

[Cite as *Willow Grove, Ltd. v. Olmsted Twp.*, 2015-Ohio-2702.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101996

WILLOW GROVE, LTD.

PLAINTIFF-APPELLEE

vs.

OLMSTED TOWNSHIP, OHIO

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-13-813235

BEFORE: Laster Mays, J., Celebrezze, A.J., and E.T. Gallagher, J.

RELEASED AND JOURNALIZED: July 2, 2015

ATTORNEYS FOR APPELLANT

Timothy J McGinty
Cuyahoga County Prosecutor

BY: Dale F. Pelsozy
Assistant County Prosecutor
Justice Center, 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113

ATTORNEYS FOR APPELLEE

Timothy J. Duff
Jordan Berns
Sheldon Berns
Berns, Ockner & Greenberger, L.L.C.
3733 Park East Drive, Suite 200
Beachwood, Ohio 44122

ANITA LASTER MAYS, J.:

{¶1} Defendant-appellant Olmsted Township, Ohio (“Township”) appeals¹ the trial court’s partial grant of summary judgment in favor of plaintiff-appellee real estate developer Willow Grove, Ltd. (“Willow”) on Willow’s complaint for declaratory relief, filed as the result of the Township’s denial of Willow’s application for a zoning certificate.

{¶2} The trial court found portions of the Olmsted Township Zoning Resolution (“OTZR”)² adopted March 9, 2000, as amended through May 2012 to be unlawful as they exceed the scope of authority delegated to the Township pursuant to R.C. Chapter 519 Township Zoning. For the reasons set below, we affirm the trial court’s decision.

I. FACTS AND PROCEDURE

A. Background

{¶3} Willow applied for a zoning certificate to develop residential townhouses on property that Willow owns in Olmsted Township, located between the Township’s middle and high schools (“Property”). Willow’s proposed development was a “use permitted by right as a principal use.” OTZR Sections 230.02(b) and 230.03.

¹ We acknowledge irregularities in the history and facts in appellant’s initial brief based on clerical error as explained in appellant’s reply brief, and accept the facts and history as set forth therein.

² The OTZR was subsequently amended May 22, 2013, effective June 21, 2013. This opinion relates to the prior version.

{¶4} Willow’s application for a zoning certificate was filed with the zoning inspector (“Inspector”) on June 3, 2013, prior to the July 1, 2013 rezoning of the Property area as a single family, R-40 zone. The application was submitted, along with detailed development plans required by the OTZR. Willow also submitted a statement of reservation of rights and objections to the OTZR’s zoning certificate procedure. Willow posited the process unlawfully divested the Inspector’s sole authority for approval or denial, delegating the authority to the zoning commission (“Commission”) and Board of Trustees (“Trustees”), which exceeds a township’s zoning authority under R.C. Chapter 519.

{¶5} The Township responded that Willow’s plans were incomplete, did not comply with OTZR requirements and were hastily compiled to beat the rezoning effective date. Willow submitted amended plans but the Township was not satisfied and identified a number of noncompliant factors.

{¶6} Willow submitted additional protest letters to the Inspector, Trustees, and Commission during the approval process reiterating its objections. On July 18, 2014, the Commission recommended denial of the application to the Trustees, finding deficiencies in the development plan. The Trustees adopted the Commission’s recommendation and denied the application under Township Board Resolution No. 69-2013, dated September 11, 2013.

B. Trial Court Adjudication

{¶7} Willow filed for declaratory judgment on the grounds that the OTZR processes and procedures for the issuance of zoning certificates for a multifamily permitted use in a residential multifamily district (“RMF”) exceed the township’s authority and are unlawful under R.C. Chapter 519. Willow moved for summary judgment on May 15, 2014.

{¶8} Willow argued that (1) the OTZR’s requirements for zoning certificates and development plan approval for new construction in a permitted multifamily district are unlawful, (2) the unlawful provisions are severable from the remaining provisions of the OTZR, and (3) Willow is not required to obtain a zoning certificate or approval of a development plan for the Property, but does remain subject to other OTZR compliance provisions. Willow also sought attorneys fees and costs.

{¶9} The Township defended that Willow’s development plans did not comply with the OTZR, justifying the denial of the certificate. The Township also argued that zoning regulations are presumptively constitutional and parties attacking zoning legislation on constitutional grounds must demonstrate that the zoning classification denies a complainant the use of their land without substantially advancing a legitimate interest in the health, safety, or welfare of the community.

{¶10} The trial court issued a journal entry and decision on September 2, 2014, containing a cogent analysis of the issues. The court determined that under R.C. Chapter 519 and case law:

(1) the Commission and Trustees lack authority to process, approve or deny zoning certificates as the Inspector has sole authority;

(2) the Commission and Trustees lack authority to approve or deny the development plans for Willow's permitted use development because the statutory authority lies solely for review of development plans for planned unit developments; and

(3) the unlawful portions of the township's zoning resolution could be severed while the remaining provisions retained validity.

{¶11} The court then identified specific portions of the OTZR to be unconstitutional, identifying those that were unlawful except as they applied to planned unit developments, and those that were unlawful to the extent they divested the zoning inspector of authority to approve or deny zoning certificates. The court denied Willow's request for attorney fees and costs.

