

## TARENTUM BOROUGH ZONING HEARING BOARD

**APPEAL BY:** AMERICA FIRST ENTERPRISES, LLP  
d/b/a OLIVER OUTDOOR

**DATE OF DECISION:** JUNE 29, 2020

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The Zoning Hearing Board of the Borough of Tarentum held a public hearing on June 29, 2020 at the Tarentum Borough Council Chambers, 318 East Second Avenue, Tarentum, Allegheny County, Pennsylvania 15084 to hear a remand from the Court of Common Pleas of Allegheny County by Order of Court issued by the Honorable Joseph James to the limited issue of whether the Tarentum Borough Zoning Ordinance is *de facto* exclusionary.

### SUMMARY

The Zoning Hearing Board of the Borough of Tarentum, after COVID-19 related delays, held a public meeting on June 29, 2020 on the limited specific issue of whether the Tarentum Borough Zoning Ordinance is *de facto* exclusionary. As part of the official record, the Board accepted the following exhibits:

1. Board Exhibit R-1 – Order of Court of the Honorable Joseph James dated December 3, 2019;
2. Board Exhibit R-2 – Proof of legal advertising for the proposed March 26, 2020 Zoning Hearing;
3. Board Exhibit R-3 – Proof of legal advertising for the cancelled March 26, 2020 hearing;

4. Board Exhibit R-4 – Proof of legal advertising for the June 29, 2020 Zoning Hearing;
5. Borough of Tarentum Exhibit R-1 – Transcribed minutes of the regular Council meeting of the Borough of Tarentum dated February 18, 2013;
6. Borough of Tarentum Exhibit R-2 – Draft zoning map of Borough of Tarentum;
7. Appellant Exhibit R-A – Containing proposed sign site plan, photos of site and surrounds, Tarentum Zoning Ordinance, Tarentum zoning map, Section 265-401, Section 265-409, Section 265-502, Section 265-702, Section 265-406 and Wooster CV and photos with proposed sign illustration;
8. Appellant Exhibit R-B – Chapter 265-406 RFO – Riverfront Overlay and RRO – Rural Resource Overlay District;
9. Appellant Exhibit R-C – Chapter 265-406 RFO – Riverfront Overlay and RRO – Rural Recourse Overlay District.
10. Appellant Exhibit R-D – Section 265-401 – Authorization of Districts.

Following a hearing on the merits of the matter, with all parties being heard and having the opportunity to present and cross examine witnesses, the Zoning Hearing Board of the Borough of Tarentum, Allegheny County, Pennsylvania found, factually, and concluded as a matter of law, that the Zoning Ordinance of the Borough of Tarentum was not *de facto* exclusionary and sets forth their opinion as follows:

### **FINDINGS OF FACT**

The Board finds as follows:

1. That the remanded hearing is from an Order of Court in the matter of America First Enterprises, LLP d/b/a Oliver Outdoor, Appellant, versus the Zoning Hearing Board of the

Borough of Tarentum, Appellee, at Allegheny County Civil Division Case SA 19-000483. Order issued on December 3, 2019 by the Honorable Joseph James. (The Order of Court was entered into the record as Exhibit Board R-1.)

2. The subject hearing was advertised in the Trib Total Media, Valley News Dispatch edition originally, on March 11 and March 18, 2020 (Notice of Hearing entered into the record as Exhibit Board R-2).

3. Due to the impact of COVID-19, the hearing originally scheduled for March 26, 2020 was cancelled. Notice of said cancellation having been published in the Trib Total Media, Valley News Dispatch edition on March 20, 2020 (Notice of advertising entered into the record as Exhibit Board R-3).

4. The hearing was rescheduled for June 29, 2020 and notice of said hearing was published in the Trib Total Media, Valley News Dispatch edition, on June 12 and June 19, 2020. (Proof of advertising entered into the record as Exhibit Board R-4.)

