

FILED

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IN THE COMMON PLEAS COURT OF GREENE COUNTY, OHIO
AJ WILLIAMS
CLERK OF COURT
GREENE COUNTY, OHIO

DOVETAIL ENERGY, LLC et al.,

Appellants

v.

BATH TOWNSHIP BOARD OF
ZONING APPEALS, et al.,

Appellees



CASE NO. 2020 CV 0198

: Consolidated with Case Nos. 2020 CV 0199
: and 2020 CV 0200

: JUDGE MICHAEL A. BUCKWALTER

: JUDGMENT ENTRY GRANTING

: JUDGMENT IN FAVOR OF

: APPELLANTS IN CONSOLIDATED
: APPEALS

FINAL APPEALABLE
ORDER

This matter consists of three administrative appeals filed under separate case numbers which have been consolidated for briefing and resolution. The appeals are brought from three appeals decided by the Bath Township Board of Zoning Appeals ("BZA") which were consolidated for hearing and decision by the BZA. The Court, for the following reasons, rules in favor of the Appellants in the three consolidated appeals.

Case No. 2020 CV 0200 is an appeal by Pitstick Renewable Energy LLC, Thomas V. Pitstick, and D. Lynne Pitstick from a March 3, 2020 decision of the Bath Township Board of Zoning Appeals in Case # 2019-003-A. The BZA's March 3, 2020 decision in Case # 2019-003-A denied the Pitsticks' appeal from a Sept. 6, 2019 Notice of Violation stating that the use of their property at Tax Parcel No. A01000200260003600 was in violation of Bath Township zoning requirements and the Ohio Revised Code in that the property was zoned agricultural but the current use of an existing biodigester facility had been determined to be an industrial use.

Case No. 2020 CV 0198 is an appeal by Dovetail Energy, LLC ("Dovetail") and its parent company, Renergy, Inc., from the March 3, 2020 decision of the BZA in Bath Township Board of Zoning Appeals Case # 2019-004-A. The BZA's decision in Case # 2019-004-A denied Dovetail's appeal from a Notice of Violation dated Sept. 6, 2019 which stated that the use of property leased by Dovetail at 1156 Herr Rd. in Fairborn, Ohio was in violation of Bath

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Township zoning requirements and the Ohio Revised Code in that the property was zoned agricultural but the current use of an existing biodigester facility on Bath Township Tax Parcel No. A01000200260003600 had been determined to be an industrial use.¹

Case No. 2020 CV 0199 is an appeal by Dovetail Energy, LLC and Renergy, Inc. from the March 3, 2020 decision of the Bath Township Board of Zoning Appeals in Case # 2019-005-A. The BZA's March 3, 2020 decision in Case # 2019-005-A denied Dovetail's appeal from a Sept. 25, 2019 notification by a Special Prosecuting Attorney for Bath Township which rejected Dovetail's Declaration of Agricultural Exemption at Bath Township Tax Parcel No. A01000200260003400 for fertilizer storage ponds.²

Stipulations of Fact

The following introduction is drawn primarily from the *Joint Stipulated Findings of Fact* ("Stip.") signed by counsel for all parties and submitted to the BZA on Feb. 24, 2020 by the parties prior to issuance of the BZA's decision.

Dovetail operates a biodigester facility in Fairborn, Ohio at 1156 Herr Road which is located on Bath Township Tax Parcel Numbers A01000200260003600 and 01000200260003400 (collectively, "the Property"). Stip. ¶ 1.

Thomas Pitstick operates Pitstick Renewable Energy, LLC and farming operations on the Property and on parcels surrounding the Property. The Property itself is owned by Pitstick Renewable Energy, LLC, to which the Property was transferred by trusts owned by Thomas and Lynne Pitstick. Stip. ¶ 11. The farming operations on and adjacent to the Property include a hog farm with barns with a capacity of almost 5,000 hogs and a nursery building, and production of crops including corn, soybeans and wheat. Stip. ¶ 11.

Per Notices of Violation issued on Sept. 6, 2019 by Special Prosecuting Attorney Jess Weade, the properties occupied by Dovetail and by the Pitstick operations are zoned agricultural.

¹ The addresses and tax parcel numbers are taken from the Joint Stipulated Findings of Fact submitted by the parties to the Bath Township Board of Zoning Appeals. Record at bates-stamp 0387-0397.

² Appellee filed a Motion to show cause on July 21, 2020. The Court agreed with Appellants' position on the Motion to show cause. It is denied.

In 2013, Bath Township, by its Zoning Inspector, issued a Zoning Certificate of Agricultural Exemption to Pitstick for an Anaerobic Digestion Facility on the Property. Stip. ¶ 13; also see Pitstick Ex. 2. Dovetail began operations in 2015. Stip. ¶ 52. In 2016, Bath Township, by its Zoning Inspector, issued a second Zoning Certificate of Agricultural Exemption for improvements to the Anaerobic Digester on the Property. Stip. ¶ 14.

Per the record presented to this Court, neither of these Zoning Certificates of Agricultural Exemption issued by Bath Township in 2013 and 2016 have been formally revoked under the procedure for revocation of zoning certificates set forth in the Bath Township Zoning Resolution ("BTZR") at Sec. 1001.4 which requires that a written notice of revocation of the certificate be served upon the owner and also posted on the premises in question.

Dovetail constructed the Anaerobic Digester on Parcel No. A01000200260003600 leased from Pitstick. Stip. ¶ 15. Pitstick provides manure from the hog farming operations to Dovetail. Dovetail combines the manure with other biologically derived fuel sources in the biodigester. The manure and other fuel sources are processed by the biodigester to produce methane. Dovetail then uses the methane to produce electrical energy. Stip. ¶¶ 16, 17.