{¶12} The Township appeals.

II. ASSIGNMENTS OF ERROR

{¶13} The Township offers three assignments of error.

I. Summary judgment was improper as there were material facts in dispute.

II. The lower court erred in determining that the Zoning Commission had no authority to review development plans and invalidating OTZR sections 230.12 and 250.12, and the lower court erred by finding that the issuance of a zoning certificate is not reviewable by the board of zoning appeals.³

III. The lower court erred in failing to determine that regulations enacted by the OTZR are constitutionally permitted and that Olmsted Township did not exceed its authority.

³ The Township lists the first portion of the statement as the second assignment of error in the table of contents to its initial brief and the body of the reply brief, while the body of the initial brief lists the second statement as the second assignment of error.

III. STANDARD OF REVIEW

{¶14} We review a trial court's entry of summary judgment de novo using the same standard as the trial court. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Summary judgment may only be granted when the following are established: (1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, who is entitled to have the evidence construed most strongly in its favor. *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 67, 375 N.E.2d 46 (1978); Civ.R. 56(C).

{¶15} The party moving for summary judgment bears the initial burden of apprising the trial court of the basis of its motion and identifying those portions of the record which demonstrate the absence of a genuine issue of fact on an essential element of the nonmoving party's claim. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996). Once the moving party meets its burden, the burden shifts to the nonmoving party to set forth specific facts demonstrating a genuine issue of material fact exists. *Id.* To satisfy this burden, the nonmoving party must submit evidentiary materials showing a genuine dispute over material facts. *PNC Bank, N.A. v. Bhandari*, 6th Dist. Lucas No. L-12-1335, 2013-Ohio-2477.

IV. LAW AND ANALYSIS

{¶16} We preface our analysis with the observation that the Township’s position is that it has authority to regulate zoning in its jurisdiction and to require that developments meet certain compliance standards. That is not the issue before the court. The issue is whether certain regulations and procedures required by the Township’s zoning resolution unconstitutionally exceed statutory authority as they relate to Willow’s development.

A. Assignment of Error No. 1

{¶17} The Township argues in its first assignment of error that summary judgment was not appropriate because of two genuine issues of material fact.

{¶18} The first argument asserts whether the Inspector actually issued the zoning certificate is a material fact that requires resolution in order to determine summary judgment. We disagree.

{¶19} The trial court aptly concluded that:

[T]he resolution of the declaratory judgment issue presented by Willow Grove does not depend upon whether its application was denied or not by the Zoning Inspector because the process of referring the application to the Zoning Commission and then to the Trustees for a decision on the application is the issue in this case.

We also observe that the record reflects the Trustees, not the Inspector, denied the application upon the recommendation of the Commission.

{¶20} Commission Res. C-13, dated August 22, 2013, states that Application No. 20130472, “[t]he only application submitted by Willow Grove, Ltd., was an application for a Zoning Certificate, * * * accompanied by a set of plans.” *Id.* The

Commission recommended that the Trustees deny the application. The Trustees adopted the Commission's recommendation, "the Board of Trustees of Olmsted Township State of Ohio, denies Application No. 20130472, submitted by Willow Grove, Ltd." Trustees Res. 69-2013, September 11, 2013.

{¶21} The Township offers as a second genuine issue of material fact, "whether or not appellee's plan is a major development requiring review" because major development is not defined by the OTZR and the Ohio Revised Code "does not set a number when designating a plan as a major development." The Township failed to offer an explanation and argument in support of this asserted error.

{¶22} Once a moving party satisfies its burden, Civ.R. 56(E) provides that the nonmoving party may not rest upon the mere allegations or denials of the party's pleadings, but has a reciprocal burden of setting forth specific facts demonstrating that a "genuine triable issue" exists to be litigated for trial. *State ex rel. Zimmerman v. Tompkins*, 75 Ohio St.3d 447, 449, 663 N.E.2d 639 (1996). We therefore find no merit to the first assignment of error.

B. Assignments of Error Nos. II and III

{¶23} The Township's second assignment of error is that (1) the lower court erred in determining that the Zoning Commission had no authority to review development plans and invalidating OTZR Sections 230.12 and 250.12 and (2) the lower court erred by finding that the issuance of a zoning certificate is not reviewable by the board of zoning appeals.

{¶24} The Township failed to offer an argument regarding the board of zoning appeals. However, we do observe that OTZR 510.11 provides that appeals from the approval or denial of a certificate by the Inspector may be appealed to the board of zoning appeals. To the extent the OTZR procedures delegate authority to the Commission and Trustees to approve or deny zoning certificate applications, there could then be no appeal because the decision was not made by the Inspector.

{¶25} Appellant's third assignment of error is the trial court erred by finding certain portions of the OTZR to be unconstitutional. We address these errors in combination for ease of analysis.