5. The Order of Judge Joseph James, dated December 3, 2019 states as follows: “And now, this 3<sup>rd</sup> day of December, 2019, it is ORDERED AND DECREED that this matter is remanded to the Zoning Hearing Board for an evidentiary hearing to determine whether the zoning *order* is *de facto* exclusionary. (Emphasis added.)

6. By agreement between the Borough of Tarentum, Intervenor, and Appellant, First American Enterprises, LLP d/b/a Oliver Outdoor, it was determined that the Zoning Hearing Board should interpret the order *to determine whether the zoning ordinance is de facto exclusionary*. (T-12 L-10-24.)

7. Jerome Oliver testified for the Appellant, American First Enterprises, LLP d/b/a Oliver Outdoor and stated that he filed the application because he “believed that the Zoning

Ordinance would permit it because it doesn't permit them anywhere, so I believed.” (T-24 L-17-19.) Mr. Oliver testified under questioning from his legal counsel that he believes that he was entitled to seek a billboard permit even though they were not expressly permitted in the CC District. (T-24 L-21-25.)

8. Charles Wooster was called as a witness in his capacity as a Professional Engineer registered in the Commonwealth of Pennsylvania as well as Ohio and West Virginia specifically, as a Professional Traffic Operations Engineer, working with the firm David E. Wooster & Associates.

9. Upon Tarentum Borough's request for an offer of proof, it was determined that the testimony was being presented to seek site-specific relief testifying from a traffic perspective regarding why the location should be deemed reasonable and not injurious to the public health, safety and welfare in terms of traffic, said testimony was not accepted by the Zoning Hearing Board.

10. The Zoning Hearing Board determined that his testimony was not relevant for the remand hearing as all parties agreed that the sole purpose of the hearing was to determine whether the ordinance was in fact *de facto* exclusionary.

11. That America First Enterprises, LLP d/b/a Oliver Outdoor called no additional witnesses on direct examination in the case in chief portion of the remand hearing.

12. In support of their position on remand, America First Enterprises, LLP d/b/a Oliver Outdoor submitted the following exhibits:

- a. Appellant R-A (a notebook evidencing proposed sign site plan, photos of site and surrounds, the Tarentum Zoning Ordinance, the Tarentum Zoning Map, Section 265-401 Authorized Zoning Districts, Section 265-409 RC District, Section 265-502 Specific Conditional Use Standards, Section 265-702 Signs, Section 265-406 and Wooster CV and photos with proposed sign illustration.)

- b. Appellant R-B – Section 265-406 RFO Riverfront Overlay and RRO – Rural Resource Overlay District provisions from the Borough of Tarentum Zoning Ordinance Ecode360.com.
- c. Appellant R-C – Section 265-406 RFO Riverfront Overlay and RRO – Rural Resource Overlay Districts.
- d. Appellant R-D – Tarentum Borough Ordinance Section 265-401 – Authorization of Districts.

13. Michael Nestico testified on behalf of the Borough of Tarentum in his capacity as Borough Manager.

14. Mr. Nestico testified that he has been Borough Manager since January of 2018 and is the keeper of the official records of the Borough of Tarentum.

15. Mr. Nestico testified that he had the opportunity to look at the records and review the prior minutes and documents of the municipality relative to the Zoning Ordinance of the Borough of Tarentum.

16. Mr. Nestico testified that there are two different versions of the Borough Zoning Ordinance, one identified through an independent company, Ecode360, and one, located on the Borough website which was provided to the Board as Section 3 of the Exhibit Appellant R-A and was the Zoning Ordinance originally provided to Appellants at the time of application.

17. Mr. Nestico testified that Tarentum Borough held a public hearing on January 12, 2012 and ultimately adopted Zoning Ordinance 12-02 which contained language concerning a Riverfront Overlay District and a Rural Resource Overlay District where billboards were permitted; however, Mr. Nestico further indicated that the language was only in effect for about one year at which point the Borough amended 12-02 to remove said language from that Section and to place it into a new Section that was called Roadway Commercial District, RC District. (T-38 L-5-14.) Mr. Nestico testified that a public hearing was held in 2013 to adopt Zoning Ordinance 13-03;

referencing Exhibit Borough R-1, minutes of the regular Council meeting of February 18, 2013, Mr. Nestico indicated that said ordinance was adopted on February 18, 2013.