After most of the methane is removed from the fuel sources, Dovetail treats the remaining material to turn it into fertilizer. The fertilizer is stored on the Property until it is provided to Mr. Pitstick and to other farmers to improve crop production. Stip. ¶ 19. The sole use of the fertilizer is for farming operations, and the fertilizer can be obtained from Dovetail by any qualifying farmer. Stip. ¶ 20.

One hundred percent of the materials used and generated by the biodigester are consumed. "Dovetail takes biologically derived and treated fuel sources, many diverted from landfills, and converts them into electricity and fertilizer for consumption and use by the public." Stip. ¶ 37.

The parties have stipulated that "Dovetail provides a reduction of waste to landfills and creates electricity via an actual greenhouse gas reduction technology. Dovetail provides a reduction in greenhouse gases that the materials would produce at a landfill." Stip. ¶ 47.

The parties have stipulated that Dovetail is not a solid waste "facility" or a "solid waste transfer facility" as those terms are defined in R.C. 3734.01. Stip. ¶ 48.

Dovetail is heavily regulated by the Ohio EPA and holds multiple environmental permits, including Permit to Install, National Pollutant Discharge Elimination System, Land Application, Air Quality, Land Application Management Plan, and Air Quality (Regional Air Pollution Control Agency). Stip. ¶ 38.

A portion of the electricity produced by methane from the Dovetail biodigester is used by the Pitstick operations on and adjacent to the Property, including the hog farming operations, the barns, a grain bin, and all of the buildings on and adjacent to the Property. Stip. ¶ 23. The Property itself has no source of electricity other than the Dovetail biodigester. Stip. ¶ 24.

The Federal Energy Regulatory Commission, "FERC," regulates the wholesale electrical generation market and transmission system in the United States. FERC has delegated authority for portions of that regulation in multiple areas of the country to Regional Transmission Organizations ("RTO's"). Stip. ¶ 26. The transmission grid and wholesale generation market in Ohio is managed by PJM Interconnection, which is an RTO responsible for Ohio as well as all or part of twelve other states ranging from Illinois to New Jersey. PJM constitutes the only market for wholesale energy generated in Ohio. Stip. ¶ 27.

The majority of the electricity produced by the methane from Dovetail's biodigester is provided by Dovetail to the local regional wholesale electric grid pursuant to a Wholesale Market Participation Agreement between Dovetail, PJM Interconnection, and American Transmission Systems, Inc. under which Dovetail is a Wholesale Market Participant. Stip. ¶¶ 26, 29.

All of the energy generated by Dovetail not used on-site for its processes or on the adjacent property parcel is sold into the PJM wholesale energy market. Stip. ¶ 34. The energy sold by Dovetail to PJM is used to provide energy to Load Serving Entities, which are typically local utilities, which then use the energy to serve customers. Stip. ¶ 35.

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Out of the total electricity generated from the biodigester by Dovetail, approximately 81% is sold to PJM Interconnection, 13% is used by the Dovetail facility, and 6% is used by the Pitstick farming operations. Stip. ¶ 34.

In addition to its agreement with PJM, Dovetail has an Interconnection Agreement with Ohio Edison Company, which imposes requirements governing creation of the facility, reactive power design criteria, and communications requirements with the transmission grid. Stip. ¶ 31. Dovetail is obligated to construct and operate its facility in accordance with the OATT [presumably the Open Access Transmission Tariff] and all relevant federal rules as well as obtain transmission onto the PJM grid. Stip. ¶ 32.

Dovetail has provided energy to the Ohio energy grid on a continuous basis since Dovetail began operations in 2015. Stip. ¶ 52.

The State of Ohio has determined that the Dovetail facility is a public utility. Dovetail's personal property has been taxed as a public utility since 2015. Stip. ¶ 40. Dovetail has been paying public utility personal property taxes to Greene County since 2015. Stip. ¶ 41. Dovetail continues to pay public utility taxes on its energy facility. Stip. ¶ 45.

In 2016, a State Department of Taxation Energy Specialist found that Dovetail was a "solid waste energy conversion facility," and the Ohio Tax Commissioner issued an exempt facilities certificate for Dovetail's facility exempting it from real property taxes. Stip. ¶ 42.

In 2018, the Greene County Board of Revision determined that the Dovetail facility was not entitled to an agricultural exemption and revoked CAUV (Current Agricultural Use Value) on the 4.79 acre portion of the 14.737 acre parcel occupied by the Dovetail biodigester. The Board of Revision also determined that Dovetail was an "energy facility" and as such was exempt from CAUV recoupment. Pitstick did not pay recoupment when the 4.79 acres was removed from CAUV. Stip. ¶ 44.

Dovetail is certified as an Ohio Renewable Energy Resource Generating Facility under Certificate No. 15-BIO-OH-GATS-1326, consistent with R.C. 4928.64 and R.C. 4928.65. Stip. ¶ 36.

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Dovetail is a provider of renewable energy credits through its PUCO renewable energy resource certification and the GATS system. Dovetail is required to provide renewable energy credits by its operations and PUCO certification. Stip. ¶ 53.

