

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
GEAUGA COUNTY, OHIO**

THOMAS E. JONES, et al.,	:	O P I N I O N
Appellants,	:	
- vs -	:	CASE NO. 2011-G-3033
AUBURN TOWNSHIP	:	
BOARD OF ZONING APPEALS, et al.,	:	
Appellees.	:	

Administrative Appeal from the Geauga County Court of Common Pleas, Case No. 10A001299.

Judgment: Reversed and remanded.

Jeffrey J. Snell, 253 W. Aurora Road, Sagamore Hills, OH 44067 (For Appellants).

Abraham Cantor, Johnnycake Commons, 9930 Johnnycake Ridge Road, Suite 4-F, Concord, OH 44060 (For Appellees).

THOMAS R. WRIGHT, J.

{¶1} This appeal is from a final judgment of the Geauga County Court of Common Pleas. Appellants, Thomas E. and Diane J. Jones, challenge the court’s decision to uphold a prior administrative ruling of the Auburn Township Board of Zoning Appeals denying their zoning application. Specifically, they assert the court should have held that they were entitled to construct a wind turbine upon their property because the Auburn Township Zoning Resolution does not set forth any restrictions on

the use of such wind turbines.

{¶2} Appellants own a large farm in Auburn Township, upon which they breed, train, and show Arabian horses. The farm has a number of buildings and other facilities which use a considerable amount of electricity. In light of the costs they were incurring for the electricity, appellants decided to construct a wind turbine on their property in order to produce their own electricity.

{¶3} As part of the system for transmitting the generated electricity, appellants' proposed turbine would be connected to the power grid of a public electric company. This connection would be necessary to ensure that the property would still receive electricity when the wind turbine is not operating, and also to serve as a means of storing any excess electricity when the turbine produces more than the farm needs. Given the nature of the connection, the local electric company classified appellants' electric meter as "commercial."

{¶4} To defray some of the costs for their proposed turbine, appellants applied for state and federal grants. In order to qualify for the grants, it was necessary for them to state that their wind turbine would be for "commercial" use. However, since they only intended to use the generated electricity for the horse farm, appellants contend that the turbine would be essentially for an agricultural purpose.

{¶5} In April 2010, appellants submitted a zoning application to Frank V. Kitko, Auburn Township Zoning Inspector. In that application, they specifically indicated that the electricity generated by the wind turbine would be used exclusively for agricultural purposes. Initially, Inspector Kitko granted the zoning application, stating in a letter that appellants were entitled to an agricultural exemption under R.C. 519.21. Upon asking

for additional information about the project, though, Inspector Kitko reversed his original decision. In a second letter sent in July 2010, he denied the application on the grounds that there were still unanswered questions concerning whether some of the electricity generated by the turbine would be used for commercial purposes.

{¶6} Appellants appealed the denial of their zoning application to the Auburn Township Board of Zoning Appeals (“the board”). In September 2010, the board held a hearing on the appeal, during which appellant submitted ten exhibits and the “testimony” of two witnesses. The witnesses consisted of a master electrician, who would assist in the installation of the turbine, and an employee of the company who manufactured the turbine. Their “testimony” essentially consisted of answering various questions raised by the board members.

{¶7} Approximately one month after the hearing, the board released its written decision upholding the denial of appellants’ application. As the basis for its ruling, the board basically concluded that appellants failed to show that the electricity generated by the wind turbine would be solely for agricultural purposes. In support of its conclusion, the board emphasized that, since the turbine would be directly connected to the local power grid, the public electric company would be able to employ any excess electricity produced by appellants. According to the board, this means that appellants would be distributing electricity for “off-site” use.

{¶8} Appellants then appealed the board’s decision to the common pleas court, pursuant to R.C. Chapter 2506. Initially, appellants captioned their notice of appeal as a “complaint” in which they tried to assert claims for relief. Moreover, besides Inspector Kitko and the zoning board, appellants also tried to name the Auburn Township Board

of Trustees as a party to the proceeding. However, after the case had been pending for nearly five months, the common pleas court issued an entry in which it was noted that appellants' "complaint" did not raise any constitutional challenge to the township zoning resolution. As a result, the case went forward solely as an administrative appeal. After the transcript of the board proceedings was filed, the parties submitted their respective briefs on the merits. No oral hearing was held before the common pleas court, and no new evidence was taken regarding the "agricultural use" issue.

