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Summary of Sowers v. Forest Hills Subdivision, 129 Nev. Adv. Op. 9

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PROPERTY – NUISANCE

Summary

The Court considered whether substantial evidence existed to support the district court’s decision to grant a permanent injunction against the construction of a wind turbine.

Disposition/Outcome

The Supreme Court of Nevada affirmed the district court’s decision to permanently enjoin a proposed wind turbine from being constructed. The Court held that the decision as to whether a wind turbine constitutes a nuisance is a question of fact, and that a district court’s decision regarding the existence of a nuisance will be upheld so long as it is not clearly erroneous and is supported by substantial evidence.

Factual and Procedural History

The issue here arose when Sowers informed residents of the Forest Hills Subdivision that he intended to construct a wind turbine on his property. After the announcement, Sower’s neighbors and the Forest Hills Subdivision filed a complaint in district court which claimed that the proposed turbine would create a nuisance because it would obstruct the views of neighboring properties, generate constant noise and produce a shadow flicker. A licensed relator testified that the turbine would diminish property values in the neighborhood. The plaintiffs sought a permanent injunction to prevent the turbine from being constructed.

Following a preliminary injunction hearing, the district court granted the permanent injunction. The district court looked at the quiet nature of the neighborhood and the size of the turbine, amongst other factors, when making its decision. After taking all of these considerations into account, the district court found that the proposed wind turbine would substantially interfere with the neighboring residents’ enjoyment and use of their property.

Discussion

Justice Hardesty wrote the opinion for the three justice panel. The Court relied on the Nevada Revised Statutes (“NRS”) when determining if a nuisance existed in this case. The NRS provides that a nuisance is “[a]nything which is injurious to health, or indecent and offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property.”² The Court noted that since wind turbines are not severe interferences in all circumstances, deciding whether a turbine constitutes a nuisance is a question of fact.

¹ By Daniel Nubel

² NEV. REV. STAT. 40.140(1)(a) (2007) (defining nuisance).

When deciding if the wind turbine constitutes a nuisance, the Court looked at “the reasonableness or unreasonableness of the operation or use in relation to the particular locality and under all existing circumstances.”³ The Court adopted the view of several other jurisdictions that aesthetics alone cannot sustain a private nuisance claim because of the subjective nature of aesthetic determinations. Still, the Court adopted *Burch v. Nedpower*’s holding that aesthetic factors can be considered amongst several other factors when deciding if a nuisance exists.⁴

The Court considered several factors when determining whether a nuisance existed here. First, the Court analogized this case with *Rose v. Chaikin*, where the Superior Court of New Jersey found that constant loud noise alone was enough to constitute a nuisance.⁵ The Court claimed that the group of citizens that were protected in *Rose* were similar to the plaintiffs in this case. Additionally, the Court found that the district court fairly considered the testimony regarding the diminution of property values as a result of the turbine. Lastly, the Court found that the district court could have properly considered aesthetics and shadow flicker when making its decision.

Conclusion

The Court concluded that (1) the district court’s decision to permanently enjoin the wind turbine from being constructed was not clearly erroneous and was supported by substantial evidence, and (2) the district court was correct to consider noise, diminution of property value, the presence of a shadow flicker, and the size of the turbine when deciding if the wind turbine constituted a nuisance.

³ *Burch v. Nedpower Mount Storm, LLC*, 647 S.E.2d 879,893 (W. Va. 2007).

⁴ *Id.* at 891.

⁵ *Rose v. Chaikin*, 453 A.2d 1378, 1381-82 (N.J. Super. Ct. Ch. Div. 1982).