Initially, courts granted *de minimis* exceptions only where strict enforcement of an ordinance would require removal or alteration of an existing building and the variance did not thwart the purpose of the zoning ordinance. See Ottaviano v. Zoning Hearing Board of Adjustment of Philadelphia, 376 A.2d 286 (Pa. Commonw. Ct. 1977); Gottlieb v. Zoning Hearing Board, 349 A.2d 61 (Pa. Commonw. Ct. 1975). Later, this standard was relaxed to allow for the grant of a variance in a unique situation where rigid compliance would not further the policy underlying the zoning ordinance. See King v. Zoning Hearing Board of the Borough of Nazareth, 483 A.2d 505 (Pa. Commonw. Ct. 1983). Most recently, the standard has developed such that a *de minimis* exception should not be granted unless compliance is not necessary for the protection of the public policy inherent in the zoning ordinance. See Township of Middletown v. Zoning Hearing Board of Middletown Township, 682 A.2d 900 (Pa. Commonw. Ct. 1996); Constantino v. Zoning Hearing Board of the Borough of Forest Hills, 618 A.2d 1193 (Pa. Commonw. Ct. 1992); Stewart v. Zoning Hearing Board of Radnor Township, 531 A.2d 1187 (Pa. Commonw. Ct. 1987). Ryan summarizes as follows:

In all cases, a request for *de minimis* treatment is necessarily limited to a minor deviation from zoning requirements. This is the essential first hurdle. Where the applicant meets this test, it seems to the author that a [sic] the zoning hearing board does not encroach on the legislative function if it grants a minor variance in the following situations.

1. Where the potential loss to the owner is quite large. This was the situation in Pzydrowski and, in a somewhat different sense in the Stewart case, where a 15-square foot shortfall would have cost owner a building.
2. Where the owner, while not meeting all traditional variance requirements, proves that the zoning limitation has a unique and particularly injurious impact on his lot. An example would be the case where a building that can be used as zoned is limited severely because of an unusual lot shape or special topographic effects and the difficulty can be cured by minor variance.

3. Where application of the zoning limitation simply does not fulfill any of its purposes. The West Bradford Township decision is an example of that phenomenon. In that case, the existing lot was already undersized and its division into two lots – one of which was to remain as open space – really added nothing to the nonconformity.”

Robert S. Ryan, Pennsylvania Zoning Law and Practice, § 6.6.9.

We are not in scenario one or two here. Penn-Mar has not built its facility, nor it is seeking to adapt an existing building. Penn-Mar’s plans remain in blueprint form, where they can be adapted easily without large costs or loss. Also, no evidence supports a finding that the lot upon which Penn-Mar hopes to build is unique or unusual or that it is uniquely and injuriously impacted by the zoning ordinance.

The zoning ordinance is in evidence and we have reviewed it to determine its inherent purposes for an analysis under the third scenario. Section 105-1 lists the objectives of the ordinance. We do not believe that no purposes of the zoning ordinance would be fulfilled if it were applied to the Penn-Mar facility. Specifically, we find that application of the zoning ordinance to the evaporators fulfills the following objective outlined in the zoning ordinance:

- A. To guide and regulate the orderly growth, development, and redevelopment of the Township....
- B. To protect the established character and the social and economic well-being of both private and public property.
- C. [T]o provide maximum protection of residential areas.
- G. To discourage, prohibit and gradually eliminate the expansion and undue perpetuation of nonconforming uses and structures.

Penn-Mar argues that forcing it to comply with the ordinance as to the evaporators is absurd in light of the numerous structures planned for the site that will be well over 45-feet high. In response, we note that it appears from the record that the Board of Supervisors intentionally differentiated between buildings and structures and they chose to apply a height restriction to buildings only. It is not for us to pass upon the logic in doing so. The Zoning Hearing Board made no findings of fact or conclusions of law related to this issue. Here, we do not have a lot or a preexisting building that already does not comply. We have a clean slate and we have been offered no explanation as to why the evaporators must extend five (5) feet above the height restriction. In light of the evidence before us we cannot say that application of the zoning ordinance here would not fulfill any of its purposes.

