

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
CHAMPAIGN COUNTY

WOODSTOCK SOLAR PROJECT, LLC	:	
	:	
Appellee	:	C.A. No. 2023-CA-7
	:	
v.	:	Trial Court Case No. 2022 CV 088
	:	
RUSH TOWNSHIP BOARD OF	:	(Civil Appeal from Common Pleas
ZONING APPEALS	:	Court)
	:	
Appellants	:	

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OPINION

Rendered on June 30, 2023

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ANNE MARIE SFERRA & KARA H. HERRNSTEIN, Attorneys for Appellee

JANE NAPIER & L. MICHAEL BLY, Attorneys for Appellants

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EPLEY, J.

{¶ 1} Appellant, the Rush Township Board of Zoning Appeals (Rush Township BZA), appeals from a judgment of the Champaign County Court of Common Pleas, which determined that the proposed solar facility to be built by Woodstock Solar Project, LLC (Woodstock) would not be subject to township zoning regulations because it would be a

public utility pursuant to R.C. 519.211(A). For the reasons that follow, the judgment of the trial court will be affirmed.

I. Facts and Procedural History

{¶ 2} In 2018, Woodstock launched the development of a solar energy project in Rush Township, Champaign County. To build the facility, Woodstock began entering into lease agreements with local landowners. In all, Woodstock acquired 500 acres of land, and of that, solar panels will be installed on 209 acres.

{¶ 3} Once built, the project will contain numerous solar panels placed on top of a metal or aluminum framework. The panels will be connected to each other with wiring which will transmit electricity to a Dayton Power & Light substation directly across the street. From there, the electricity will be delivered into a larger transmission system managed by the PJM regional wholesale electric grid. This regional transmission organization is responsible for powering about a dozen states ranging from Illinois in the west to New Jersey in the east. When completed, the Woodstock Solar Project will have a capacity of 40 megawatts – enough energy to power approximately 6,700 homes.

{¶ 4} In March 2022, Woodstock applied for a “conditional use permit” to use the land as a “Public Service Facility” or, in the alternative, as a “Light Manufacturing Facility” as defined in the Rush Township Zoning Resolution. On March 30, 2022, Bradley Herron, the township zoning inspector, rejected the conditional use permit, reasoning that the project would not fit within the parameters of a conditional use permit in Rush Township and therefore was ineligible to be considered by the Rush Township BZA. Hearing Exhibit G.

{¶ 5} Woodstock filed an appeal of Herron's determination with the Rush Township BZA. The document raised seven grounds for appeal, including that the solar project would be a common law public utility and would be exempt from the township zoning regulations pursuant to R.C. 519.211(A). At the hearing before the BZA, Woodstock presented the testimony of Trevor Sprague, an officer of Woodstock's parent company, and its expert, John Bentine, a utility lawyer and consultant. Bentine testified that the solar facility should qualify as a public utility and be immune from Rush Township zoning. The BZA also heard testimony from the township's witnesses: Herron, the zoning inspector, and then-state representative Nino Vitale. At the end of the hearing, the BZA voted to reject Woodstock's appeal.

{¶ 6} Upon receipt of a short, written decision from the BZA, Woodstock appealed to the Champaign County Court of Common Pleas pursuant to R.C. 2506.01. The trial court reversed, finding that the decision of the BZA was "not supported by substantial, reliable, and probative evidence. Instead, there is substantial, reliable, and probative evidence from which to conclude that Woodstock is a public utility and therefore exempt from the Rush Township Zoning Resolution." Trial Court Decision at 23.

{¶ 7} Rush Township BZA has appealed, raising two assignments of error.

II. Remand to the BZA was not required

{¶ 8} In its first assignment of error, Rush Township BZA argues that because it did not make a determination as to Woodstock's entitlement to a zoning exemption under R.C. 519.211(A), the issue was not ripe for appellate review by the Champaign County Court of Common Pleas. According to the BZA, Woodstock's entitlement to public utility

status should have first been remanded to the board for a written decision before the trial court considered the case. We disagree.