Bath Township Notices of Violation, Denial of Certificate of Exemption, and Appeals to BZA
Case No. 2019-003-A

By letter dated Sept. 6, 2019, Special Prosecuting Attorney Jess Weade notified Thomas and Lynne Pitstick that activity on their property located at 1146 Herr Road in Fairborn appeared to be in violation of the Bath Township Zoning Resolution in that “[t]he property is zoned agricultural and the current use of the existing biodigester facility has been determined to be an industrial use based on the following information.” The Sept. 6, 2019 Notice of Violation stated in brief that the property did not meet the definition set forth in R.C. 5713.30(A)(1)(b) of “Land devoted exclusively to agricultural use” because at least fifty percent of the feedstock used for production of energy, biodiesel production, etc. was not derived from parcels of land upon which the production facility was located under common ownership or leasehold. The letter advised that “[t]he use of this property at the present time appears to be more industrial in nature as opposed to agricultural,” and therefore was in violation of both the Ohio Revised Code and the Bath Township Zoning Resolution. Record (“Rec.”) at bates-stamp number 0002.

The Pitsticks and Pitstick Renewable Energy LLC filed an appeal to the BZA, assigned Case No. 2019-003-A. The Pitstick Notice of Appeal stated as grounds that the property at 1146-1156 Herr Road was exempt from the Bath Township Zoning Resolution under R.C. 519.21(A) because the buildings and structures on the property were incident to the use of agricultural purposes of the land on which they were located, and was also exempt under R.C. 519.211(A) because the property and the buildings and structures on the property were used by a public utility for the generation of electricity. In addition, Bath Township had previously ruled that the land, buildings and structures on the property were exempt from the BTZR, and the buildings and structures had been constructed and operated in reliance upon that determination. Rec. 0008-0009.

Case No. 2019-004-A

By letter dated Sept. 6, 2019, Special Prosecuting Attorney Jess Weade notified Dovetail Energy that activity on the property it leased at 1146 Herr Road appeared to be in violation of the BTZR in that the property was zoned agricultural and the current use of the existing biodigester facility had been determined to be an industrial use. The Notice of Violation cites R.C. 5713.30(A)(1)(b)'s definition of "land devoted exclusively to agricultural use." The Notice of Violation stated that the use of the property appeared to be more industrial in nature as opposed to agricultural in violation of the Ohio Revised Code and the Bath Township Zoning Resolution, and gave 30 days to correct the violation. Rec. 0004.

Dovetail appealed to the BZA. The appeal was assigned Case No. 2019-004-A. Dovetail asserted as grounds that its use was exempt from township regulation because the property was being used as, by or in conjunction with agriculture, a public utility, methane gas production, a renewable energy resource generating facility, and/or other uses. Dovetail appealed on the additional ground that its use was in compliance with the zoning certificate previously issued by Bath Township with the determination of agricultural exemption from the BTZR. Rec. 0012.

Case No. 2019-005-A

By letter dated Sept. 25, 2019, the Special Prosecuting Attorney for Bath Township rejected Dovetail's Declaration of Agricultural Exemption for Parcel No. 010002002600003400, stating that Bath Township did not agree with Dovetail's assessment that the use was agricultural. The letter advised that it appeared that the project for the listed parcel would be an expansion of the current facility, in spite of the fact that it was on a different tax parcel, and as a result, the Township did not believe that R.C. 519.21 was the sole controlling statute. Therefore, the Township denied the exemption. Rec. 0006.

Dovetail filed an appeal to the BZA, designated Case No. 2019-005-A, asserting as grounds that the decision and order was contrary to State and Federal Constitutions and laws as well as to the Bath Township Zoning Resolution; that Bath Township had no jurisdiction or authority to regulate the identified use of the property and the use was exempt from township regulation in that the property was being used as, by or in conjunction with agriculture or a

public utility; and that the decision and order was an unconstitutional taking of property without just compensation in violation of Dovetail's procedural and substantive due process rights.

Bath Township Board of Zoning Appeals Decision

The BZA held a public hearing in the above three appeals on Feb. 13, 2020. The parties were granted leave to submit proposed findings of fact and closing arguments by Feb. 24, 2020. The parties submitted the Joint Stipulated Findings of Fact on Feb. 24, 2020.

The BZA issued its Decision on March 3, 2020. The Decision includes an additional Finding of Fact by the BZA, which states: "A total of 2.5% to 3% of the feedstock used for the Biodigester located on the subject Herr Road property came from Pitstick farming operations in 2019, with an annual maximum of 25%."

The BZA affirmed the decisions of the Bath Township zoning authorities "with respect to their determination regarding the current and proposed uses of properties subject to the Appeals, and affirms the appealed zoning decisions in their entirety."

The BZA's decision includes a list of eleven "Conclusions" lettered A through K. In regard to the agricultural use issue, the BZA concluded that the "proposed and existing uses of the subject properties involved in the Appeals is not Agricultural in nature," "notwithstanding prior approvals of the subject properties as exempt from regulation as Agricultural in nature[.]"

The BZA concluded that testimony during the recent hearing "established that only 2.5-25% of the feedstock used in the production was or will be derived from parcels of land under common ownership or leasehold, below the agricultural exemption requirement of at least 50%. R.C. Section 5713.30(A)(1)(b) provides that land containing biomass energy production and similar uses is devoted to agricultural use provided that at least fifty per cent (sic) of the feedstock used in the production is derived from parcels of land under common ownership or leasehold. The conduct of such operations using less than the 50 percent threshold requires industrial zoning for which the properties at issue are not appropriately zoned."

In regard to the public utility exemption issue, the BZA stated that consideration of "whether the existing uses on the subject properties constitute a public utility was not within the

purview of the appointed Bath Township Zoning Inspector or the Special Prosecutor appointed to represent Bath Township.” In filing the appeals to the BZA, the Appellants had “for the first time argued that the uses constitute Public Utilities, a claim which the Bath Township enforcement authorities never considered in their September 2019 enforcement action.”