1. Constitutionality Challenge

{¶26} A statute, regulation, or ordinance may be attacked as unconstitutional on its face or as applied. *See Belden v. Union Cent. Life Ins. Co.*, 143 Ohio St. 329, 55 N.E.2d 629 (1944), paragraph four of the syllabus. A zoning regulation is "presumed to be constitutional unless determined by a court to be clearly arbitrary and unreasonable and without substantial relation to the public health, safety, morals, or general welfare of the community." *Goldberg Cos., Inc. v. Council of Richmond Hts.*, 81 Ohio St.3d 207, 208, 690 N.E.2d 510 (1998), syllabus.

{¶27} A "party challenging the constitutionality of a zoning ordinance bears the burden of proof and must prove unconstitutionality beyond fair debate." *Id.* at 209, citing *Cent. Motors Corp. v. Pepper Pike*, 73 Ohio St.3d 581, 584, 653 N.E.2d 639

(1995); *Mayfield-Dorsh, Inc. v. S. Euclid*, 68 Ohio St.2d 156, 157, 429 N.E.2d 159 (1981).

{¶28} “The governmental power to interfere [with property rights] by zoning regulations * * * is not unlimited, and * * * cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare.” *Nectow v. Cambridge*, 277 U.S. 183, 188, 48 S.Ct. 447, 72 L.Ed. 842 (1928).

2. Derivative Power of Township Zoning in Ohio

{¶29} We begin with fundamental observations regarding the source of Ohio township zoning powers. Townships are strictly statutory creatures, created under R.C. Chapter 503, whose powers are not derived from the Constitution as are counties and municipalities.

{¶30} Authority for township zoning is a delegated power of the Ohio General Assembly set forth in R.C. Chapter 519:

This same doctrine of delegated power with reference to constitutions very generally prevails when the legislature assumes to confer, within its constitutional grant, certain powers upon various political subdivisions of the state or upon some officer, board or commission of such subdivision.

Such grant of power, by virtue of a statute, may be either express or implied, but the limitation put upon the implied power is that it is only such as may be reasonably necessary to make the express power effective. In short, the implied power is only incidental or ancillary to an express power, and, if there be no express grant, it follows, as a matter of course, that there can be no implied grant.

State ex rel. A. Bentley & Sons Co. v. Pierce, 96 Ohio St. 44, 47, 117 N.E. 6 (1917).

{¶31} Townships are not required to adopt zoning legislation but must adhere to

R.C. Chapter 519 if they choose to do so:

Ohio townships have no inherent or constitutionally granted police or zoning power. *Yorkavitz v. Bd. of Columbiana Twp. Trustees*, 166 Ohio St. 349, 351, 142 N.E.2d 655 (1957). “Accordingly, the zoning authority possessed by townships in the state of Ohio is limited to that which is specifically conferred by the General Assembly.” *Bd. of Bainbridge Twp. Trustees v. Funtime, Inc.*, 55 Ohio St.3d 106, 108, 563 N.E.2d 717 (1990).

In addition, 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.

Terry v. Sperry, 130 Ohio St.3d 125, 2011-Ohio-3364, 956 N.E.2d 276, ¶ 18-19. {¶32}

A township’s authority to regulate zoning as well as the implementation process is set forth in R.C. 519.02. The board of trustees, vested with governance and legislative powers of townships by R.C. Chapter 505,⁴ prepares and implements a comprehensive zoning resolution:

(A) Except as otherwise provided in this section, in the interest of the public health and safety, *the board of township trustees may regulate by resolution, in accordance with a comprehensive plan*, the location, height, bulk, number of stories, and size of buildings and other structures, including tents, cabins, and trailer coaches, percentages of lot areas that may be occupied, set back building lines, sizes of yards, courts, and other open spaces, the density of population, the uses of buildings and other structures, including tents, cabins, and trailer coaches, and the uses of land for trade, industry, residence, recreation, or other purposes in the unincorporated territory of the township.

⁴ There has been no evidence offered asserting that Olmsted Township is a limited home rule township under R.C. Chapter 504.

(Emphasis added.) R.C. 519.02(A). Willow’s permitted use is an example of a comprehensive plan and zoning map provision allowing that use in the zoned area.

{¶33} The purpose of the R.C. 519.02 comprehensive plan and map is to ensure uniformity and predictability for all property owners. “[T]he uniformity requirement is a statutory form of a general principle underlying the Equal Protection Clause; that is, all land in similar circumstances should be zoned alike and that differential treatment must be justified by showing a different circumstance justifying such treatment.” Meck & Pearlman, *Ohio Planning and Zoning Law*, Section 8:42 (2014 Ed.), quoting R. M. Anderson, *American Law of Zoning*, 3d Ed. Section 5:25 (1986; Supp.1994).

{¶34} “A ‘comprehensive plan’ is a specific plan which sets forth uniform standards in a given district or zone, as opposed to a ‘general plan’ for the entire community.” *Bd. of Trustees, Howland Twp., Ohio v. Dray*, 11th Dist. Trumbull No. 2004-T-0137, 2006-Ohio-3402, ¶ 52. Simply put, the plan sits as a zoning and use template upon the township’s land. It is the “local government’s textual statement of goals, objectives and policies accompanied by maps to guide public and private development within its planning jurisdiction.” *Ohio Planning and Zoning Law*, Section 4:29.