{¶ 9} When an appellate court reviews a decision by the common pleas court regarding an agency order, the appellate court utilizes two distinct standards of review. On a question of fact, our review is limited to an abuse of discretion. *Key Ads, Inc. v. Dayton Bd. of Zoning Appeals*, 2014-Ohio-4961, 23 N.E.3d 266, ¶ 13 (2d Dist.). On a question of law, however, the review is de novo. *Id.*, citing *Ohio Dept. of Commerce, Div. of Real Estate v. DePugh*, 129 Ohio App.3d 255, 261, 717 N.E.2d 763 (4th Dist.1998). In this case, because we are reviewing the interpretation of statutes, the proper standard of review is de novo. *See Dayton v. Johnson*, 2d Dist. Montgomery No. 29057, 2021-Ohio-3519, ¶ 25 (“The interpretation of a statute is a question of law, which we review de novo.”).

{¶ 10} R.C. Chapter 2506 governs administrative appeals to the common pleas court. “If an appeal is taken in relation to a * * * decision [of the agency], * * * the court may find that the * * * decision is unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence on the whole record. Consistent with those findings, the court may affirm, reverse, vacate, or modify the * * * decision, or remand the cause to the [agency] with instructions[.]” R.C. 2506.04.

{¶ 11} The plain language of the statute gives the trial court options. If it finds the decision of the agency (in this case, the BZA) to be incorrect, the trial court can *either* reverse, vacate, or modify the decision on its own, *or* it can send the case back to the

agency with further instructions. In this case, based on the information in the record before it, the trial court determined that the proposed Woodstock facility would be a public utility under R.C. 519.211 and that it did not need to remand the case to the BZA for additional arguments. It simply reversed the decision of the BZA, as was its prerogative under R.C. 2506.04. See *Dovetail Energy, LLC v. Bath Twp. Bd. of Zoning Appeals*, 2022-Ohio-92, 183 N.E.3d 602 (2d Dist.).

{¶ 12} Still, Rush Township BZA argues that the case should be remanded for further arguments because the township was neither given an opportunity to “present evidence affirmatively demonstrating that Woodstock does not meet the threshold necessary to be considered a public utility as a matter of law” nor able to “proffer rebuttal testimony in the form of its own public utility expert.” This contention that the township was caught off guard at the BZA hearing by Woodstock’s claim that its proposed facility would be a public utility is belied by the record. Woodstock filed its notice of appeal with the BZA on April 19, 2022, and in that document, it argued that “Woodstock is a common law public utility that is exempt from the Rush Township Zoning Ordinance(s), pursuant to R.C. 519.211(A).” Notice of Appeal Exhibit 2. The BZA hearing was held on May 24, 2022, more than a month later. Rush Township *could* have retained an expert to refute Woodstock’s, but it did not.

{¶ 13} Rush Township BZA also cites several cases to bolster its position that the trial court should have remanded the case back to the agency to decide on the issue. The cases, though, use language that confirms the trial *may* remand to the agency for further proceedings, but does not *have* to do so. For instance, *State ex rel. Chagrin Falls v.*

Geauga Cty. Bd. of Commrs, 96 Ohio St.3d 400, 2002-Ohio-4906, 775 N.E.2d 512, ¶ 8, verifies that “common pleas courts have authority in R.C. Chapter 2506 administrative appeals to remand for further proceedings, including a new hearing.” There is no dispute that the trial court *can* remand; it just does not *have* to.

{¶ 14} The trial court did not err by simply ruling that Woodstock’s proposed solar facility would be a public utility because R.C. 2506.04 permits a trial court hearing an administrative appeal to remand the case to the agency for further proceedings but does not require it. The first assignment of error is overruled.

III. Public Utility

{¶ 15} In its second assignment of error, Rush Township BZA asserts that the trial court erred by finding that the proposed Woodstock solar facility would be a public utility.

{¶ 16} R.C. 519.211 restricts the zoning authority of townships over public utilities.

The statutes states:

Except as otherwise provided in division (B) or (C) of this section, sections 519.02 to 519.25 of the Revised Code confer no power on any board of township trustees or board of zoning appeals in respect to the location, erection, construction, reconstruction, change, alteration, maintenance, removal, use, or enlargement of any buildings or structures of any public utility or railroad, whether publicly or privately owned, or the use of land by any public utility or railroad, for the operation of its business.

