Billboards

The regulatory process 42 years after the Federal Highway Beautification Act

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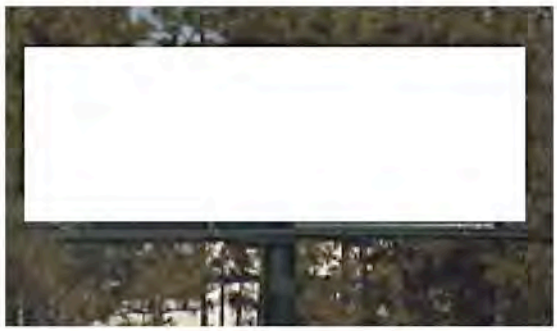
Commonwealth Court has recently handed down three decisions relating to municipal zoning ordinance regulation of billboards. In all three cases, the validity of municipal regulations was challenged and, again in all three cases, the validity of the specific regulation at issue was sustained. The issuance of the decisions in these three cases coincides with the recent passing of Lady Bird Johnson who, in her role as "First Lady," fought for and won the passage of the Highway Beautification Act in 1965. We will here provide summaries of the three Commonwealth Court decisions, and then comment on the state of billboard regulation in Pennsylvania, as affected by these three cases and by the Highway Beautification Act.



Township of Exeter v. ZHB of Exeter Township, 911 A.2d 201 (Pa Cmwlth. 2006)

Facts

Land Displays, Inc., a billboard company, filed applications in Exeter Township (Berks County) for 11 separate off-site advertising signs at various locations in the township. The proposed sizes of the billboards were either 300 square feet or 672 square feet, with a maximum height of 44 feet.

The Exeter Township Zoning Ordinance, although allowing off-site advertising signs, placed a limit of 25 square feet on the area of any off-site sign, and also set a maximum height of 25 feet. The permit applications were, obviously, rejected, whereupon Land Displays filed a challenge with the township Zoning Hearing Board to the substantive validity of the sign ordinance provisions, arguing that the size and height limitations of the ordinance created a de facto total exclusion of billboards in Exeter Township.

Land Displays, in presenting its case to the Zoning Hearing Board, relied heavily upon evidence and ultimately argument that the billboard industry had adopted standardized specifications of 300 square feet and 672 square feet for billboard sizes, such that "national advertisers" would contract for advertising only upon these standard sized billboards.

The township, in turn, presented its defense of the validity of its restrictions on sign area and sign height, citing concerns for public safety along highly congested highways, and also demonstrating that there were already in existence several off-site advertising signs along the major highway within the municipality, conforming to the 25 square foot size and 25 foot height limitations.

Nevertheless, the Zoning Hearing Board found Land Displays' arguments to be persuasive, and concluded that the severe limitations on size and height constituted a de facto exclusion of billboards (i.e., off-site signage) within Exeter Township. The Zoning Hearing Board did limit billboard signage to 300 square feet (excluding the rather huge 672 square foot option) and also created some limitations on placement that coincided with the busiest section of highway.

The Berks County Court, upon the Township of Exeter's appeal thereto, affirmed the decision of the Zoning Hearing Board. The Township thereupon took its further appeal to Commonwealth Court.

Decision

Commonwealth Court first acknowledged that the theory of a de facto total exclusion was one that was recognized by the Pennsylvania courts—often, our courts have discussed total exclusions as if they were synonymous with de jure exclusions and, as witnessed by this case, it is a perfectly valid approach to exclusionary zoning to argue that the regulatory provisions are so severe as to create a de facto total exclusion, where, as here, the ordinance on its face makes provision for off-site sign:

> "A de facto exclusion exists where an ordinance permits a use on its face, but when applied acts to prohibit the use throughout the municipality." 911 A.2d at 204.

Secondly, the court acknowledged that off-site signage—i.e., billboards—were legitimate uses that could not be totally excluded from a municipality, citing Borough of Dickson City v. Patrick Outdoor Media, Inc., 496 A.2d 427 (Pa.Cmwlth. 1985).