The BZA stated that it had been called upon to determine the appropriateness of enforcement actions taken by letters dated Sept. 6, 2019 and Sept. 25, 2019 solely upon consideration of whether the existing uses of the property constituted an agricultural use. The BZA stated that the BTZR, at Section 106, requires that “determination of qualification as a public utility or railroad shall be made by the Zoning Inspector after the submittal of documented criteria.”

The BZA stated that R.C. 519.14 and the BTZR provide for appeals from the enforcement actions of the zoning inspector and enforcement authority where it is alleged that there is error in any order, requirement, decision or determination made by an administrative official in enforcement of the Revised Code or of any resolution adopted thereto.

The BZA stated that it would not consider or address the issue of whether the subjects of the appeals were exempt as public utilities because that issue had not been considered by a Zoning Inspector or by Bath Township enforcement authorities, and also stated that it did not find that the proposed and existing uses under appeal constituted a public utility: “The BZA concludes that absent prior consideration by Bath Township zoning enforcement authorities, or a determination by declaratory judgment, the BZA should not consider whether the uses as existing and proposed by Appellants constitutes a ‘public utility,’ and does not find that the uses as existing and proposed by Appellants constitute a ‘public utility.’ ”

Discussion

Introduction

Townships in Ohio do not possess any inherent or constitutionally granted powers of zoning. The zoning authority of townships is limited to the authority specifically conferred by the General Assembly. *Terry v. Sperry*, 130 Ohio St.3d 125, 2011-Ohio-3364, 956 N.E.2d 276,

¶ 18, quoting *Bd. of Bainbridge Twp. Trustees v. Funtime, Inc.*, 55 Ohio St.3d 106, 108, 563 N.E.2d 717 (1990).

All zoning decisions, “whether on an administrative or judicial level, should be based on the following elementary principles which underlie real property law. Zoning resolutions are in derogation of the common law and deprive a property owner of certain uses of his land to which he would otherwise be lawfully entitled. Therefore, such resolutions are ordinarily construed in favor of the property owner. Restrictions on the use of real property by ordinance, resolution or statute must be strictly construed, and the scope of the restrictions cannot be extended to include limitations not clearly prescribed. (Citation omitted.) Furthermore, exemptions from restrictive zoning provisions are to be liberally construed.” *Terry v. Sperry*, supra at ¶¶ 18-19 (citations omitted).

“Ambiguities in zoning provisions which restrict the use of one’s land must be construed against the zoning resolution because the enforcement of such provisions is an exercise [of] police power that constricts property rights.” *Allen v. Miami County Bd. of Zoning Appeals*, 186 Ohio App.3d 196, 2010-Ohio-377, 927 N.E.2d 33, ¶ 17 (2d Dist.) (citation omitted).

In applying a zoning provision, the court must not view the provision in isolation, “rather, its ‘meaning should be derived from a reading of the provision taken in the context of the entire ordinance.’ ” *Cleveland Clinic Foundation v. Cleveland Bd. of Zoning Appeals*, 141 Ohio St.3d 318, 2014-Ohio-4809, 23 N.E.3d 1161, ¶ 35 (citation omitted).

These appeals from the decision of the Bath Township Board of Zoning Appeals are governed by R.C. 2506.04, which provides that if an appeal is taken from an administrative decision, 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.” The trial court may affirm, reverse, vacate or modify the decision, or remand the matter with instructions to enter a decision consistent with the findings or opinion of the court.

Chapter 2506 of the Revised Code “confers on the common pleas courts the power to examine the whole record, make factual and legal determinations, and reverse the board’s

decision if it is not supported by a preponderance of substantial, reliable, and probative evidence.” *Cleveland Clinic Foundation*, supra at ¶ 24 (citation omitted).

In an appeal of a zoning decision, the common pleas court must act under a presumption that the determination of a board of zoning appeals is valid. *BP Oil Co. v. Dayton Bd. of Zoning Appeals*, 109 Ohio App.3d 423, 428, 672 N.E.2d 256 (2d Dist., 1996). The party opposing the determination of the board of zoning appeals bears the burden of overcoming this presumption. *Id.*

But, a common pleas court has no duty to defer to the administrative interpretation of an ordinance unless it finds the ordinance to be ambiguous. “A court owes no duty of deference to an administrative interpretation unless it finds the ordinance ambiguous. ‘A court, as well as an agency, must give effect to the unambiguously expressed intent of [the legislature].’ ” *Cleveland Clinic Foundation*, supra, quoting *Lang v. Ohio Dept. of Job & Family Servs.*, 134 Ohio St.3d 296, 2012-Ohio-5366, 982 N.E.2d 636, ¶ 12.

Use of the Land and Structures by a Public Utility

Section 519.211(A) of the Ohio Revised Code provides in full as follows:

(A) 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. As used in this division, “public utility” does not include a person that owns or operates a solid waste facility or a solid waste transfer facility, other than a publicly owned solid waste facility or a publicly owned solid waste transfer facility, that has been issued a permit under Chapter 3734. of the Revised Code or a construction and demolition debris facility that has been issued a permit under Chapter 3714. of the Revised Code.

Section 106.2 of the BTZR provides in full as follows:

106.2 Except for wireless telecommunication towers and facilities in “R” District, the location, erection, construction, reconstruction, change, alteration, maintenance, removal, use and/or enlargement of any 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 or the use of land for essential services as herein defined shall be permitted in any Districts established

by this Resolution and no Zoning Certificate shall be required for any structure or for the use of any land essential to the operations of a public utility or railroad, but the determination as to the qualification of public utility or railroad shall be made by the Zoning Inspector after submission of documented criteria.