{¶9} In its final judgment, the common pleas court began its analysis by noting that, under R.C. 519.21(A), real property used for agricultural purposes is exempt from township zoning regulations. However, the common pleas court then observed that the statutory scheme governing township zoning had a specific section, R.C. 519.213, that pertained to the use of wind turbines. Applying the definition in subsection (A) of that statute to the assertions in appellants' zoning application, the court concluded that the installation of the proposed turbine would cause their property to be considered a "small wind farm" which could be subject to township zoning regulation. Turning to subsection (B) of the statute, the common pleas court next emphasized that R.C. 519.213 gives a board of township trustees or a board of zoning appeals the power to regulate certain matters involving a "small wind farm." In light of these specific provisions, the common pleas court ultimately decided the case without determining whether the proposed wind turbine was to be used for agricultural purposes:

{¶10} "Based on the foregoing, regardless of Appellants' intended agricultural use, the BZA's decision should be affirmed. While the BZA's decision was based upon the prospect that the sale of electricity disqualified the wind turbine re-classification as

an agricultural use, that does not affect the upholding of its decision in this case. The BZA has power with respect to the location, erection, construction and so on of a small wind farm. The BZA in this case denied the appeal. They had the power to do so and therefore, the decision of the Auburn Township Board of Zoning Appeals in upholding the Zoning Inspector's denial of a zoning permit to [appellants] for a wind turbine is affirmed."

{¶11} In appealing the foregoing determination to this court, appellant has raised the following three assignments of error for review:

{¶12} "[1.] The trial court erroneously relied upon Section 519.213 to hold the Board of Zoning Appeals had inherent authority to prescribe more strict regulations of wind turbines when the Township had not created no such regulations under Section 519.213.

{¶13} "[2.] The court committed error in affirming the Board of Zoning Appeals' denial of a wind turbine when the unrefuted evidence in the record was that the wind turbine would be used exclusively for agricultural purposes and was thus exempt from the Township Zoning under [Section] 519.21.

{¶14} "[3.] The court's affirmance of the Zoning Inspector's reversal of a zoning permit was against the manifest weight of the evidence as the wind turbine was agricultural and could only serve the agricultural use."

{¶15} Appellants' first assignment constitutes the crux of their appeal. Basically, they contend that the common pleas court erred in holding that the zoning board could invoke R.C. 519.213 to regulate their proposed use of a wind turbine in the absence of previously enacted regulations. While not denying that the statute generally grants such

boards the authority to oversee the use of wind turbines, appellants argue that such power could not be exercised in this case because the Auburn Township Zoning Resolution does not contain any specific provisions governing wind turbines. According to appellants, in the absence of any controlling regulations in the resolution, Inspector Kitko and the board were obligated to grant their zoning application, and the board was not permitted to create the regulations in the first instance. For the following reasons, we agree.

{¶16} To briefly reiterate, Inspector Kitko's decision and the zoning board's ruling focused solely upon whether appellants' use of the proposed turbine would be for agricultural purposes only. The reason for this analysis was R.C. 519.21(A), which states, in pertinent part:

{¶17} "Except as otherwise provided in division (B) of this section, sections 519.02 to 519.25 of the Revised Code confers no power on any township zoning commission, board of township trustees, or board of zoning appeals to prohibit the use of any land for agricultural purposes or the construction or use of buildings or structures incident to the use for agricultural purposes of the land on which such buildings or structures are located, * * *."

{¶18} While not expressly stated in the board's written decision, it is apparent that if the proposed turbine had been found to be solely for agricultural use, appellants generally would have been allowed to go forward with minimal requirements regarding the actual construction and maintenance of the turbine. However, if the turbine would have had other uses besides agricultural, such as commercial, the board would not allow the project to proceed under any circumstances.

{¶19} In its separate analysis, the common pleas court held that the resolution of the “agricultural use” issue was simply irrelevant to whether appellants’ construction of the turbine is permissible under the law. Instead, the court held that the outcome of the controversy is controlled entirely by R.C. 519.213. The first two subsections of this statute provides:

{¶20} “(A) As used in this section, ‘small wind farm’ means wind turbines and associated facilities with a single interconnection to the electrical grid and designed for, or capable of, operation at an aggregate capacity of less than five megawatts.

{¶21} “(B) Notwithstanding division (A) of section 519.211 * * * of the Revised Code, sections 519.02 to 519.25 of the Revised Code confer power on a board of township trustees or board of zoning appeals with respect to the location, erection, construction, reconstruction, change, alteration, maintenance, removal, use, or enlargement of any small wind farm, whether publicly or privately owned, or the use of the land for that purpose, which regulations may be more strict than the regulations prescribed in rules adopted under division (B)(2) of section 4906.02 of the Revised Code.”