{¶35} While the R.C. 519.02 uniformity requirement is strictly limited by the express grant of power by the General Assembly, “the legislature has granted townships additional powers to regulate zoning with regard to planned-unit developments [pursuant

to R.C. 519.021].” *Long v. Bd. of Twp. Trustees*, 5th Dist. Delaware No. 95CA-E-06-037, 1996 Ohio App. LEXIS 3704 (May 24, 1996):

[I]n light of the fact that township zoning authority is strictly limited to that which is expressly granted by the General Assembly, it is important to distinguish R.C. 519.02 with another provision in Chapter 519. That is, R.C. 519.021, regarding township zoning for planned-unit development, states that such “regulations shall further the purpose of promoting the general public welfare* * * *Within a planned-unit development, the township zoning regulations* * * may vary in order* * * to promote the public health, safety, morals, and the other purposes of this section.*” Thus, the legislature has granted townships additional powers to regulate zoning with regard to planned-unit developments.

(Emphasis added.) *Id.* at ¶ 9.

{¶36} R.C. 519.021 governs planned unit developments (“PUD”) and provides, in part:

A township zoning resolution or amendment adopted in accordance with this chapter may establish or modify planned-unit developments. Planned-unit development regulations shall apply to property only at the election of the property owner and shall include standards to be used by the board of township trustees or, if the board so chooses, by the township zoning commission, in determining whether to approve or disapprove any proposed development within a planned-unit development. The planned-unit development shall further the purpose of promoting the general public welfare, encouraging the efficient use of land and resources, promoting greater efficiency in providing public and utility services, and encouraging innovation in the planning and building of all types of development. *Within a planned-unit development, the township zoning regulations, where applicable, need not be uniform, but may vary in order to accommodate unified development and to promote the public health, safety, morals, and the other purposes of this section.*

(Emphasis added.) R.C. 519.021.⁵

⁵ The remainder of R.C. 519.021 sets forth the procedures by which PUDs may be implemented.

{¶37} The zoning commission is created and empowered by the trustees to perform four tasks. The commission (1) formulates the comprehensive zoning plan and map required for the zoning resolution by R.C. 519.02 (R.C. 519.04 and 519.05), (2) initiates proposed amendments to the zoning resolution (R.C. 519.12), (3) reviews PUD development plans and makes recommendation to trustees (R.C. 519.021), and (4) enforces landscaping and architectural standards if the trustees delegate that power in lieu of forming an architectural review board (R.C. 519.171).

{¶38} The trustees may also elect to implement a zoning certificate system and delegate enforcement powers to a zoning inspector. R.C. 519.16 and 519.17. A “zoning certificate shall not be issued unless the plans for the proposed building or structure fully comply with the zoning regulations then in effect.” R.C. 519.17.

{¶39} The zoning inspector has sole authority to approve or deny zoning certificates. *Statkus v. Zak*, 11th Dist. Geauga No. 645, 1976 Ohio App. LEXIS 6748, *2-3 (Feb. 2, 1976). The role of the zoning inspector is ministerial in nature and actions that exceed zoning authority are deemed invalid and unenforceable. *State ex rel. Ross v. Guion*, 8th Dist. Cuyahoga No. 24795, 161 N.E.2d 800 (1959); *Jeffrey Mann Fine Jewelers, Inc. v. Sylvania Twp. Bd of Zoning Appeals*, 6th Dist. Lucas No. L-08-1013, 2008-Ohio-3503.

{¶40} Trustees may also elect to appoint a board of zoning appeals whose role is to:

(A) Hear and decide appeals where it is alleged there is error in any order, requirement, decision, or determination made by an administrative

official [such as the zoning inspector] in the enforcement of sections 519.02 to 519.25 of the Revised Code, or of any resolution adopted pursuant thereto;

(B) Authorize, upon appeal, in specific cases, such variance from the terms of the zoning resolution as will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the resolution will result in unnecessary hardship, and so that the spirit of the resolution shall be observed and substantial justice done;

(C) Grant conditional zoning certificates for the use of land, buildings, or other structures if such certificates for specific uses are provided for in the zoning resolution. If the board considers conditional zoning certificates for activities that are permitted and regulated under Chapter 1514. of the Revised Code or activities that are related to making finished aggregate products, the board shall proceed in accordance with section 519.141 of the Revised Code.

(D) Revoke an authorized variance or conditional zoning certificate granted for the extraction of minerals, if any condition of the variance or certificate is violated. The board has three primary functions: to hear appeals from the administrative official in charge of the enforcement of the zoning resolution, authorize variances and grant conditional uses.

R.C. 519.14(A)-(D). *See also* R.C. 519.13.

3. The Olmsted Township Zoning Resolution

{¶41} The OTZR requires that all buildings and structures comply with the regulations for that particular district and acknowledges that the resolution must adhere to the Ohio Revised Code. OTZR 101.04 and 101.06. A judicial declaration that any provision is invalid does not affect the validity of the remainder. OTZR 101.07.

{¶42} The Trustees implemented a zoning certificate system under OTZR Chapter 510. Zoning certificates may not be “issued unless the plans for the proposed

building or structure fully comply with the regulations set forth in this Zoning Resolution.” OTZR 510.01.