The Notices of Appeal to the BZA by Dovetail and the Pitsticks include an appeal on the ground that the property is exempt from the BTZR because the property and its buildings and structures are used by a public utility for the generation of electricity and that "Bath Township has no jurisdiction or authority to regulate the use of the property and the use is exempt from township regulation" because the property was being used as, by or in conjunction with "agriculture, a public utility, methane gas production, a renewable energy resource generating facility, and/or other use that Bath Township has no jurisdiction or authority to regulate."

The BZA, in its decision, stated that it would not address the issue of whether the Dovetail and Pitstick operations on the properties in question constituted a public utility exempt from Township zoning because that issue had not been within the purview of the appointed Bath Township Zoning Inspector or the Special Prosecutor. Neither of these officials had considered or determined the issue of whether the operations constituted a 'public utility.'

The BZA cited R.C. 519.14, which states that a township board of zoning appeals may hear and decide appeals "where it is alleged there is error in any order, requirement, decision, or determination made by an administrative official," and essentially stated that it did not possess jurisdiction to consider the public utility issue because the issue had not been previously determined by the appointed Bath Township Zoning Inspector, Special Prosecutor, or other administrative official, in that the BTZR, at Section 106, includes a requirement that a determination of qualification as a public utility shall be made by the Zoning Inspector after submission of documented criteria. Decision, ¶¶ C through J of the Conclusions.

The BZA concluded that "absent prior consideration by Bath Township zoning enforcement authorities, or a determination by declaratory judgment," it should not consider whether Appellants' proposed and existing uses constituted a public utility. The BZA then stated

that it did not find that the uses as existing and proposed by Appellants constitute a public utility. Decision, ¶ K, Conclusions.³

R.C. 519.14(A) provides that a township board of zoning appeals may hear and decide appeals “where it is alleged there is error in any order, requirement, decision, or determination made by an administrative official in the enforcement of sections 519.02 to 519.25 of the Revised Code, or of any resolution adopted pursuant thereto[.]”

R.C. 519.14 further provides that a township board of zoning appeals, in exercising its powers, may reverse or affirm, wholly or partly, or may modify the determination appealed from, “and may make such order, requirement, decision or determination as ought to be made, and to that end has all powers of the officer from whom the appeal is taken.”

The Appellants in this case, in their appeals to the BZA, alleged that the officer from whom the appeal was taken, the Special Prosecuting Attorney, committed error in determining that their use of their property was in violation of the BTZR because the property was exempt from the BTZR as a public utility pursuant to R.C. 519.211(A). Accordingly, under R.C. 519.14(A), the BZA had jurisdiction to consider and determine the public utility exemption issue.

In regard to the BZA’s statement that the BTZR provides that the determination of public utility status shall be made by the Zoning Inspector after submission of documented criteria, the BZA had all powers of the Zoning Inspector to make “such order, requirement, decision or determination as ought to be made” under R.C. 519.14.

The Feb. 13, 2020 hearing before the BZA included testimony and submission of a number of exhibits relevant to the issue of whether Appellants’ use of their properties fell within the scope of R.C. 519.211(A)’s public utility exemption.

As an initial matter, R.C. 519.211(A) provides that as used in that division, “public utility” does not include a person “that owns or operates a solid waste facility or a solid waste

³ The BZA’s statement that it did not find that Appellants’ existing and proposed uses constituted a public utility is ambiguous and could be read as either that the BZA considered the issue and found that the uses did not constitute a public utility, or that the BZA did not make any determination because it did not consider the public utility issue. Given the previous statements in the Decision, it appears that the BZA meant that it did not consider the issue.

transfer facility, other than a publicly owned solid waste facility or a publicly owned solid waste transfer facility, that has been issued a permit under Chapter 3734. of the Revised Code or a construction and demolition debris facility that has been issued a permit under Chapter 3714. Of the Revised Code.”

The *Joint Stipulated Findings of Fact* submitted to the BZA by the parties include a stipulation at ¶ 48 that Dovetail “is not a solid waste ‘facility’ or ‘solid waste transfer facility,’ as those terms are defined in R.C. Section 3734.01, nor has Dovetail been issued a permit under Ohio Revised Code Chapter 3734.”³

Since the parties have stipulated that Dovetail has not been issued a permit under R.C. Ch. 3734 and there is no evidence otherwise, R.C. 519.211(A)’s exclusion from the public utility zoning exemption for private persons owning or operating a solid waste facility or a solid waste transfer facility that has been issued a permit under R.C. Ch. 3734 is not applicable in this matter.

The *Joint Stipulated Findings of Fact* include numerous stipulations relevant to the issue of Appellants’ status as a public utility under R.C. 519.211(A). Dovetail produces electrical energy from methane derived from fuel sources. Stip. ¶ 17. The Dovetail facility provides wholesale electrical generation service to the wholesale electric grid. PJM Interconnection, as a Regional Transmission Organization responsible for Ohio and all or parts of 12 other states, holds authority delegated by the Federal Energy Regulatory Commission over management of Ohio’s electrical transmission grid and wholesale generation market, and provides the only market for wholesale energy generated in Ohio. Stip. ¶¶ 26, 27.

Dovetail is a party to a Wholesale Market Participation Agreement between Dovetail, PJM and American Transmission Systems, Inc., under which it is responsible for complying with FERC and PJM rules as a Wholesale Market Participant. Stip. ¶ 29. Dovetail has an Interconnection Agreement with Ohio Edison Company with provisions governing certain factors of the facility. Stip. ¶ 31. Dovetail is under requirements to construct and operate its facility in accordance with the OATT and relevant federal rules as well as obtain transmission

³ R.C. Chapter 3734 governs “Solid and Hazardous Wastes.” R.C. 3734.01 is its definitions section.

onto the PHM grid. Stip. ¶ 32. Approximately 81% of the energy generated by Dovetail is sold to PJM. Stip. ¶ 34.

