

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

PAMELA SPARKS, et al.,	:	
Plaintiffs-Appellants,	:	CASE NO. CA2009-02-065
- vs -	:	<u>OPINION</u>
	:	9/28/2009
EMMA BOWLING, et al.,	:	
Defendants-Appellees.	:	

CIVIL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CV2008-07-3255

David F. Robertson, Jr., Jeffrey M. Kelly, 11137 Main Street, Cincinnati, Ohio 45241, for plaintiffs-appellants, Pamela Sparks, Steve Sparks, Ronnie M. Brown, Alexandra M. Stemple, Thomas D. Wahl, Edmond C. Sowards, William G. Ramsey, Ivan Paul Booth, and Roland R. Vorhees

Jay C. Bennett, Oxford Professional Building, 5995 Fairfield Road, Suite 5, Oxford, Ohio 45056, for defendant-appellee, Emma Bowling

John B. Kopf, Jerry Vande Werken, Scott A. Campbell, 41 South High Street, 17th Floor, Columbus, Ohio 43215, for defendants-appellees, T-Mobile Central, LLC and Matt Meyers d.b.a. PBM Wireless

Robert J. Surdyk, One Prestige Place, Suite 700, Miamisburg, Ohio 45342, for defendant-appellee, Robert McIntyre, Zoning Inspector

Jack F. Grove, 1251 Nilles Road, Suite 10, Fairfield, Ohio 45014-2911, for defendant-appellee, Robert McIntyre, Zoning Inspector

HENDRICKSON, J.

{¶1} Plaintiffs-appellants, Pamela Sparks, Steve Sparks, Ronnie M. Brown,

Alexandra M. Stemple, Thomas D. Wahl, Edmond C. Sowards, William G. Ramsey, Ivan Paul Booth, and Roland R. Vorhees (collectively appellants), appeal the Butler County Court of Common Pleas' decision granting the motions to dismiss of defendants-appellees, Emma Bowling (Bowling), T-Mobile Central LLC (T-Mobile), Matt Meyers d.b.a. PBM Wireless (PBM), and Robert McIntyre in his official capacity as Fairfield Township Zoning Inspector (McIntyre). We affirm the trial court's decision.

{¶12} Appellants and Bowling are all property owners in Long Meadow Estates, Brooke Meadows subdivision, in Fairfield Township. In the fall of 2007, T-Mobile's agent, PBM, approached Bowling and other subdivision property owners about constructing a cell tower on one of their respective properties. Bowling agreed, and entered into a contract with T-Mobile to build the cell tower on her property.

{¶13} In April 2008, upon their own investigation, appellants discovered that the subdivision was zoned agricultural, or A-1, rather than residential. Appellants filed a request with the Fairfield Township Zoning Commission to have their properties rezoned from agricultural to residential, because their properties were exclusively used for residential purposes and were taxed as residential property. Meanwhile, in May of 2008, McIntyre issued a letter (exemption letter) to T-Mobile informing the company that the cell tower, as a public utility, was exempt from township zoning. On July 10, 2008, appellants successfully had their respective properties rezoned as residential. Bowling's property, however, remained zoned agricultural. On July 22, 2008, appellants requested that McIntyre rescind the zoning exemption letter. McIntyre declined this request.

{¶14} Two days later, appellants filed a complaint against Bowling, PBM, T-Mobile and McIntyre seeking a declaratory judgment finding the site of the cell tower's construction was in a residential zone. Appellants contended if the site were in an area zoned residential, they would be entitled to notice pursuant to R.C. 519.211; and the site

would be subject to local zoning laws. In addition, appellants requested the trial court issue a writ of mandamus ordering McIntyre to rescind the exemption letter.

{¶15} Bowling, PBM, T-Mobile and McIntyre all filed motions to dismiss. Appellants, in turn, filed a motion for summary judgment. The trial court granted the motions to dismiss, denied the writ of mandamus, and denied appellants' summary judgment motion. In granting the motions to dismiss, the trial court found that the tower was slated for construction on Bowling's agriculturally zoned property and not in an area zoned for residential use. Appellants filed a timely appeal raising two assignments of error.¹ Appellant's second assignment of error is as follows:

{¶16} "THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY FAILING TO CONCLUDE THAT THE PROPERTY IN QUESTION IS IN AN AREA ZONED FOR RESIDENTIAL USE UNDER O.R.C. 519.211."

{¶17} Appellants argue that the trial court erred in finding Bowling's property was not in an area zoned for residential use. We do not agree.

{¶18} "A motion to dismiss for failure to state a claim upon which relief can be granted * * * tests the sufficiency of the complaint." *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.*, 65 Ohio St.3d 545, 548, 1992-Ohio-73. "A [successful] Civ.R. 12(B)(6) motion only determines whether the pleader's allegations set forth an actionable claim." *Pyle v. Ledex, Inc.* (1990), 49 Ohio App.3d 139, 143.

