IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

GRAYS RUN CLUB,	:	NO. 05-01,495
Appellant	:	
	:	CIVIL ACTION - LAW
vs.	:	
	:	
LYCOMING COUNTY ZONING,	:	
HEARING BOARD,	:	
Appellee	:	Land Use Appeal

OPINION AND ORDER

Before the Court is Grays Run Club's ("the Club's") appeal from the July 25, 2005, decision of the Lycoming County Zoning Hearing Board ("the Board"), which affirmed the determination of the Zoning Administrator that a wind energy project proposed by Laurel Hill LLC is a "public service use" under the terms of the Lycoming County Zoning Ordinance. Argument on the matter was heard December 13, 2005.

Laurel Hill LLC proposes to construct a 70.5 MW wind-powered electric generating, transmitting and interconnecting facility that will consist of 47 wind turbines, an approximately 2 mile long overhead electric transmission line, and a switchyard and substation that will provide an interconnection to an existing electric transmission system.[1] The company plans to lease from various property owners approximately 706 acres located in Jackson and McIntyre townships.[2] Most of the wind turbine sites and part of the electric interconnection transmission line are to be located within a Resource Protection Zoning District, where a "public service use" is permitted by special exception.[3]

The Zoning Administrator determined the project should be considered a "public service use" based on Section 3110 of the Zoning Ordinance, which provides, in relevant part, that the Zoning Administrator may permit uses which are not specifically listed but are similar

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[1] See Exhibit GR4.

[2] Both of these townships have elected to provide for zoning regulation through the Lycoming County Zoning Ordinance.

[3] The project is currently the subject of an Application for Special Exception pending before the Board.

to uses that are expressly permitted in Section 3120. Upon review, the Zoning Hearing Board found that the project is "similar to a public service use as defined at Ordinance Section 3230C.1 – "…utility substations or transmission and distribution facilities for electric, telephone, and television cable service…".[4] Specifically, the Board found that the project "does not require structures or improvements which vary significantly from utility right-of-ways and distribution facilities, nor does it involve industrial processes typical of manufacturing, or, indeed, typical of most existing power generation technologies, e.g., coal, oil, and gas burning facilities, or nuclear power facilities."[5] Based on these findings, and on the discretion provided by Section 3110 to the Zoning Administrator, and the authority provided by Section 3200 to the Board to "make interpretations of use", the Board affirmed the Zoning Administrator's determination. The Club contends in the instant appeal that the Board erred in several respects.

First, the Club contends the wind energy project is *not* similar to a "public service use" and classification as such contravenes Grant v. Zoning Hearing Board of Penn Township, 776 A.2d 356 (Pa. Cmwlth. 2001). In Grant, the Court was called upon to decide "whether the [proposed] electric generating facility is of the same general character as an essential service." Grant, *supra*, 776 A.2d at 360-361.[6] An essential service was defined by the ordinance, in relevant part, as "the erection, construction, alteration or maintenance, … of underground or overhead gas, electrical, steam or water transmission or distribution systems or collection, communication, supply or disposal systems, including poles, wires, mains, drains, sewers, pipes, conduit cables, fire alarm boxes, police call boxes, traffic signals, hydrants and other similar equipment and accessories in connection therewith …, but not including buildings." Id. The Court described the proposed facility as follows:

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[4] See Record of the Zoning Hearing Board dated July 25, 2005, at paragraph 16.

[5] Id. at paragraph 17.

[6] Similar to the Lycoming County Zoning Ordinance, the zoning ordinance before the Court in Grant permitted a use by special exception "if it is of the same general character as any of the uses authorized as permitted uses, conditional uses or special exceptions" in the particular district at issue. Grant v. Zoning Hearing Board of Penn Township, 776 A.2d 356, 361 (Pa. Cmwlth. 2001).

> The unmanned facility would generate power during periods of peak demand and require the installation of two, forty-four megawatt natural gas fired combustion turbine generators, with fuel oil backup capability. A five hundred-gallon tank would be used for the storage of diesel fuel, which would be used to power the plant should natural gas become unavailable. Two sixty-foot exhaust stacks would be constructed in order to allow for escape of waste products from consumed fuel. The proposed facility would generate electricity that would be transferred to an existing electric transmission and distribution substation adjacent to the site … .

Id. at 357. In determining that the proposed use was *not* of the same general character as an essential service, the Court stated as follows:

> The production of electricity does not involve underground or overhead systems but rather requires construction of buildings, smoke stacks and generators. Production of electricity is not of the same general character as the distribution of electricity. Moreover, the definition of essential services excludes buildings, which would need to be constructed for the electric generating facility.

Id. at 361. The Court concluded that "no reasonable interpretation of the ordinance in this case would equate production of electricity with distribution of electricity." Id.

The Club argues that this Court is bound to hold controlling the statement that "[p]roduction of electricity is not of the same general character as the distribution of electricity." Such a broad reading of the case, however, ignores the basis for the decision – the Court's comparison of the physical characteristics of the proposed facility with the description of a permitted use in the ordinance before it. This Court believes that such a blind application of Grant would misconstrue that decision and that, in fact, classification as a public service use of the wind energy project in the instant case, does not at all contravene Grant.