{¶43} The Trustees delegated zoning certificate and enforcement powers to the Inspector. The Inspector’s explicit powers include the authority to “issue zoning certificates as provided by this Zoning Resolution” and “to deny the issuance of a zoning certificate.” OTZR 410.02(b) and (c).

{¶44} The Commission is vested with “all the powers and duties prescribed by law and by this Resolution.” OTZR 420.01. The delineated powers include reviewing all development plans, all planned residential development plans, recommending approval, modification, or denial of plans to the Trustees, and providing advice to the Inspector upon request regarding interpretation or enforcement of the zoning regulations. OTZR 420.06(b), (c), and (h).

{¶45} Procedurally, the Inspector receives a zoning certificate application and processes the application. OTZR 510.03. The actions to be taken by the Inspector depend on the basis for the zoning application submission. “Applications for Zoning Certificates for permitted uses [such as the Willow development] requiring review of developments shall be transmitted to the Zoning Commission according to Chapter 520.” OTZR 510.05(b).

{¶46} Chapter 520 is entitled, “Development Plan Review” and provides that the Commission “shall” review development plans and make recommendations to the Trustees for new construction of all permitted multifamily uses and any planned

residential development. OTZR 520.02(a). Chapter 520 contains detailed provisions regarding the content and process of the plans.

{¶47} Zoning permits may not be issued for uses in a nonresidential district unless the development plans have been reviewed by the Commission pursuant to Chapter 520. OTZR 250.12. Applications for planned developments (PUDs per R.C. 519.021) must be submitted to the Commission for Chapter 520 review. OTZR 220.13.

4. Analysis

{¶48} The trial court prepared a well-reasoned analysis of the OTZR provisions and procedures. We agree that certain provisions exceed the statutory authority of R.C. Chapter 519. We further agree that the unlawful sections of the OTZR may be excised and invalidated while maintaining the enforceability of the remaining substantive provisions of the zoning ordinance.

a. Zoning Certificates

{¶49} OTZR 410.02 vests authority in the Inspector to enforce zoning regulations, to receive applications for zoning certificates and to approve or deny zoning certificates. The Inspector's authority is exclusive. The Commission and Trustees have no authority to approve or deny zoning certificates under R.C. Chapter 519.

{¶50} In *Statkus v. Zak*, 11th Dist. Geauga No. 645, 1976 Ohio App. LEXIS 6748, * 2-3 (Feb. 2, 1976), the appellate court affirmed the trial court's finding that Section 803 of the Claridon Township Zoning Resolution was invalid, unlawful, and contrary to R.C. Chapter 519. Claridon implemented a zoning certificate program and appointed a zoning

inspector. Section 803 of the zoning resolution improperly gave the zoning commission the authority to approve or deny a zoning certificate application.

{¶51} The *Statkus* court held, “it is clearly the intent of RC 519.16 that the zoning inspector is the township official charged with the issuance of zoning certificates. Other sections of Chapter 519 also clearly indicate that the enforcing of the township zoning law is not a proper function of the zoning commission.” *Id.* at *2-3. *See also Lyman v. Chester Twp. Bd. of Trustees*, 11th Dist. Geauga No. 778, 1979 Ohio App. LEXIS 9540 (Mar. 19, 1976), *rev’d on other grounds*, 63 Ohio St.2d 208, 407 N.E.2d 511 (1980); *Jeffrey Mann Fine Jewelers, Inc. v. Sylvania Twp. Bd. of Zoning Appeals*, 6th Dist. Lucas No. L-08-1013, 2008-Ohio-3503, ¶ 24.

{¶52} In *Lyman*, Chester Township enacted a zoning resolution that included a zoning certificate procedure and zoning inspector. The inspector received the zoning certificate application, referred it to the architectural review board with approval or denial recommendations that, in turn, referred non-residential use applications to the zoning commission that accepted or rejected the application.

{¶53} As with the instant case, the appellate court entertained the questions of (1) the sole authority of the inspector to approve or deny zoning certificates pursuant to R.C. 519.16 and *Statkus, supra*, and (2) the lack of statutory authority for the zoning commission to approve or deny zoning certificate applications. The appellate court found

the procedure to be unconstitutional under R.C. Chapter 519 due to the inspector's exclusive authority.

{¶54} Further to the inspector's authority:

In his ministerial role, a zoning inspector has the duty to issue a permit or certificate where the property owner has complied with all legal requirements, and the proposed use falls within the use classification applicable to the area where the owner proposes to engage in the use.

(Citations omitted.) *Barrett Paving Materials, Inc. v. Bd. of Zoning Appeals*, 12th Dist. Clermont No. CA90-07-066, 1991 Ohio App. LEXIS 2961, *6 (June 24, 1991).