18. Mr. Nestico testified that the amendments identified three primary changes and, reading from the regular Council minutes stated “the first change is per the citizens who live northwest of new Route 28 in West Tarentum. They wanted the Rural Resource Overlay removed and the new Ordinance so removes it. It will not longer be in existence. That per the Planning Commission’s recommendation. The second is to add a district called the Roadway Commercial District. That district, and I don’t know if you can see it well in here and that district goes from Bakerstown Road out towards Cedar Street. It doesn’t go very deep, 750 feet deep, and it encompasses a couple vacant lots along Cedar and goes to Bakerstown Road and it goes further from there and explains a third change which is not relevant related to adult videos.” (T-40 L-22-25; T-41 L-1-13.) Mr. Nestico further testified from the minutes of February 18, 2013 “the language where we can regulate billboards which was removed from the RRO was in fact added the Roadway Commercial District where we can add – let’s see, we can add a permit fee on resolution of Council, height and width regulations that we had in the prior Ordinance. So, they are in this just in another place.” (T-42 L-2-9.)

19. Mr. Nestico testified further that the prior Borough Solicitor, in addressing the Tarentum Borough Council responded to a question of Council, “how far from Bakerstown Road are we talking?” to which he replied “to Bakerstown Road, this Roadway Commercial District starts at Bakerstown Road and goes East toward Bullcreek Road to Cedar Street, and its 750 feet deep and just that wide.” (T-43 L-11-17.)

20. Mr. Nestico further testified that during the same Council meeting “the Councilman asks “Why are we changing that? What’s the reason for that?” The Solicitor responds “to put billboards in.” (T-43 L-21-24.)

21. Mr. Nestico testified, further, from the Council meeting transcripts, which he identified were of actual transcripts of the Council meetings, wherein it is stated “Mr. Grimm had three proposals and this is actually the 4<sup>th</sup> and was a compromise on his part to put that there.” (T-44 L-6-8.)

22. Mr. Nestico further testified that in 2014, the Zoning Ordinance was again revisited at which time the Council amended 409-E in which they expanded the size of billboards from 42 feet to 48 feet. (T-46 L-12-18.)

23. Mr. Nestico acknowledged inconsistencies or mistakes in the Tarentum Zoning Ordinance but indicated that “you can put a billboard in the Roadway Commercial District along the Route 28 corridor. You know, that has been done since this Ordinance was fully adopted and amended.” (T-49 L-22-25.) Mr. Nestico testified that there has been one billboard placed in the Roadway Commercial District since the enactment of the Ordinance amendments in 2014 which said application was approved by the Council of the Borough of Tarentum. (T-50 L-23-25; T-51 L-1.)

24. The Borough admitted Exhibit Borough R-2 a draft zoning map of Tarentum Borough, Allegheny County.

25. Mr. Nestico testified that discrepancies existed between the official Zoning Ordinance of the Borough of Tarentum and the version identified on the website owned by Ecode360.

26. Mr. Nestico further testified that references to Section 265-406 in the RRO – Rural Resource Overlay District on Ecode360 were inaccurate.

27. Mr. Nestico indicated that during his tenure as Manager changes were not provided to Ecode360 to amend the documents because the Borough is in the process of preparing a new Zoning Ordinance.

28. Mr. Nestico testified that Ecode360 remains on the Borough website because they cannot simply remove the one Ordinance or one document and stated “we have Ordinances – the entire Borough Code is listed on there, so 265 Chapters, obviously not all-inclusive, but there are a number of documents on there.” (T-64 L-1-5.)

29. Anthony Bruni testified for the Borough of Tarentum as the Code Enforcement and Zoning Officer.

30. Mr. Bruni testified that he is aware of multiple billboard applications for property near the Tarentum bridge, including an application filed regarding property identified as the Weleski property.