{¶19} "In order for a complaint to be dismissed under Civ.R. 12(B)(6) * * *, it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to relief." *Cincinnati v. Berretta U.S.A. Corp.*, 95 Ohio St.3d 416, 2002-Ohio-2480, ¶5. "In construing a complaint upon a motion to dismiss for failure to state a

1. On September 1, 2009, in oral argument before this court, appellants withdrew their first assignment of error regarding the trial court's denial of their request for a writ of mandamus to compel McIntyre to rescind

claim, we must presume that all factual allegations of the complaint are true and make all reasonable inferences in favor of the non-moving party." *Mitchell v. Lawson Milk Co.* (1988), 40 Ohio St.3d 190, 192. "[A]s long as there is a set of facts, consistent with the plaintiff's complaint, which would allow the plaintiff to recover, the court may not grant a defendant's motion to dismiss." *York v. Ohio State Hwy. Patrol* (1991), 60 Ohio St.3d 143, 145.

{¶10} "An order granting a Civ.R. 12(B)(6) motion to dismiss is subject to de novo review." *Perrysburg Twp. v. Rossford*, 103 Ohio St.3d 79, 2004-Ohio-4362, ¶5. Thus, a reviewing court must independently review the complaint to determine whether dismissal was appropriate, and need not defer to the trial court's decision. *Chinese Merchants Assoc. v. Chin*, 159 Ohio App.3d 292, 2004-Ohio-6424, ¶4.

{¶11} "The zoning authority possessed by townships in the state of Ohio is limited to those powers specifically conferred by the General Assembly." *Symmes Twp. Bd. Of Trustees v. Smyth*, 87 Ohio St.3d 549, 552, 2000-Ohio-470, citing *Yorkavitz v. Columbia Twp. Bd. of Trustees* (1957), 166 Ohio St. 349. "As a general rule, Ohio law provides that townships have no power under the zoning laws to regulate the location, erection, or construction of any buildings or structures of any public utility."² *Symmes* at 551, citing R.C. 519.211(A). Indeed, "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, 1999-Ohio-437. This "exemption ensures that public utilities will be able to construct the facilities

the exemption letter. Therefore, we will only address appellant's second assignment of error.

2. "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 * * * for the operation of its business." R.C. 519.211(A).

required to serve the public interest across the state without undue interference from township zoning resolutions." *Symmes* at 556.

{¶12} "There is a limited exception to this rule that applies to certain telecommunications towers that are to be located 'in an area zoned for residential use.'"³ *Symmes* at 551-52, citing R.C. 519.211(B)(1)(c). However, because the exception "[a]ppear[s] * * * immediately after the broadly worded prohibition of township regulation of public utilities, * * * R.C. 519.211(B)(1)(c) represents an *exceptional* restraint on the use, management, or alienation of private property and should not be extended to include limitations not clearly described therein. (Emphasis sic.) *Symmes* at 554, citing *State ex rel. Moore Oil Co. v. Dauben* (1919), 99 Ohio St. 406, 411. Thus, application of R.C.519.211(B)(1)(c) remains "the *exception* rather than the *rule*." (Emphasis sic.) *Symmes* at 554.

{¶13} Both sides cite *Symmes* in support of their respective positions. In *Symmes*, AT&T built a cell tower on property belonging to an auto service shop, which was zoned as an "E Retail Business District," after receiving a "public utility exemption letter" from the county zoning commission. *Id.* at 550. After the tower was completed, *Symmes* Township moved for a restraining order against AT&T, the property owner and lessee arguing that because the zoning classification permitted residential use, the tower was subject to *Symmes*' regulation. *Id.* Both the trial court and the appellate court found that the property – although it permitted residential use – was not zoned residential and thus not subject to *Symmes*' regulation. *Id.* 550-51. The Supreme Court accepted certiorari after certifying a conflict with another case over the meaning of the phrase, "in an area zoned for residential use." *Id.* at 551. Finding the phrase

3. R.C. 519.211(B)(1) mandates that five criteria must be met in order for the townships to have any power to regulate telecommunications structures. This includes the requirement that "[t]he free-standing or

ambiguous, the court relying on R.C. 1.42 and legislative intent, held that the site where the cell tower was built was not "in an area zoned for residential use" even though residential use was permitted. *Id.* at 553-58. The *Symmes* court found that, "[t]he language 'an area zoned for residential use' means an area zoned as a residential district, an area with a residential zoning classification under the township's zoning resolution, or an area zoned primarily for residential use." *Id.* at 558.

{¶14} Appellants' position is that although *Symmes* clarified what "zoned for residential use" meant; the decision failed to explain what is meant by "an area." Appellants urge this court to find that "an area" includes not only the property on which the tower is to be located, but also the character, or more correctly zoning, of the surrounding/contiguous properties. They support this argument by pointing out that the *Symmes* decision twice made reference to the auto service shop's surrounding properties and their zoning classifications.⁴ Appellants contend that if the phrase "an area" is found to mean only the site on which the tower is to be located, it would frustrate the purpose of zoning regulations, and undermine the legislative intention to balance the rights of property owners and telecommunications companies. Appellants also assert that the notice provisions within R.C. 519.211(B)(3) demonstrate an intention by the legislature to include surrounding property owners in the process.⁵

attached structure is proposed to be located in an unincorporated area of a township, in an area zoned for residential use." R.C. 519.211(B)(1)(c).