{¶55} OTZR Chapter 510 entitled "Approval of Zoning Certificates," states that zoning certificate applications (1) are filed with the Inspector for all buildings or uses requiring a permit, and (2) must include the development plan items required by OTZR 520.03 for "uses that require review by the Zoning Commission." OTZR 510.03. The chapter also provides that "[a]pplications for Zoning Certificates for permitted uses requiring review of development plans shall be transmitted to the Zoning Commission according to Chapter 520." OTZR 510.05(b)

{¶56} OTZR Chapter 520 addresses development plan review only. There is no provision in Chapter 520 for accepting, processing, denying, modifying, or approving zoning certificate applications. While the term "application" is used throughout OTZR Chapter 520, it relates solely to applications for development plan review for planned residential districts (PUDs per R.C. 519.021).

{¶57} In spite of the lack of protocol, procedure, or authority over zoning certificate applications in OTZR Chapter 520, the Commission acted on Willow’s zoning certificate application:

*The only application submitted by Willow Grove, Ltd. was an application for a Zoning Certificate, which was filed on June 3, 2013. Also submitted on June 3, 2013, was a set of plans, three pages in length. * * * The Zoning Commission recommends that Application No. 20130472 be denied by the Olmsted Township Board of Trustees.*

(Emphasis added.) Commission Res. C-13 dated August 22, 2013.

{¶58} Based on the Commission’s unlawful referral, the Trustees “considered Application No. 20130472” based on the “Zoning Commission[’s] recommended denial of the application and plan as submitted by Willow Grove, Ltd.” Trustees Res. 69-2013, September 11, 2013. After holding a public hearing on the matter, the Trustees “denie[d] Application No. 20130472, submitted by Willow Grove, Ltd.” *Id.*

{¶59} The express acts by the Commission and Trustees denying Willow’s zoning certificate application, usurping the sole power of the Inspector, exceeded the authority of those bodies, not only under R.C. 519.16, 519.17 and *Statkus, supra*, but also of OTZR Chapters 410, 510 and 520, as enacted.

{¶60} We therefore find that the OTZR zoning certificate application process is unlawful.

b. Development Plan Review

{¶61} We next consider whether the procedure for development plan review by the Commission and Trustees is unlawful as it applies to Willow’s development.

{¶62} The Township argues that the Commission and Trustees have the statutory power to conduct development plan reviews and approvals for all uses per OTZR Chapter 520. Willow’s position is that the Commission and Trustees do not have authority for development plan reviews for permitted uses and that the only R.C. Chapter 519 authority for development plan review by the Commission or Trustees is the discretionary review process under R.C. 519.021 for PUDs.

{¶63} The Willow development is a permitted use. OTZR 230.02(b) and 230.03. Zoning ordinances generally provide for two types of uses, permitted (or principal)⁶ uses and conditional uses. A permitted or principal use is one that is ““allowed as of right, provided the landowner meets all other requirements, e.g., building code requirements.”” *Dinardo v. Chester Twp. Bd. of Zoning Appeals*, 186 Ohio App.3d 111, 2010-Ohio-40, 926 N.E.2d 675, ¶ 23 (11th Dist.), quoting Meck and Pearlman, *Ohio Planning and Zoning Law*, Section 9:11, at 387 (2004 Ed.).

{¶64} The OTZR requires that the Commission (1) review and approve the development plans for all uses in an RMF District according to the Chapter 520 procedures (OTZR 230.12), and (2) review all development plans for new construction of all permitted uses in multifamily districts, recommending approval, disapproval or modification of the plans to the Trustees (OTZR 520.02(a)(2)).

⁶ See OTZR 110.02(b)(103) defining a principal use as “[t]he primary or main use or activity of a building or lot.”

{¶65} The duty to review plans for permitted uses lies with a zoning inspector as part of the zoning certificate approval process:

A zoning certificate is essentially a building permit issued prior to the construction of a building within territory included in a zoning resolution. A zoning certificate shall not be issued *unless the plans* for the proposed building or structure fully comply with the zoning resolution in effect. R.C. 519.17. * * * *When approving an application for a zoning certificate, the zoning inspector must determine first if the planned structure complies with the zoning regulations; and secondly, whether the proposed use falls within the provisions of the applicable zoning resolution. R.C. 519.17.*

(Emphasis added and citations omitted.) *Barrett Paving Materials* at ¶ 54. *Id.* at *5, *7.

{¶66} Where a township has delegated enforcement and zoning certificate powers to a zoning inspector, the only R.C. Chapter 519 authority vested in the Commission and Trustees to review development plans is for PUDs under R.C. 519.021:

Planned-unit development regulations shall apply to property only at the election of the property owner and shall include standards *to be used by the board of township trustees or, if the board so chooses, by the township zoning commission, in determining whether to approve or disapprove any proposed development within a planned-unit development.*

(Emphasis added.) R.C. 519.021.

{¶67} Willow's permitted use fits within the narrow construct of R.C. 519.02 zoning powers designed to provide uniformity in zoning regulations based on the comprehensive zoning plan and map. PUD development plans require scrutiny because the unique aspects of the developments involve allowing the Township to exercise broader discretion over the scope of the property owner's proposed activities. That is also why the property owner must elect to have the PUD regulations apply. R.C. 519.021.