R.C. 519.211(A). *See Campanelli v. AT&T Wireless Servs., Inc.*, 85 Ohio St.3d 103, 107, 706 N.E.2d 1267 (1999) (R.C. 519.211 “was intended to exempt public utilities providers

from regulation by township zoning boards and boards of zoning appeals”). What qualifies as a “public utility” is not as clear, though, because the legislature did not define the term insofar as it relates to R.C. 519.211. Because of this, Ohio courts have fleshed out the defining characteristics.

{¶ 17} The Ohio Supreme Court has held that “public utilities possess certain common attributes or characteristics which courts employ in determining the nature of an entity’s operations. The * * * most important attribute of a public utility is a devotion of an essential good or service to the general public which has a legal right to demand or receive this good or service.” *A & B Refuse Disposers, Inc. v. Ravenna Twp. Bd. of Trustees*, 64 Ohio St.3d 385, 389, 596 N.E.2d 423 (1992). Moreover, “an entity may be characterized as a public utility if the nature of its operation is a matter of public concern, and membership is indiscriminately and reasonably made available to the general public.” *Marano v. Gibbs*, 45 Ohio St.3d 310, 311, 544 N.E.2d 635 (1989).

{¶ 18} The determination of whether an entity is a public utility for the purpose of exemption from zoning restrictions “requires consideration of several factors related to the ‘public service’ and ‘public concern’ characteristics of a public utility. It follows that a business claiming public utility status bears the burden of offering sufficient evidence on these factors[.]” *A & B Refuse Disposers* at 389. The determination is a mixed question of law and fact. *Id.* at 387.

Public Service

{¶ 19} An entity provides a public service if it (1) provides essential goods or services to the public which has a legal right to demand or receive them; (2) provides the

goods or services to the public indiscriminately and reasonably; and (3) the obligation to provide the goods or services cannot be arbitrarily or unreasonably withdrawn. *Id.*; see also *Westfield Twp. Zoning Inspector v. Emerald Bioenergy, LLC*, 5th Dist. Morrow No. 2021 CA 0001, 2021-Ohio-3843, ¶ 40. There is little doubt that electricity is a good or service.

{¶ 20} The record indicates that Woodstock’s proposed solar facility will generate a considerable amount of electricity for public consumption. At full capacity, it will create 40 MW of electricity, enough to power approximately 6,700 homes. The electricity will flow from the solar panels to the DP&L substation and then into the PJM regional power grid. Once the electricity has been transmitted into the grid, Woodstock will not control where it goes or who uses it. Once in the grid, “those electrons just go where they want to. They take the path of least resistance.” Hearing Tr. at 105. On cross-examination, Rush Township witness Nino Vitale testified that, when the electricity hits the PJM grid, it is then being used by the general public.

Attorney: If [the electricity] goes into the big grid, like you say, you would agree with me that it is electricity that’s being generated for the public use, like any other electricity * * * ?

Vitale: If it – if it hits the general grid, then it is being used by the public, right.

Hearing Tr. at 171. There was also testimony at the BZA hearing from Woodstock’s expert that it could not discriminate against customers as it would be selling into one market at the price determined by that market. Hearing Tr. at 105-106.

{¶ 21} Woodstock’s solar facility will provide a public service. The trial court did not err in making that same determination.

Public Concern

{¶ 22} The other characteristic of a public utility that courts consider is whether the entity conducts its operations “in such a manner as to be a matter of public concern.” *A & B Refuse Disposers*, 64 Ohio St.3d at 387, 596 N.E.2d 423. A public utility often occupies a monopolistic or oligopolistic position in the marketplace, and that “gives rise to a public concern for the indiscriminate treatment of that portion of the public which needs and pays for the vital good or service offered by the entity.” *Id.* Factors used to determine whether an enterprise conducts itself in such a way to be a matter of public concern include competition in the marketplace, the good or service provided, and regulation by a government authority. *Id.* No single factor is controlling. “Nevertheless, in a case where the business enterprise serves such a substantial part of the public that its rates, charges and methods of operation become a public concern, it can be characterized as a public utility.” *Id.*, citing *Indus. Gas Co. v. Pub. Utilities Comm. of Ohio*, 135 Ohio St. 408, 412, 21 N.E.2d 166 (1939).