The Lycoming County Zoning Ordinance defines public service use to include, *inter alia*, utility substations or transmission and distribution facilities for electric, telephone, and television cable service.[7] The proposed project entails wind turbines, an overhead electric transmission line, and a switchyard and substation.[8] While the Court acknowledges that the

[7] Importantly, the ordinance does not prohibit buildings, as did the ordinance in Grant.

[8] There are references in the record to an administration building but it is unclear whether such is part of the substation or switchyard, or whether it is a separate building. In either case, the Court notes that also included in

wind turbines will be 388 feet tall, obviously higher than a typical electric transmission line, such fact does not render the comparison unreasonable. Overall, the Court finds the comparison indeed reasonable and concludes, as did the Board, that the proposed project is similar to a public service use as defined at Ordinance Section 3230C.1.

The Club nevertheless argues that the project cannot be classified as a public service use because it is "neither authorized by the Commonwealth of Pennsylvania nor does it offer a service to the general public." As the Club points out, "public service" is defined in Section 14300 of the Ordinance as "[a]ny facility or service provided by the local or federal government, or duly authorized by the state of Pennsylvania to provide services to the general public." In defining "public service use", however, Section 3230C.1 lists uses commonly provided by private entities and does not impose a similar "government provided or authorized" restriction.[9] Thus, read together the two sections are somewhat ambiguous. Were the Court to accept the Club's interpretation, that the applicant must not only propose a use listed in Section 3230C.1 or one similar thereto, but must *also* be a government entity or authorized by one, since Section 14300 includes "*any* facility or service", there would be no need to list particular uses. Section 3230C.1 would thus be rendered meaningless, in derogation of Section 1922 of the Statutory Construction Act,[10] which allows for a presumption that the governing body intends the entire ordinance to be effective and certain. See Primiano v. City of Philadelphia, 739 A.2d 1172 (Pa. Cmwlth. 1999). The Court believes a more reasonable interpretation of the ordinance as a whole defines public service use to include the particular

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the definition of public service use is "building and garages essential to ambulance, fire, police and rescue operations", and that an administration building would be a similar use.

[9] Specifically, Section 3230C.1 provides "[t]hese uses include emergency service facilities such as heliports, building and garages essential to ambulance, fire, police and rescue operations; utility substations or transmission and distribution facilities for electric, telephone and television cable service, excluding communication towers; pumping stations; highway maintenance storage areas; and other similar publicly owned facilities, excluding solid waste facilities as defined by the PA Solid Waste Management Act.

[10] 1 Pa.C.S. §§ 1501 *et seq*. Principles of statutory construction may be applied when the language of the statute is ambiguous. See Primiano v. City of Philadelphia, 739 A.2d 1172 (Pa. Cmwlth. 1999). Further, the principles of the Statutory Construction Act are to be followed in construing a local ordinance. Patricca v. Zoning Board of Adjustment of City of Pittsburgh, 590 A.2d 744 (Pa. Cmwlth. 1991).

facilities or services listed in Section 3230C.1, or uses similar thereto, whether or not provided or authorized by the government.

The Club also argues that the wind energy project is inconsistent with the intent of both of the zoning districts in which it is proposed to lie. With respect to this argument the Court merely notes that such is not an issue before this Court but, rather, is currently before the Zoning Hearing Board as part of its consideration of the Application for Special Exception.[11] Indeed, there is insufficient evidence in the record before this Court to make such a determination.

Finally, the Club argues that the Zoning Administrator and the Board cannot rely upon Section 3110 to permit a use that the governing body "deliberately omitted from a given use classification" and that by doing so, both "acted as a super-legislator." On the contrary, while the Ordinance indicates that "no use which is expressly prohibited shall be built in a district",[12] "prohibited" obviously refers only to "excluded" uses.[13] "Expressly prohibited" cannot be read to mean "deliberately omitted" since, as noted above, the Ordinance allows the Zoning Administrator to permit uses which are not specifically listed as long as they are similar to those which are, and also indicates that "[t]he uses not enumerated in this division are not necessarily excluded."[14] The Court believes the Zoning Administrator and the Board both acted within their respective authority under the Ordinance

Accordingly, as the Court finds the proposed use to be similar to a public service use as defined at Ordinance Section 3230C.1, the Zoning Hearing Board did not commit an error of law, and its decision will be upheld.

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[11] Section 10310 of the Ordinance requires the Board review the Application for Special Exception for compliance with: (A) Consistency with the general purposes, goals, objectives and standards of the County Comprehensive Plan; (B) Avoidance of any substantial or undue adverse effect on adjacent property, the character of the neighborhood, traffic conditions, parking, public improvements, public sites or right-of-ways, or other matters affecting the public health, safety and general welfare; and (C) Assurance that the proposed use will not impose an undue burden on public improvements, facilities, utilities or services.

[12] Section 3110.

[13] For example, Section 3230C.1 includes "transmission and distribution facilities for electric, telephone and television cable service, *excluding* communication towers", and "other similar publicly owned facilities, *excluding* solid waste facilities". (Emphasis added.)

[14] Section 3200.

ORDER

AND NOW, this 19th day of December 2005, for the foregoing reasons, the appeal filed by Grays Run Club is hereby denied, and the July 25, 2005, Order of the Lycoming County Zoning Hearing Board is hereby affirmed.

BY THE COURT,

Dudley N. Anderson, Judge

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Hon. Dudley Anderson