Having so set the table, Commonwealth Court then pulled the tablecloth out from under the signage company, concluding that Exeter Township's size and height limitations on off-site signs were reasonable and, in fact, did not serve to totally exclude off-site signage from the township. Citing Atlantic Refining and Marketing Corporation v. Board of Commissioners of York Township, 608 A.2d 592 (1992), the Court framed the scope of regulatory authority available to municipalities, in the context of billboard regulation, as follows:

> "The zoning authority can establish rigorous objective standards in its ordinance for size, placement, materials or coloration of signs to insure that there offensiveness is minimized as much as possible. ... Signage ordinances utilizing these objective standards will be upheld where they are reasonably related to the clearly permissible objectives of maintaining the aesthetics of an area and fostering public safety through preventing the distraction of passing motorists."

Thus, Commonwealth Court allowed the township's arguments—protection of public safety and promotion of aesthetics—to trump Land Display's argument that the billboard industry could not survive in Exeter Township unless "national standards" for size and height were allowed:

> "While the testimony ... reflects the importance of uniform sizing in the billboard industry, it simply is not sufficient to support a conclusion that the sign ordinance is unconstitutional. For all intents and purposes, the ZHB has allowed industry standards to control local conditions. This is neither a suitable nor satisfactory result." 911 A.2d at 204.

A key component of this decision was the township's ability to demonstrate that other advertisers—perhaps not "national advertisers"—had complied with the 25 square foot size limitation in erecting off-site billboard signs within the township. Note that Land Displays, Inc. has filed a petition for allowance of appeal to the Pennsylvania Supreme Court, and that on June 21, 2007, the Pennsylvania Supreme Court has accepted this appeal and, hence, the "fat lady" has not finished her song as yet. Stay tuned.

Lamar Advertising of Penn, LLC v. ZHB of The Borough of Deer Lake, 915 A.2d 705 (Pa.Cmwlth. 2007)

Facts

Traveling north from Berks County, the Borough of Deer Lake is located in Schuylkill County, Pennsylvania, a more rural area of the commonwealth. The Deer Lake Borough Zoning Ordinance (unlike Exeter Township's) failed to make any allowance for off-site advertising signage and, hence, the sign company here involved (Lamar Advertising) filed a challenge to the substantive validity of the Borough's zoning ordinance on the basis of de jure exclusion. The Zoning Hearing Board, in its decision on the validity challenge, acknowledged that the Borough's zoning ordinance constituted a total de jure exclusion of off-site signage, but, in fashioning a remedy for the unconstitutionality of the ordinance, imposed the sign area and height limitations applicable under the ordinance to permitted "on-site" signage, being 160 square foot maximum size and 25 foot maximum height.

Lamar, in its validity challenge, requested approval—either in the form of interpretation or in the form of a variance—to erect a 247 square foot sign 30 feet in height. Lamar, disappointed by the limitations imposed by the Zoning Hearing Board, filed its appeal to the Schuylkill County Court, arguing that, in addition to the de jure total exclusion of billboards, the size and height limitations imposed by the Zoning Hearing Board resulted in a second layer of exclusion, being a de facto exclusion of billboards, echoing the argument that Land Displays had posed in Exeter Township.

The Schuylkill County Court rejected the de facto exclusion component of this argument, sustaining the Zoning Hearing Board's size and height limitations. Thereupon, Lamar filed its appeal to Commonwealth Court.

Decision

Commonwealth Court sustained the Zoning Hearing Board's application of the size and height limitations of the Township Zoning Ordinance, concluding:

> "The fact that the Board found the ordinance exclusionary as to off-site billboards does not automatically permit Lamar to erect whatever kind of structure it wishes without investigation into the reasonableness of the proposed plans. ... The approval of a challenger's plan is not automatic, but must be subject to reasonable regulation by the municipality, which must not be arbitrary or discriminatory and must bear a reasonable relationship to public health, safety, welfare and morals." 915 A.2d at 710.

Commonwealth Court went on to hold that, even though the size and height limitations were originally intended as limitations on on-site signage, they were reasonable regulations to be applied for the now-permissible off-site sign proposed by Lamar, noting that these restrictions were in the ordinance when Lamar filed its validity challenge:

> "The board counters that it may apply existing dimensional restrictions to an applicant who has successfully proven a de jure exclusion because an unconstitutional de jure exclusion does not automatically defeat other restrictions in the ordinance." 915 A.2d at 711.