Dovetail pays public utility personal property taxes to the State of Ohio and to Greene County, and has been doing so since 2015. Stip. ¶¶ 40, 41.

Dovetail “indiscriminately provides electric energy to the Ohio energy grid that is regulated and indiscriminately provides energy to consumers in the Ohio and the regional electric power system.” Stip. ¶ 51. Its operations and contracts “require it to provide energy to the grid, which cannot be arbitrarily or unreasonably withdrawn.” Stip. ¶ 52.

Dovetail “is certified as an Ohio Renewable Energy Resource Generating Facility (Certificate Number 15-BIO-OH-GATS-1326), consistent with Sections 4928.64 and 4928.64 and 4928.65 of the Ohio Revised Code. As a certificate holder, Dovetail is subject to all applicable rules and regulations of the PUCO.” Stip. ¶ 36.

“Dovetail indiscriminately provides renewable energy credits through its PUCO renewable energy resource certification and the GATS system. Dovetails (sic) operations and PUCO certification require it to provide renewable energy credits, which cannot be arbitrarily or unreasonably withdrawn.” Stip. ¶ 53.

At the BZA hearing of Feb. 13, 2020, Mike Oberfield, the Chief Financial Officer of Renergy, Dovetail’s parent company, testified that Dovetail’s anaerobic digester facility generates renewable energy by converting solid waste into electricity and fertilizer. Transcript (“Tr.”) 30, 32. The facility is a one megawatt capacity facility. Tr. 32. The Dovetail and Pitstick operations are powered by the electricity produced by the Dovetail facility, and the remaining approximately 81% is sold to the marketplace on the grid via PJM. Tr. 34, 35. PJM uses the Ohio Edison infrastructure and the electricity ends up being used by consumers. Dovetail cannot withdraw its participation in that process. Tr. 47.

Dovetail sells renewable energy credits through a marketing company. Tr. 39. Dovetail generates a renewable energy credit for each megawatt of electricity, and Dovetail sells the credits indiscriminately to anyone. Tr. 48. Dovetail’s certification as a renewal energy resource

generating facility, required for certification of its renewable energy credits, was admitted as Dovetail Ex. 8. Tr. 40.

Dovetail is taxed as a public utility by both Greene County and the State of Ohio. Tr. 40. Dovetail holds a tax exemption from the State which found it was an exempt facility based on public utility solid waste conversion to electricity. Tr. 43.

Dovetail's facility and energy and fertilizer production is regulated by a number of entities. Dovetail is regulated by PUCO and the Federal Energy Regulation Commission through its PJM interconnection agreement. Its renewable energy credit generation is regulated. Tr. 35. It is a party to contracts relating to its electricity production, including a contract with Ohio Edison, a wholesale agreement with PJM, and a service agreement with ACES (Alliance for Cooperative Energy Services), which assists Dovetail in complying with the requirements imposed by PJM, PUCO, FERC, etc. Tr. 35-38.

Dovetail is regulated by the Ohio EPA in numerous aspects ranging from air quality to permits to install and operate. Tr. 35, 44. It has a discharge permit, also known as an NPDES permit. Tr. 45. It has an air quality permit through RAPCA. Tr. 46. It is required to file a land application management plan in association with application of the fertilizer. Tr. 46.

Dovetail routinely tests the materials that come into the biodigester and that come out of the biodigester to ensure that they meet EPA regulations. The construction of the ponds and the facilities are regulated by the EPA. Tr. 162.

John Bentine, an expert witness called by Dovetail, is an attorney who worked at PUCO and at the Attorney General's office as counsel to PUCO; in the City of Columbus's Law Department representing the City's utilities, and at a boutique law firm with a utility related practice. Tr. 59. Mr. Bentine considers himself to be an expert on public utility issues in the State of Ohio. Tr. 62.

Mr. Bentine testified that over the past 20 years the concept of 'distributive generation' has evolved, under which there are more and more small generators. The concept has changed from "large central station places" to trying to bring more renewables and more economics and more environmental attention into how Ohio provides electricity. Tr. 102.

Mr. Bentine testified that the process utilized by Dovetail works as a whole with a utility purpose using both parcels of property, in that it takes in waste, processes the waste, creates methane from the waste, generates electricity from the methane and processes the remaining materials into fertilizer. Tr. 99-100.

Mr. Bentine testified that Dovetail's acceptance of fuel sources is open to the public, its output in regard to the energy it generates is available to all customers using the PJM grid, and its renewable energy credits are available for sale to the public. Tr. 90. Dovetail's system is a matter of public concern in that wholesale power is a matter of public concern. Tr. 91.

Jacob Barnes was called as a witness by Bath Township to provide expert zoning testimony. Tr. 108. Mr. Barnes testified that he was not hired by Bath Township to look into whether Dovetail was a public utility, and he did not look at anything relating to the public utility issue, but rather looked strictly at the agricultural exemption issue. Tr. 111. Mr. Barnes determined that the biodigester was in violation of the BTZR because there is zoning which allows agricultural exemptions for biodigesters which meet certain requirements, but the Dovetail biodigester did not meet the requirement that greater than 50% of the feedstock had to come from properties under the same ownership as the biodigester site. Tr. 113. Mr. Barnes testified that he never really considered whether Dovetail was a public utility because that wasn't part of what he was asked to do. Tr. 117.