{¶22} Appellants do not contest the common pleas court’s finding that their proposed wind turbine will render their property a small wind farm for purposes of R.C, 519.213, or the statute’s general applicability. Instead, appellants challenge the court’s interpretation of the statute that the zoning board has the power to create the standards for regulating the use of wind turbines in the first instance.

{¶23} Applying R.C. 519.213, the common pleas court first noted the statutory language that gave zoning boards express power over certain items or issues pertaining

to small wind farms. The court then concluded that the statute gave the Auburn zoning board the authority to decide if appellants should be permitted to install the proposed wind turbine, and that, in light of this grant of authority, the board's ultimate ruling must therefore be upheld. By framing its analysis in this manner, the common pleas court essentially held that R.C. 519.213 gives the zoning board the power to both create and enforce regulations governing the installation of wind turbines.

{¶24} While the relevant portion of R.C. 519.213(B) is worded in a broad manner, that statutory grant of power must be construed in light of the other statutes in R.C. Chapter 519. A township zoning board's limited powers are delineated under R.C. 519.14, which states that such a board has the authority to perform three basic tasks: (1) hear and decide appeals from a decision of a township's administrative official; (2) authorize variances from the township zoning resolution in specific cases; and (3) grant conditional zoning certificates. R.C. 519.14 confers no power to a board of zoning appeals to regulate in the first instance. Under the governing statutory scheme, such authority rests solely with the board of township trustees. See R.C. 519.02(A).

{¶25} In construing statutes that relate to the same general subject matter, a court is required to read the various provisions *in pari material*; i.e., the entire statutory scheme must be given a reasonable construction so that each and all statutes are accorded proper force and effect. *United Telephone Co. of Ohio v. Limbach*, 71 Ohio St.3d 369, 372 (1994). Accordingly, this court concludes that, in conferring power to zoning boards regarding small wind farms, R.C. 519.213(B) only gives such boards authority that is commiserate with their basic powers under R.C. 519.14. That is, R.C. 519.213 only grants zoning boards the ability to hear appeals from administrative rulings

as to a small wind farm's location, erection, construction, and the other items listed in the statute. As to the standard to be used in deciding such appeals, the zoning board cannot create the regulations, but instead must follow the law as set forth in the governing state statutes and township zoning resolution.

{¶26} When construed in concert with R.C. 519.02(A), R.C. 519.213 can only be interpreted to grant a township board of trustees the authority to regulate small wind farms in the township zoning resolution. However, in this case, the parties agree that, at the time appellants submitted their zoning application, the Auburn Township Zoning Resolution did not contain any provisions governing wind turbines or small wind farms. In other words, the Auburn Township Board of Trustees had never invoked its power under R.C. 519.213. Accordingly, appellants assert that their zoning application should have automatically been granted.

{¶27} In response, Inspector Kitko and the zoning board maintain that, given the lack of any specific provisions in the zoning resolution, appellants cannot place the wind turbine on their property until the necessary provisions are enacted. In support of this point, they emphasize that, under Article 4.03(c) of the Auburn Township Zoning Resolution, a proposed use of property must be expressly cited in the resolution before it is permissible.

{¶28} In essence, it is the position of Inspector Kitko and the zoning board that wind turbines are completely banned in Auburn Township at this time. As to the power of a township board of trustees to ban a specific use for all purposes, this court has stated:

{¶29} “The purpose of a zoning ordinance is to limit the use of land in the

interest of the public welfare.’ *Smith v. Juillerat* (1954), 161 Ohio St. 424, 428, * * *. A township’s power to regulate may include the power to prohibit a use. *E. Fairfield Coal Co. v. Booth* (1957), 166 Ohio St. 379, 382, * * *, citing *Juillerat*, supra. “Whether the power exists to forbid the use must not be considered abstractly, but in connection with all the circumstances and locality of the land itself and its surroundings.” *Booth*, supra, at 382, quoting *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387, * * *.” *Machnics v. Sloe*, 11th Dist. No. 2004-G-2554, 2005-Ohio-935, ¶51.

{¶30} In *Machnics*, this court upheld the township’s ban of the commercial sale of motor vehicles because the property owner did not present any evidence demonstrating that the township trustees had failed to consider all relevant circumstances, including the locality of the land. *Id.* at ¶52. See, also, *Edinburg Twp. Trustees v. 14 & 76 Novelty Co.*, 11th Dist. No. 91-P-2366, 1992 Ohio App. LEXIS 3731.