As was the case in Exeter Township, Deer Lake Borough already had advertising signs that complied with the area and height restrictions in the ordinance, thus proving that the size and height limitations did not constitute a de facto exclusion of signage within the borough.

As this case was decided after the Exeter Township case, and the size limitation of 160 square feet was more than six times as large as the 25 square foot size limitation sustained in Exeter, this result in Lamar is hardly surprising.

Adams Outdoor Advertising, LP v. Zoning Hearing Board of Smithfield Township, 909 A.2d 469 (Pa.Cmwlth. 2006)

Facts

Unlike Exeter and Lamar, this case does not involve alleged exclusion of billboards, but rather examines the circumstances under which a municipality may require removal of existing billboards.

Adams Outdoor Advertising ("Adams") leased space on a 7.7 acre tract (otherwise undeveloped) for two billboard signs. The landowner decided that a more profitable use of the property could be made, and filed an application for land development approval to construct an office building on the tract, located in Smithfield Township, Monroe County.

Upon receipt of preliminary land development plan approval, the landowner was required by the township to remove the two billboard signs prior to commencement of any grading activities on the site. Adams resisted the requirement (the landlord does not appear to have been active in resistance), arguing that the township could not constitutionally require removal of the billboards until the landowner received a certificate of occupancy for the proposed office building.

The landowner did testify at the hearing that he was only performing excavation work, and that he did not have short-term plans for constructing the office complex.

Nevertheless, the Zoning Hearing Board sustained the township's position that, since the landlord had "proposed" land development (as evidenced by the preliminary land development plan approval and application for a grading permit), the intent of the ordinance was to require the billboards to be removed at that stage of activity.

The exact language of the ordinance provisions at issue was as follows:

> "Where an existing commercial advertising sign exists on a property proposing land development or alterations or enlargement of an existing use, said sign shall be removed."

Aside from its argument that this provision was vague enough in using the term "proposing," Adams' argument was based upon its position that implementation of this ordinance provision would constitute an unlawful attempt to amortize a pre-existing off-site sign, constituting unlawful amortization and unlawful taking of its property.

Decision

Commonwealth Court first acknowledged that under the Pennsylvania Supreme Court's decision in PA Northwestern Distributors, Inc. v. ZHB of Moon Township, 584 A.2d 1372 (Pa. 1991), any ordinance requirement that existing lawful, non-conforming billboards be "amortized"—removed after a certain number of years of use—constituted an unlawful taking of property without just compensation, in violation of the Pennsylvania Constitution.

The Court further noted that even the use of the term "amortization" was somewhat misleading, since the end result was a requirement for removal after a certain period of years, irrespective of the condition of the sign at the end of the "amortization period."

Commonwealth Court nevertheless sustained the township's position in requiring the two billboard signs to be removed concurrently with the commencement of grading activities on the site. Commonwealth Court sustained the township's argument that the facts as here presented were readily distinguishable from a standard "amortization" requirement in a zoning ordinance, in that the required discontinuance of the billboard use was triggered by the choice of the landowner, not by any municipal action:

> "It is the landowner's voluntary decision to pursue land development on the subject property that necessitates removal of the billboards, rather than any action by the township." 909 A.2d at 476.

Adams also argued that the regulation at issue violated its rights to equal protection, in that it did not apply to "on-site" signage, but rather applied only to off-site or billboard type signs. Commonwealth Court again rejected this argument, stating that "there is nothing novel or constitutionally infirm about the use of the on-site/off-site distinction." 909 A.2d at 479.

Comment

Among these three cases, the Exeter case would seem to be by far the most significant in terms of future application. If the Pennsylvania Supreme Court does sustain the decision of Commonwealth Court, then municipalities in Pennsylvania will be able to apply the type of area and height restrictions which Exeter Township imposed on off-site signage—25 square feet maximum per side for all billboards and a maximum height of 25 feet. Thus, as so regulated, billboards would be either 5x5 feet in size, or perhaps 6 feet by 4 feet to conform with the more rectangular orientation of most billboards. Exeter therefore does not change the legal principle, that all municipalities in Pennsylvania must make provision for off-site signage in their zoning ordinances, but would allow what billboard companies would consider to be very strict limitations on the size of billboards.