{¶68} Further, as to the unique nature of PUDs:

PUD regulation parallels subdivision control and the planning documents resemble those submitted for subdivision approval. Consequently, the approval process typically involves two steps: (1) submission of a preliminary development plan, which provides an overall concept or design for the site, designating uses and densities or intensities; and (2) a final development plan, which is very specific in the location of buildings, uses and structures, streets, landscaping, parking, and other site features. In the authors' experience, considerable negotiation accompanies the approval process, regardless of how clearly drafted the regulations are. Often the negotiations are three-way, between and among the local government, the developer, and neighboring property owners or residents. Both the preliminary and final development plans are adopted by the local government as part of the PUD approval. When zoning permits are issued for the site, the uses or buildings must comply with the final development plan.

Ohio Planning and Zoning Law at Section 11:24.

{¶69} The Township PUD regulations were implemented under the third statutory procedure option:

Pursuant to section 519.12 of the Revised Code, the board of township trustees may adopt planned-unit development regulations and amend the zoning map to rezone property as planned-unit developments. Any other zoning regulations and zoning district that exist at the time a planned-unit development district is established under this division continue to apply within the planned-unit development district unless the board or the township zoning commission approves an application of an owner of property within the district to subject the owner's property to planned-unit development regulations under this division. Such an application shall be made in accordance with the planned-unit development regulations *and*

shall include a development plan that complies with the planned-unit development regulations. Upon receiving such an application, the board of township trustees or township zoning commission, as applicable, shall determine whether the application and plan comply with the planned-unit development regulations.

(Emphasis added.) R.C. 519.021(C). OTZR 220.01.

{¶70} The Township refers to a PUD as a “planned residential development” (“PRD”), and defines it as:

An area of land to be planned and developed as a single entity, in which a variety of housing units are accommodated under more flexible standards, such as lot size and setbacks, than those that would normally apply under single-family district regulations, allowing for the clustering of houses to preserve common open space.

OTZR 110.02(b)(78).

{¶71} Under the Township’s “Planned Residential Development Overlay Regulations,” PRDs are established to allow various residential dwelling types and natural areas that preserve the character of the Township. OTZR 220.01. The chapter also provides that the use and dimensional specifications generally found in the OTZR are replaced by the detailed plan approval process⁷ whereby the plan becomes the basis for land use control. OTZR 220.02(c).

⁷ The PRD provisions also includes requirements such as (1) minimum project area, (2) development standards, (3) common space requirements; street, common drive and sidewalk requirements, and (4) phase development. OTZR 220.05, 220.07, 220.09 and 220.12.

{¶72} OTZR 220.13 requires that the PRD applicant submit a “development plan” in accordance with OTZR Chapter 520. OTZR Chapter 520 is entitled “Development Plan Review.” The OTZR defines a development plan: PLAN, DEVELOPMENT: Drawing(s) and map(s) illustrating the proposed design, layout and other features for the development of one or more lots.

- A. GENERAL DEVELOPMENT PLAN: Drawings and maps including all the elements set forth in Section 520.03.
- B. FINAL DEVELOPMENT PLAN: Drawings and maps including all the elements set forth in Section 520.04.

OTZR 110.02(b)(77).

{¶73} First, the applicant submits the general development plan, “[a]n application for a proposed Planned Residential Development shall include review and approval of a general development plan * * *.” OTZR 520.03. The final development plan requirements are found at OTZR 520.04. The remaining sections of OTZR Chapter 520 set forth the steps for plan review and approval by the Commission and Trustees. *See also* R.C. 519.021.

{¶74} The OTZR 220.13 requirement that PRD development plans be submitted for Commission and Trustee review and approval pursuant to OTZR 520.03 for PRD development plan reviews is endorsed by R.C. 591.021. However, OTZR 510.05(b) subjects permitted uses such as Willow’s to a review process that the Commission and Trustees have no statutory authority to conduct since they are not governed by R.C. 519.021.

{¶75} The Commission’s delineated powers under OTZR 420.06 unlawfully vests authority in the Commission to review all development plans required by the OTZR.

The only lawful process for development plan processing in the OTZR is the Chapter 520 process for PRD plan reviews, the procedure employed by the Township in this case. This process is unlawful because as the procedures for the creation of a PRD do not apply to Willow's permitted use of the property.

{¶76} In *Lofino Props., L.L.C. v. Wal-Mart Stores, Inc.*, 2d Dist. Greene No. 2003 CA 57, 2004-Ohio-458, adjacent property owners appealed from a judgment of the Greene County Common Pleas Court. The trial court granted summary judgment to the shopping center owners, manager, and the Wal-Mart lessee in plaintiffs' declaratory judgment action seeking to prevent the planned expansion of Wal-Mart's store and parking area. Lofino argued that the defendants-appellees failed to comply with Article 8 of the Sugarcreek Township zoning code that required a detailed review of the plans and a public hearing, even though the expansion involved a permitted use.

{¶77} Though Sugarcreek Township did not require the defendants to comply with the Article 8 PUD process for the defendants' permitted use as Olmsted Township requires in the instant case, the appellate court made a salient observation:

*[I]t would not be logical for a developer of an area to have to complete the same procedures for building a permitted use within an existing zone as a developer seeking to change the zoning on an area for their development. Therefore, we find that those procedures * * * pertain only to the creation of a planned development.*

(Emphasis added.) *Id.* at ¶ 23.