4. Appellants specifically cite to the following two sentences contained within the *Symmes* decision: (1) "[t]he township zoning resolution permits some residential uses in this zoning district, but the property at issue here is occupied by an auto service shop and is nearly surrounded by other commercial uses such as convenience stores and filling stations" and (2) "[i]f we accept the township's interpretation of R.C. 519.211(B), AT&T will be subject to township zoning for a tower built behind an automobile service shop between two commercial billboards, on a triangular plot of land with a business zoning classification, located in a busy intersection surrounded on nearly every side by office and business zones." *Id.* at 550, 558.

5. R.C. 519.211(B)(3) states in pertinent part that: "[a]ny person who plans to construct a telecommunications tower in an area subject to township zoning regulations shall provide * * * [w]ritten notice to each owner of property, as shown on the county auditor's current tax list, whose land is contiguous to or directly across a street or roadway from the property on which the tower is proposed to be

{¶15} PBM and T-Mobile argue that the *Symmes* decision requires courts to read the phrase narrowly, as it is a limited exception to the rule that townships have no zoning authority over public utilities. In addition, PBM and T-Mobile contend that allowing appellants to rezone their property in order to "trigger" the township's zoning power would in effect create a de facto residential classification over Bowling's property.

{¶16} PBM, T-Mobile, McIntyre and Bowling all assert that the proper inquiry in this case is how Bowling's property is zoned, and not how other properties, near, beside, or even around her property are zoned. PBM and T-Mobile maintain that to expand the meaning of area beyond Bowling's property would lead to further problems in determining how many other properties to include in the inquiry. In addition, McIntyre and Bowling insist that the *Symmes* decision only concerned itself with the property on which the tower was being placed, and not on other properties in the area. Finally, PBM, T-Mobile, McIntyre and Bowling all argue that the notice provision in R.C. 519.211(B)(3) is *only* applicable if the tower site is subject to township zoning regulations; and inapplicable, in substance and form, where the tower is built on agriculturally zoned property.

{¶17} When McIntyre issued the exemption letter to T-Mobile in May of 2008, all of the properties in the area, including Bowling's, were zoned agricultural.⁶ Thus, even if we were to apply a broad reading of "area," to include surrounding properties, *none* of the properties were zoned for residential use at the time the exemption letter was

constructed * * *."

6. The fact that appellants' properties were rezoned to residential, after McIntyre issued the exemption letter, has no bearing on this decision. "In Ohio, zoning legislation enacted subsequent to the filing of an application for a building permit does not affect the property owner's right to receive the permit." *Union Oil Co. of California v. City of Worthington* (1980), 62 Ohio St.2d 263, 264, citing *Gibson v. Oberlin* (1960), 171 Ohio St. 1. We believe this same logic applies to the instant case, because the rezoning of property does not affect the exemption letter that was issued prior to the rezoning.

issued. Nevertheless, the *Symmes* decision requires this court to strictly construe the language of the "exceptional restraint" on the general prohibition against township regulation of public utilities pursuant to R.C. 519.211. Since the proposed site for the tower is Bowling's property, which was never residentially zoned, the tower's location, erection, construction, etc. clearly falls outside the purview of Fairfield's zoning authority pursuant to R.C. 519.211(A). Accord *Symmes* at 553-58. We also note that Fairfield's own zoning commissioner, McIntyre, believes the tower site is exempt from the township's authority precisely because Bowling's property is zoned agricultural. See *Symmes* at 555-56 (citing practitioners' views and/or opinions as an additional factor to consider). Because we find the exception in R.C. 519.211(B) inapplicable to this case, we need not address those arguments related to that section of the statute.

{¶18} Finally, the legislature's purpose in enacting R.C. 519.211 was to provide "public access to public utilities, largely unimpeded by the requirements of township zoning." *Symmes* at 556. Essentially, the legislature carefully crafted a balance between the competing interests of both townships and public utilities. In attempting to rezone property after the exemption letter was granted, appellants were, in effect, trying to circumvent the prohibition against regulation of public utilities by townships. Cf. *AT&T Wireless PCS, Inc. v. Beavercreek Twp. Zoning Appeals* (Oct. 9, 1998), Greene App. No. 98-CA-18, 1998 WL 698374, at *5 (noting if a township rezoned an area residential, after a public utility's exemption application was received, it would be circumventing R.C. 519.211).

{¶19} In conclusion, even if we presume that all factual allegations of the complaint are true and make all reasonable inferences in favor of the nonmoving party, we find that appellants can prove no set of facts entitling them to relief. Therefore, appellants' assignment of error is overruled.

{¶20} Judgment affirmed.

BRESSLER, P.J., and POWELL, J., concur.