{¶31} In this case, the issue of whether the use of wind turbines is totally banned in Auburn Township was never raised before the trial court. As a result, neither side presented evidence on the pertinent issues. Since no evidence on either point is in the trial record at this juncture, the “ban” issue is not properly before this court in this appeal, and the matter must be remanded to the trial court for further proceedings.

{¶32} As a separate point, this court would further indicate that, regardless of the outcome of the “ban” dispute, appellants still would be entitled to erect the proposed wind turbine if the agricultural exception is applicable. As previously noted, R.C. 519.21(A) states that township officials have no authority to prohibit the construction or use of structures that are intended for agricultural purposes. In enacting R.C. 519.213,

the General Assembly gave no indication in the wording of R.C. 519.213 and 519.21 that the power granted to township officials over small wind farms is intended to supersede the agricultural exception.

{¶33} In its analysis, the trial court essentially concluded that, in light of the authority granted to the zoning board under R.C. 519.213(B), the “agricultural use” issue was no longer relevant. However, given the lack of any limitation on the agricultural exception in the governing statutes, the trial court’s legal analysis was incorrect. That is, if appellants’ proposed wind turbine is covered under the “agricultural use” exception of R.C. 519.21(A), that decision would be dispositive of the entire underlying dispute. For this reason, upon remand, the trial court should first review the merits of the zoning board’s decision that the “agricultural use” exception was not applicable in this instance. If the trial court concludes that the zoning board’s decision must be upheld, it should then proceed to the merits of the township’s “ban” argument.

{¶34} As to the “agricultural use” exception, Auburn Township, in its zoning resolution, has adopted its own version of R.C. 519.21(A). Article 1, section 1.05 specifically states: “Powers not conferred by Chapter 519 of the ORC or this Resolution follow.” Subsection (a) states: “This Resolution does not prohibit the use of any land for agricultural purposes or the construction or use of buildings or structures *incident* to the use for agricultural purposes of the land on which such buildings or structures are located, * * *.” (Emphasis added.) In its use of the word “incident,” subsection (a) is similar to R.C. 519.21(A), which provides that a township has no authority “to prohibit the use of any land for agricultural purposes or the construction or use of buildings or structures *incident* to the use for agricultural purposes * * *.” (Emphasis added.)

{¶35} In analyzing the question of what constitutes an agricultural use, the employment of the word *incident* is significant. Nowhere in the Revised Code or in the township's zoning resolution is there a suggestion that the structure must be used *exclusively* for agricultural purposes. If the intention was to limit the "agricultural" structures to those used *exclusively* for agricultural purposes, that is what the General Assembly would and should have provided. Therefore, an ancillary benefit, such as distribution of any excess energy produced, should not disqualify the structure, as long as the primary purpose of structure is clearly agricultural. See *Schabel v. Troyan*, 11th Dist. Nos. 2010-G-2953 and 2010-G-2954, 2011-Ohio-2452, ¶53.

{¶36} Because the common pleas court erred in not reviewing the actual merits of the zoning board's ruling, appellants' first assignment has merit.

{¶37} Under their remaining two assignments, appellants challenge the zoning board's finding on the "agricultural use" dispute. Under their second assignment, they state that the board erred as a matter of law in holding that the agricultural exemption under R.C. 519.21(A) can only be invoked when the proposed wind turbine will serve no commercial purpose. Under their third assignment, they assert that the board's finding was not supported by a preponderance of the evidence.

{¶38} Again, in light of its unwarranted emphasis on the "small wind farm" statute, the common pleas court never went forward on either of the foregoing questions concerning the merits of the zoning board's determination. Given the inherent differences between the standards of review that a common pleas court and an appellate court apply in relation to an administrative appeal of a zoning board's ruling, see *Schabel*, 2011-Ohio-2452, ¶30, it would not be prudent for this court to analyze the

two questions raised by appellants until the common pleas court has rendered a decision on the matter. For this reasons, the merits of the second and third assignments are not properly before us at this juncture.

{¶39} Pursuant to our legal analysis under the first assignment of error, the judgment of the Geauga County Court of Common Pleas is reversed, and this case is remanded for further proceedings in regard to the “agricultural use” issue and, if necessary, the issue of whether a small wind farm have been banned in Auburn Township if the wind turbine is not for agricultural purposes.

TIMOTHY P. CANNON, P.J.,

MARY JANE TRAPP, J.,

concur.