

Pennsylvania Supreme Court Rules on Zoning of Billboards

Township of Exeter v. Zoning Hearing Board of Exeter Township

In the Exeter Township Zoning Ordinance, the term “Advertising Sign” was defined as a sign directing attention to a business elsewhere than upon the premises where the sign is displayed—an off-site sign or billboard, in common parlance. While the township did allow “Advertising Signs” to be constructed in the commercial and industrial zoning districts of the township, the maximum size of any proposed off-site sign was limited to 25 square feet per side.

Facts

A billboard company known as Land Displays, Inc. obtained rights from various property owners to construct billboards along the portion of U.S. Route 422 within Exeter Township, and thereafter filed a challenge to the validity of that portion of the Exeter Township Zoning Ordinance which limited the size of off-premises signs to 25 square feet. Land Displays, Inc. based its validity challenge, filed with the Township Zoning Hearing Board, on the allegation that the 25-square foot maximum area for off-premises signs constituted a de facto exclusion of billboards. Land Displays submitted evidence that in the “national outdoor advertising industry,” the standard billboard size was either 300 square feet or 672 square feet, quite a departure from the 25-square foot maximum allowed in Exeter Township.

The township submitted evidence to the Zoning Hearing Board, however, that there were several existing 25-square foot Advertising Signs along Route 422 in Exeter Township, and that any larger size would have an adverse impact on aesthetics and traffic safety along Route 422. The speed limits along that highway vary from 40 MPH to 55 MPH.

The Zoning Hearing Board concluded that the 25-square foot size limitation was “grossly deficient when compared with the national standards” and that “national advertisers will not purchase billboard space on 25 square foot signs.” Thus, the Zoning Hearing Board sustained the validity challenge as filed by Land Displays, Inc. The Zoning Hearing Board granted partial “site specific” relief, allowing certain 300-square foot billboards to be constructed by Land Displays, Inc. The Zoning Hearing Board also recommended that the township, through the services of a qualified expert, establish a sliding scale of billboard sizes relating to the location and roadway circumstances (allowing larger billboards along the Route 422 bypass) and to establish a separation distance of 1200 feet between permissible billboards.

The Berks County Court affirmed the decision of the Zoning Hearing Board, and thereupon the township appealed to Commonwealth Court, which reversed the decision. Land Displays, as an additional party to the Commonwealth Court proceedings, filed a Petition for Allowance of Appeal to the Pennsylvania Supreme Court, the

Court thereupon accepting the case for final review.

Decision

The Supreme Court first reviewed the two types of exclusion, noting that here, where “Advertising Signs” (off-premises signs) are permitted, the validity challenge is based upon the alleged de facto exclusion where “the challenger alleges that an ordinance appears to permit a use, but under such conditions that the use cannot in fact be accomplished.”

In this regard, the use alleged to be excluded was “industry-standard billboards”—a concept that is narrower than the broader concept of “off-premises signs.” (For example, off-premises signs could include directional signs to a local business, rather than a national advertising sign.)

The Court noted that billboards are considered to be a legitimate business use “not objectionable per se” (each municipality must provide for billboard usage within its borders).¹

¹ *The door is always open for municipalities to try to establish extraordinary justification for exclusion of legitimate uses. In fact, the Supreme Court’s Order at the end of its decision was to remand the matter back to the Commonwealth Court with respect to the analysis of the township’s aesthetic and*

The Supreme Court was then left to decide what size (assuming 25 square feet is de facto exclusionary) will suffice to avoid the stamp of de facto exclusion of billboards. On this issue, the Court elected not to rule, but rather stated:

“Industry size standards are not automatically controlling in determining what size sign restriction can be deemed de facto exclusionary. ... The 300 square foot industry minimum was a matter of industry standardization, and not necessarily the absolute minimum size necessary to make a billboard effective in serving its communication purpose and thus economically viable.” 962 A.2d at 662.”

The Court essentially discounted both the township’s claim that since it already had 25-square foot off-premises signs on its roadways it was not exclusionary of billboards, and the Land Displays’ argument that only a 300-square foot sign or larger would meet industry standards. Thus, the Court stated:

“This case does not require us to determine what size a sign must be to function as a billboard. We only consider whether the record established that a 25 square foot sign does not. ...

We do not conclude that a zoning ordinance must allow for signs that meet national industry size standards in order to avoid being labeled a de facto exclusion of billboards.” 962 A.2d at 663 – see footnote 8.

Comment

The general concepts here discussed by the Pennsylvania

Supreme Court are not new. In fact, billboards have been considered a legitimate business use since the 1965 decision in *Norate Corp. v. ZBA of Upper Moreland Township*, 417 Pa. 397, 207 A.2d 890 (1965). The case does break new ground, however, in applying the doctrine of de facto exclusion to billboards. Many municipalities are working on zoning ordinance revisions to deal with the de facto exclusion issue, and at the same time, at least in southeastern Pennsylvania, companies such as Land Displays, Inc. and other billboard companies are looking for loopholes to obtain approvals for more, larger, and strategically located billboards.

An analysis of the issue, however, should begin with a fundamental premise that off-site signs in general, and billboards in particular (as a category of off-site signs), are “principal uses,” just like retail stores, restaurants and offices. Most of us think of signs as accessory uses, and surely they are when they are on the same premises as the business to which they relate. But when a billboard is constructed, advertising some national brand or other off-site business, it cannot be conceived as accessory to anything and, thus, constitutes a principal use.

Ordinances often specify that only one principal use per lot may be approved, as part of a land development plan. There is no reason why a municipality in its zoning ordinance cannot require a billboard to be the sole principal use of a commercial property. This

leads, of course, to the question of setback and lot size for such usage. The courts have not weighed in on this issue, but it is a fair judgment that requiring a large lot for a single billboard—let’s say a half acre for the sake of argument—would in turn be challenged as de facto exclusionary. Just as the Supreme Court has left open the question of just where a size limitation crosses the line to constitute de facto exclusion (somewhere between 25 square feet and 300 square feet), the question of a reasonable lot size and setback requirement for billboards is an entirely open issue.

The case also leaves open the concept of varying the maximum permissible size for billboards according to the local conditions. Foremost among the local conditions, it would seem, is the speed limit of the road to which a proposed billboard would be adjacent. Where a central business district is located on a road with a 25-mile per hour speed limit, a smaller maximum size requirement would seem to be more reasonable than on a more open highway, with a 55-mile per hour limit.

The proverbial bottom line is that (i) billboards cannot be excluded, either facially or by unreasonable regulation, in any municipality’s zoning ordinance, and (ii) the Court’s refusal to endorse “national billboard standards” as the determining factor in regulating the size of billboards leaves room for municipalities to make their own “judgment calls” as to what maximum size may be reasonable. ☐