Mr. Barnes gave a report at a township meeting in September of 2019, and recommended that the township give notice of a violation based upon his review and understanding of the Bath Township zoning laws. Tr. 114. (The notices of violation were issued on Sept. 6, 2019.)

R.C. 519.211 "was intended to exempt public utilities providers from regulation by township zoning boards and boards of zoning appeals." *Campanelli v. AT&T Wireless Serv., Inc.*, 85 Ohio St.3d 103, 107, 706 N.E.2d 1267 (1999). The public utility exemption in R.C. 519.211(A) "ensures that public utilities will be able to construct the facilities required to serve the public interest across the state without undue interference from township zoning resolutions." *Symmes Twp. Bd. of Trustees v. Smyth*, 87 Ohio St.3d 549, 556, 2000-Ohio-470, 721 N.E.2d 1057.

The determination of whether an entity is a public utility is a “mixed question of law and fact.” Two of the factors are whether the nature of its operation is “a matter of public concern,” and whether its services are provided to the public in a “reasonable and indiscriminate manner.” *Campanelli*, supra at 106..

None of the “numerous attributes common to public utilities” defined by case law are controlling; each case must be determined on its own facts. One of the most important attributes of a public utility is that it provides “an essential good or service to the general public which has a legal right to demand or receive this good or service,” and the good or service must be provided to the public “generally and indiscriminately.” *St. Marys v. Auglaize Cty. Bd. of Commrs*, 115 Ohio St.3d 387, 2007-Ohio-5026, 875 N.E.2d 561, ¶¶ 53-58 (citations omitted).

An entity must also conduct its operations “in such a manner as to be a matter of public concern.” *Id.* In determining whether an entity “conducts itself in such a way as to become a matter of public concern, courts look to the good or service provided, competition in the local marketplace, and regulation by a governmental authority.” *Id.* Where an entity “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.*

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, 637 (1989). Factors relevant to whether an entity “conducts itself in such a way as to become a matter of public concern include the good or service provided, competition in the local marketplace, and regulation by governmental authority.” *Rumpke Sanitary Landfill, Inc. v. Colerain Twp.*, 134 Ohio St.3d 93, 2012-Ohio-3912, 980 N.E.2d 952, ¶¶ 23-24 (citations omitted).

Dovetail is a provider of electricity generation on a large-scale basis, traditionally a matter of public concern. Its electricity generation is indiscriminately made available to the public via PJM Interconnection, and its rates are regulated by PUCO and therefore presumptively reasonable. There is no evidence of competition in the local marketplace in the record. The

Dovetail facility and its processes are extensively regulated by government authority, as discussed above.

The stipulated facts that Dovetail is certified as an Ohio Renewable Energy Resource Generating Facility consistent with R.C. 4928.64 and R.C. 4928.65, and that Dovetail is required to provide renewable energy credits through its PUCO renewable energy resource certification, are pertinent to the Court's finding that Dovetail is an exempt public utility.

Revised Code Ch. 4928, "Competitive Electric Retail Service," includes a statute entitled "State Policy" which provides in R.C. 4928.02(C) that it is the policy of the State of Ohio to "[e]nsure diversity of electricity supplies and suppliers, by giving consumers effective choices over the selection of those supplies and suppliers and by encouraging the development of distributed and small generation facilities[.]"

R.C. 4928.02(D) provides that it is State policy to "[e]ncourage innovation and market access" for cost-effective supply and demand-side retail electric service, including waste energy recovery systems. R.C. 4928.02(J) provides that it is State policy to provide means of giving appropriate incentives to technologies which can adapt successfully to potential environmental mandates. R.C. 4928.02(M) provides that it is State policy to encourage education of small business owners in Ohio regarding use of, and to encourage the use of, energy efficiency programs and alternative energy resources in their business.

R.C. 4928.64(B)(1) provides that by the end of 2026, an electric distribution utility shall have provided from qualifying renewable energy resources at least eight and one half percent of its total of electricity kilowatt hours sold to retail electric customers. R.C. 4928.64(B)(3) provides that the qualifying renewable energy resources implemented by the utility or company shall be met by either resources deliverable into Ohio or through facilities located in Ohio.

Under Dovetail's PUCO renewable energy resource certification, purchasers of renewable energy credits have a legal right to demand renewable energy credits from Dovetail.

The Court, having considered the evidence and the law in this matter, finds that the BZA had jurisdiction on appeal to determine the public utility exemption issue, finds that Dovetail is a public utility for purposes of R.C. 519.211, finds that the conclusion of the BTZR is not a public

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utility is not supported by the preponderance of the substantial, reliable and probative evidence, and finds that Dovetail and Pitstick's current and proposed use of their land and structures is exempt from the Bath Township Zoning Resolution pursuant to R.C. 519.211(A).

Use of Land for Agricultural Purposes

R.C. 519.21(A) provides in full as follows:

(A) Except as otherwise provided in divisions (B) and (D) of this section, sections 519.02 to 519.25 of the Revised Code confer 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, including buildings or structures that are used primarily for vinting and selling wine and that are located on land any part of which is used for viticulture, and no zoning certificate shall be required for any such building or structure.

The BTZR, at Sec. 106.1, provides that "[t]he use of land for agricultural purposes or the construction or use of structures incidental to the use for agricultural purpose of the land on which such structures are located shall be permitted in all Districts established by this Resolution, and no Zoning Certificate shall be required for any such structure, except as stated in Article 4, Agricultural Uses." The Definitions section contained in Article 2 of the BTZR defines "agriculture" by reference to R.C. 519.01.