{¶ 23} Rush Township BZA argues that the solar facility is not a matter of public concern because it does not have a monopolistic position in the solar energy marketplace. However, while there may be multiple players in the solar energy market, deregulation and the ever-changing nature of public utilities have decreased the significance of this factor. See *Campanelli*, 85 Ohio St.3d at 106, 706 N.E.2d 1267. The Ohio Supreme Court has determined that wireless telecommunication companies (like AT&T, Verizon, and T-

Mobile) are public utilities pursuant to R.C. 519.211 even though they do not hold monopolistic positions in the marketplace. *Id.* Rush Township BZA argues that we should disregard cases like *Campanelli* because this case is about energy producers. *Campanelli* was about a telecom company, but it is apparent to this Court that the analytical framework is the same; the only difference is the product supplied. Even though there may be other solar energy companies, there is only one marketplace for the energy produced by them – the PJM market. Hearing Tr. at 105.

{¶ 24} Woodstock is also subject to government regulation. According to the record, the solar project will be regulated by the Federal Energy Regulatory Commission through PJM. Pursuant to the interconnection service and interconnection construction service agreements (Hearing Exhibit D) entered into by Woodstock, the project must comply with all PJM regulations, including the Open Access Transmission Tariff. Expert Report at 14-15. The project has also gained approval from the U.S. Army Corp of Engineers, U.S. Fish and Wildlife Service, and the Ohio Department of Natural Resources. Hearing Exhibit C; Hearing Tr. at 33-34. It should also be noted that Woodstock will be taxed as a generator and public utility. Hearing Tr. at 39, 97.

{¶ 25} Based on our analysis of the “public service” and “public concern” factors, we conclude, as the lower court did, that Woodstock’s solar facility will be a public utility for purposes of R.C. 519.211. The second assignment of error is overruled.

{¶ 26} Finally, we note that this case is directly on point with a recent opinion from this Court in *Dovetail Energy*. Dovetail, a renewable energy company, operated an anaerobic digestion facility in Bath Township. The operation turned solid waste material

(manure) into electricity and fertilizer. The energy produced was used to power the nearby hog farm which provided the manure, but the majority of the electricity was sold to the PJM regional wholesale electric grid through an interconnection agreement with Ohio Edison.

{¶ 27} Soon after it began operations, nearby residents began complaining of the noxious odors emanating from the property, and Bath Township informed Dovetail that “[t]he property [wa]s zoned agricultural and the current use of the existing biodigester facility ha[d] been determined to be an industrial use.” Dovetail appealed the Bath Township BZA’s determination, arguing that the property was exempt from zoning resolutions because the buildings were used by a public utility to generate power. The common pleas court agreed with Dovetail, reversed the BZA’s decision, and remanded the case to the board to grant the certificate of exemption.

{¶ 28} On appeal to this court, Bath Township argued that (1) the trial court did not have the authority to rule that Dovetail was a public utility without remanding to the BZA, and (2) Dovetail was not a public utility (and therefore was subject to zoning) because it was neither a public service nor a public concern. We concluded then – as we do now – that R.C. 2506.04 gives the common pleas court the authority to modify the decision of an administrative agency without remanding the case back to the BZA. We also held that the Dovetail energy facility was a public utility because it generated electric energy and provided it to the PJM grid (the only market in which to sell energy) where it would no longer have any control over where it went or who received it. Finally, we determined that because the Dovetail biodigester was state- and federally-regulated and taxed, it was of

public concern.

{¶ 29} The cases are remarkably similar and so are our conclusions: (1) R.C. 2506.04 permits a trial court hearing an administrative appeal to remand the case to the agency for further proceedings but does not require it, and (2) the Woodstock solar project will be a public utility (and excluded from Rush Township zoning regulations) because it will be of public service and of public concern.

IV. Conclusion

{¶ 30} The judgment of the trial court will be affirmed.

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WELBAUM, P.J. and LEWIS, J., concur.