Note further that the Adams case does not modify the principle of law established by the Pennsylvania Supreme Court in the PA Northwestern case, that existing lawful, non-conforming billboard signs (i.e., "grandfathered" signs) cannot be required to be removed, and are thus permitted indefinite extensions of time.

This brings us to a connection between the Pennsylvania case law as here discussed and the federal Highway Beautification Act of 1965, as amended in 1978 to provide that whatever the state law may be with regard to amortization—and many states differ from the Pennsylvania approach and authorize state, county or municipal regulations to require amortization (removal of billboard signs) after a reasonable period of time—any required removal of existing lawful, non-conforming billboards under the Highway Beautification Act would require compensation to the landowner.

Thus, the 1978 amendment to the Highway Beautification Act essentially adopts the Pennsylvania approach to amortization, rightly or wrongly.

As noted at the outset, Lady Bird Johnson's death, some 42 years after the passage of the Highway Beautification Act, lends some poignancy to a review of what that Act has and has not accomplished with regard to billboard regulation.

From the standpoint of those who wish to promote scenic highways, the Highway Beautification Act can be viewed as the proverbial road paved with good intentions and little in the way of results. Indeed, if one looks for a case study in the failure of federalism, one might well choose the Highway Beautification Act as an excellent example.

First, as is often the case in proposed federal legislation dealing with interstate commerce, a balance between federal regulation and state's rights must be negotiated. The concept of "state's rights" was considerably at issue in the mid-60's, at a time when the Lyndon Johnson administration was in a position to pass sweeping federal legislation on protection of civil rights and other matters (perhaps more important than highway beautification). In any event, the Highway Beautification Act sought to balance the issue by recognizing that land use or zoning regulation at the state, county or municipal level, which called for industrial or commercial uses within a particular stretch of federal highway, would be exempt from the billboard limitations as set forth in the Highway Beautification Act. Thus, local zoning for commercial or industrial uses would trump any restrictions on billboard construction under the federal act.

Okay, so then let's talk about "unzoned areas," where federal highways traverse. (Indeed, even today there are many areas of rural states that are unzoned and, hence, this additional issue was of substantial importance to the billboard industry.) The "compromise" reached was that any unzoned area in which commercial or industrial activities would take place would likewise, for a substantial area around such activities, be treated as zoned for commercial and industrial uses, thus trumping the regulatory provisions of the federal act. (For those interested in actually reading the regulations, note that they are codified at Title 23, Code of Federal Regulations, Part 750.)

These two loopholes assure that the billboard industry is nowhere near "shut out" from placing billboards adjacent to interstate highways—one need only witness the number of signs along I-95 for "South of the Border" as a case study in the massive scope of these two loopholes. The Federal Highway Administration does not concede that it is utterly lacking in its ability to challenge what it considers to be "sham" local zoning, such as a strip of commercial or industrial zones paralleling an interstate highway itself. The FHA's position is as follows:

> "With respect to unzoned areas, we will recognize local practices on customary use as mutually agreed to by state and federal agencies. It will be our policy to assume the good faith of the several states in this regard. The only exception to the above would be a situation in which state or local authority might attempt to circumvent the law by zoning an area as 'commercial' for billboard purposes only. We think you will agree that this is a reasonable position, since we know that the Congress does not wish for the law to be deliberately evaded." (See Legal Opinion on FHA's interpretation of 23 C.F.R., §750.708(b).)

Add to these two loopholes the restrictions as set forth in the 1978 amendment that non-conforming billboards cannot be required to be removed by any state (of course, in Pennsylvania, it wouldn't happen anyway) without payment of just compensation. The stated intent of the 1978 amendment was coupled with a commitment by the federal government to provide 75% of the funding necessary to pay for required removal of non-conforming billboards adjacent to interstate highways. Okay—sounds good---so how much money has been appropriated? The answer is, currently none. There are no appropriations available for federal assistance to states or municipalities who may wish to pay billboard owners to require them to remove existing non-conforming billboards.

Conclusion

While the Highway Beautification Act's provisions for planting of wildflowers along interstate highways may still enhance the aesthetics of our interstate highway system, it is clear that the billboard regulation and removal provisions of the Highway Beautification Act of 1965 have fallen way, way short of the purposes and intentions of those who passed the Act. It seems quite unlikely in today's world that an effective revisiting of these purposes will ever be achieved by the federal government.

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