{¶78} We hold that the OTZR Chapter 520 development plan review process applies to PRDs only, because as the authority of the Commission and Trustees to review and approve development plans is limited pursuant to R.C. Chapter 519.

c. Severability and Reformation

{¶79} The trial court's final step was to excise or amend the unlawful OTZR sections. This court has held that:

One part of a statute may be invalid for want of conformity to the Constitution without affecting the validity of the remainder of the statute, where the invalid part may be stricken and is not in its nature and connection so essential to the remainder of the statute or so related to the general purpose of its enactment as to warrant the conclusion that the General Assembly would have refused to adopt the statute with the invalid part thereof stricken therefrom. *Also see Lyman v. Chester Twp. Bd. of Trustees*, 63 Ohio St.2d 208, 210, 407 N.E.2d 511 (1980); *State, ex rel. Allen v. Ferguson*, 155 Ohio St. 26, 44-45, 97 N.E.2d 660 (1951); *State, ex rel. Greenward Realty v. Zangerle*, 135 Ohio St. 533, 21 N.E.2d 662 (1939); and *Treasurer v. Bank*, 47 Ohio St. 503, 25 N.E. 697 (1890).

Cleveland v. Walters, 8th Dist. Cuyahoga No. 43050, 1981 Ohio App. LEXIS 14032, *3-4 (May 7, 1981). *See also Lyman*, 11th Dist. Geauga No. 778, 1979 Ohio App. LEXIS 9540; *Emmons v. Keller*, 21 Ohio St.2d 48, 254 N.E.2d 687 (1970).

{¶80} Authority for this process lies not only in case law but also the OTZR itself:

If any section, subsection, or any provision of this Resolution, or amendments thereto, is held to be invalid by a court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of this Resolution or amendments thereto.

OTZR 101.07. In addition, OTZR 101.06 reflects the legislative intent that the OTZR comply with the Revised code.

V. CONCLUSION

{¶81} We uphold the trial court's findings that OTZR: (1) unlawfully vests authority in the Commission and Trustees to approve or deny zoning certificates; (2) provides no procedure for processing zoning applications in OTZR Chapter 520; and (3) unlawfully applies the OTZR Chapter 520 development plan process to permitted uses but that the procedure only applies to PRDs where the Commission and Trustees have authority to review and approve per R.C. 519.021.⁸

{¶82} We therefore determine that the unlawful provisions are arbitrary and unreasonable and without substantial relation to the public health, safety, morals, or general welfare of the community. We further determine that the unlawful portions are severable and may be stricken from the OTZR while the remaining substantive provisions shall be enforced. OTZR 101.06, OTZR 101.07,⁹ *Walters* at *3-4.

{¶83} The following OTZR sections are stricken in their entirety:

230.12 DEVELOPMENT PLAN REVIEW

⁸ Willow filed a motion to dismiss this case due to mootness during the pendency of the appeal. The Township opposed. We find that the subsequent denial of Willow's zoning certificate issued arguably as the result of the Township's implementation of the process set forth in the trial court's opinion as to Willow's property is not determinative of the issues pending before this court.

⁹ We find it of interest that the 2013 version of OTZR 101.07 regarding validity and severability, though not the subject of this case, seeks to limit the application of a declaration of judicial invalidity to the particular development in issue. We opine, as dicta, that a judicial finding of unconstitutionality of certain OTZR provisions and procedures because they exceed the Township's statutory authority may not be limited by the amendment language.

All uses in an RMF District shall be permitted only after development plans have been reviewed and approved by the Zoning Commission according to the procedures set forth in Chapter 520.

250.12 DEVELOPMENT PLAN REVIEW

All uses in a nonresidential district shall be permitted only after development plans have been reviewed and approved by the Zoning Commission according to the procedures set forth in Chapter 520.

510.05(b) APPROVAL OF ZONING CERTIFICATE

Applications for Zoning Certificate for permitted uses requiring review of development plans shall be transmitted to the Zoning Commission according to Chapter 520.

{¶84} The following OTZR sections are limited to PRDs only:

420.06(b) [Zoning Commission] POWERS AND DUTIES

To review all development plans required by this Resolution.

420.06(d) [Zoning Commission] POWERS AND DUTIES

To review all sign applications required by this Resolution.

510.03(b) Zoning Certificates Requiring Zoning Commission Review.¹⁰

Chapter 520 DEVELOPMENT PLAN REVIEW.

{¶85} The second and third assignments of error are overruled.

{¶86} The trial court's order is affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

¹⁰ We further observe that the 2013 amendment to OTZR 510.03(b) provides, "Applications for uses that require review by the Zoning Commission shall include the items required for review of development plans as set forth in Sections 520.04 and 520.08, as applicable." OTZR 520.04 and 520.08 are specific to PRDs.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

ANITA LASTER MAYS, JUDGE

EILEEN T. GALLAGHER, J., CONCURS;
FRANK D. CELEBREZZE, JR., A.J., CONCURS IN JUDGMENT ONLY