We look to Ryan on Zoning as the most noted treatise on the matter in the Commonwealth. “A *de minimis* variance begins with the question whether the relief requested really is *de minimis*. However, the analysis can’t end there. If there were no other standards, then all very small variances could be granted. A good zoning board finds – or should find – this position uncomfortable, for the board is... exercising a small but essentially irrational power if it picks and chooses without being able to explain why one applicant wins and the other loses.” Robert S. Ryan, *Pennsylvania Zoning Law and Practice*, § 6.6.8. In this case, the ZHB offered only a cursory explanation of its decision to grant the variance under the *de minimis* exception and it references no guidelines or bases for its decision that could be used in the future.

On our review of the same record that the ZHB had before it, we conclude as a matter of law that the variance requested by Penn-Mar is not *de minimis* and we deny their request for a variance under the *de minimis* exception.

3. Remaining issues

On review of the record as a whole, we believe we have addressed fully the two major issues raised on appeal from the decision of the Greene Township ZHB: whether applicant's use is a permitted use in the Heavy Industrial District and whether a variance is appropriate on the state of the record. Further, it appears that we have explicitly or implicitly addressed appellants' claimed erroneous conclusions of law numbered 1, 2, 5, 6, 7, 12, 13 and 14. Because of our resolution of both the permitted use and variance issues, we do not think it necessary to further address appellants' remaining ascription of errors or law or claims that the Board abused its discretion in making certain findings of fact.

**IN THE COURT OF COMMON PLEAS OF THE 39TH JUDICIAL DISTRICT
OF PENNSYLVANIA--FRANKLIN COUNTY BRANCH**

**APPEAL FROM THE GREENE TOWNSHIP
ZONING HEARING BOARD DECISION OF
THE VARIANCE APPLICATION OF
PENN-MAR ETHANOL, LLC,**

CIVIL ACTION

APPELLANTS:

**DeETTA ANTOUN
CITIZENS FOR A QUALITY ENVIRONMENT
JOHN LUCABAUGH
KRISTI KUSCH-LUCABAUGH
FLORA LaRUE
ROBERTA REDMON
JACKIE SALMON
JOHN SCHOENBERGER
CAROL SCHOENBERGER
DUANE SCHOOLEY
GINA SCHOOLEY**

NO. 2005-1581

DEPUTY

LINDA L. DEARD
PROthonARY

2005 NOV 23 12 22

FRANKLIN COUNTY

PROthonARY

JUDGE: RICHARD J. WALSH

ORDER OF COURT


November 22, 2005, upon consideration of the record of the proceedings before the Zoning Hearing Board of Greene Township, and of the evidence taken by the trial court on September 19, 2005, and upon further consideration of the briefs and arguments of the parties and of the law,

IT IS DETERMINED AND ORDERED THAT the applicant's proposed use is not a permitted use in the Heavy Industrial District.

IT IS FURTHER DETERMINED AND ORDERED THAT the applicant has failed as a matter of law to carry its burden of establishing the elements necessary for the granting of a dimensional variance.

Pursuant to the requirements of Pa.R.C.P. 236(a)(2), (b) and (d), the Prothonotary shall immediately give written notice of the entry of this Order, including a copy of this Opinion and Order, to each party's attorney of record or to each party, if unrepresented, and shall note in the docket the giving of such notice and the time and manner thereof.

By the Court,


Richard J. Walsh, J.

The Prothonotary shall give notice to:

- ✓ D. Reed Anderson, Esq., Counsel for Penn-Mar Ethanol, LLC
- ✓ Frederic G. Antoun, Jr. Esq., Counsel for Petitioners/Appellants
- ✓ David C. Cleaver, Esq., Solicitor for the Greene Township Zoning Hearing Board
- ✓ Welton J. Fischer, Esq., Solicitor for Greene Township