The BZA, in determining the appeals in this matter, did not apply the agricultural exemption set forth in R.C. 519.21(A) or the definition of "agriculture" set forth in R.C. 519.01, other than stating at p. 2 of the decision that "[t]he proposed and existing uses of the subject properties involved in these Appeals is not agricultural in nature."

The BZA, in denying the appeals, relied upon a "bright-line" definition set forth in R.C. 519.21(C).

The BZA focused upon application of the exemptions provided in R.C. 519.21(C), stating at ¶ C of the Conclusions that testimony at the hearing established that only 2.5-25% of the feedstock used in production [of biomass energy] "was or will be derived from parcels of land

under common ownership or leasehold, below the agricultural exemption requirement of at least 50%.”

R.C. 519.21(C)(2) provides that R.C. Sections 519.02 to 519.25 “confer no power on any township zoning commission, board of township trustees, or board of zoning appeals to prohibit in a district zoned for agricultural, industrial, residential, or commercial uses, the use of any land for . . . (2) Biodiesel production, biomass energy production, or electric or heat energy production if the land on which the production facility is located qualifies as land devoted exclusively to agricultural use under sections 5713.30 to 5713.37 of the Revised Code for real property tax purposes.”

R.C. 519.21(C)(3) similarly provides that a township has no power to prohibit, in a district zoned for agricultural, industrial, residential or commercial uses, the use of any land for “(3) Biologically derived methane gas production if the land on which the production facility is located qualifies as land devoted exclusively to agricultural use under sections 5713.30 to 5713.37 of the Revised Code for real property tax purposes and if the facility that produces the biologically derived methane gas does not produce more than seventeen million sixty thousand seven hundred ten British thermal units, five megawatts, or both.”

R.C. 5713.30 as eff. 3/27/20, the definitions statute of R.C. Ch. 5713, “Assessing Real Estate,” provided in R.C. 5713.30(A)(1)(b) that, for lots or parcels of land totaling ten acres or more, “[l]and devoted exclusively to agricultural use” includes land which is devoted exclusively to biodiesel production, biomass energy production, electric or heat energy production or biologically derived methane gas production if the land on which the production facility is located is contiguous to or part of a parcel of land under common ownership or leasehold that is otherwise devoted exclusively to agricultural use, provided that at least fifty percent of the feedstock used in the production is derived from parcels of land under common ownership or leasehold.

The BZA, applying R.C. 519.21(C)(2), found that Dovetail did not qualify for the agricultural use exemption because evidence at the hearing established that less than fifty percent

of the feedstock used for the biodigester was derived from the Pitstick farming operations on an annual basis.

The BZA could have, but did not, consider or apply R.C. 519.21(A)'s agricultural exemption, which provides that townships have no power to prohibit the use of any land for agricultural purposes or 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.

"Agriculture," for purposes of R.C. 519.21(A), is defined by R.C. 519.01, which defines "agriculture" as including farming, animal husbandry, and the production of field crops. *Terry v. Sperry*, 130 Ohio St.3d 125, 2011-Ohio-3364, 956 N.E.2d 276, ¶ 22.

The evidence at the hearing in this case is that the Pitsticks' land, including the land in their trust, is contiguous and includes 14.7 acres owned by Pitstick Renewable Energy LLC, part of which is used for crop farming of corn, soybeans and wheat and part of which is occupied by the biodigester. Pitstick owns land and operates a farm at 1146 Herr Road in Fairborn where he and his wife raise corn, soybeans, wheat, hay, hogs and cattle.

The manure from the Pitsticks' hog facilities is sent to the biodigester where it is used as feedstock for the biodigester. The electricity from the biodigester provides all of the farm's electricity, including the hog barns, two residences, the shop and the grain bin. The farm uses effluent produced by the biodigester as fertilizer for farming crops.

R.C. 519.21 does not include a requirement that R.C. 519.21(C)(2) or (3) must be applied rather than R.C. 519.21(A) in cases involving use of land for biomass energy production or biologically derived methane gas production. Given the biodigester's intake of manure from Pitstick's hog farming operation, the use of electricity from the biodigester to power Pitstick's farming operations, and the use of fertilizer produced by the biodigester for Pitstick's crop farming operations, the BZA had facts upon which to find that the construction and use of the biodigester facilities were incident to the use for agricultural of the land upon which the biodigester is located under R.C. 519.21(A). The Court's observations on this issue are moot, however, given that the Court finds that the preponderance of the evidence supports the

conclusion that the Dovetail facility is a public utility exempt from township zoning pursuant to R.C. 519.211(A).

WHEREFORE, the Court rules as follows:

The Court rules in favor of the Appellants in Case No. 2020 CV 0198, Case No. 2020 CV 0199, and Case No. 2020 CV 2020 CV 0200. The Court finds that the Dovetail biodigester facility is a public utility exempt from township zoning requirements pursuant to R.C. 519.211(A). The Court reverses the BZA's finding that the uses of the facility as existing and proposed by Appellants do not constitute a public utility. The Court finds that the agricultural exemption issue is moot.

The cases are remanded to the BZA with instructions to vacate the Notices of Violation issued to Pitstick and Dovetail in Case Nos. 2020 CV 198 and 2020 CV 0200 and to grant Dovetail's request for a certificate of exemption in Case No. 2020 CV 0199.

SO ORDERED.



JUDGE MICHAEL A. BUCKWALTER *z*

Service of Copy: A copy hereof was served upon:
Catherine A. Cunningham, Counsel for Appellants, via facsimile (614) 464-2634
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Jack A. Van Kley,, Counsel for Appellants Pitstick, via facsimile (614) 431-8905
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via facsimile or regular mail on the date of filing same.



Assignment Commissioner

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