31. Mr. Bruni testified that the application was denied by the Zoning Hearing Board.

32. Mr. Bruni testified that there was a second request for a variance filed by Brian Marra who owns a business adjacent to the Weleski property.

33. Mr. Bruni indicated that the Zoning Hearing Board denied the Marra application for variance.

34. Mr. Bruni testified that Ross Grimm filed an application with the Borough of Tarentum for a billboard on the Route 28 corridor within the Borough of Tarentum.

35. Mr. Bruni did not believe that the Grimm matter was heard before the Zoning Hearing Board.

36. Mr. Bruni indicated that a permit was issued for the Grimm billboard on the Route 28 corridor.

37. Mr. Bruni testified that if an application was presented in the Roadway Commercial District for a billboard and as long as the plan specifications met all other terms of the Ordinance it would go through without the need for a Zoning Hearing. (T-74 L-14-19.)

38. Ross Alan Grimm testified. Mr. Grimm testified that he applied for a sign permit for a property that he owns along the Route 28 corridor in 2014.

39. Mr. Grimm testified that he met with the “Zoning Officer, Council. The property was zoned Highway Commercial, which permitted the LED billboard.” (T-78 L-12-16.)

40. Mr. Grimm testified that he did receive the billboard permit without proceeding before the Zoning Hearing Board. (T-78 L-17-25.)

41. On cross-examination, Mr. Grimm testified that his application was presented in the RC Highway Commercial District and that the billboard is on property that he owns in said district.

42. Michael Nestico was recalled testifying and testified that the application of Ross Grimm was presented in the form of zoning application or billboard application on July 24, 2015.

43. Mr. Nestico testified that he doesn’t have the exact date that the billboard was granted.

### **CONCLUSIONS OF LAW**

The Board concludes, as matter of law, as follows:

1. That Tarentum Borough possesses one official Zoning Ordinance, said Zoning Ordinance having been provided to the applicants at the time of application and said Ordinance having been made part of Appellant’s Exhibit R-A (tab 3).

2. That the Borough of Tarentum engaged the services of Ecode360 for the production of an online code of all Ordinances of the Borough of Tarentum and has not updated Ecode360 for a number of years.

3. That the Borough is unable to remove the Zoning Ordinance from Ecode360, as the Borough does not own the website and cannot control partial content to remove the Zoning Ordinance without removing the entirety of the Code of the Borough of Tarentum.

4. That the Council of the Borough of Tarentum, in 2013, enacted Ordinance 13-03 to permit billboards in the Highway Commercial District (RC District) along the Route 28 corridor.

5. That the Borough of Tarentum Zoning Ordinance was further amended in 2014 by action of the Council of the Borough of Tarentum to expand the size of permitted billboard in the RC District from 42 feet in width to 48 feet in width.

6. That the Tarentum Borough Zoning Ordinance in Section 265-401(F) recognizes Roadway Commercial Districts.

7. That the lot, piece or parcel of land in the appeal of Oliver Outdoor is situate in the CC Commercial District.

8. That the Commercial Center, CC District, identified in Section 265-402 of the Zoning Code of the Borough of Tarentum, does not identify billboards as a permitted use.

9. That Tarentum Borough Code Section 265-502(B) provides for billboards as a conditional use in the C-3 Heavy Commercial District and sets forth design and location criteria.

10. That Section 265-409(B)(12) of the Tarentum Borough Code identifies billboards as a permitted use in the RC, Roadway Commercial District.

11. That Section 265-409(E) provides that billboards are authorized permitted uses in the RC District, either as a principal or accessory use, subject to Pennsylvania Department of

Transportation (PennDOT) regulations where such billboard is proposed on the land abutting a Commonwealth owned and maintained right-of-way and the following standards:

- (a) Billboard may not exceed forty-two feet (48') in width and 14 feet (14') in height. (Error noted.)
- (b) Billboards may not be illuminated after 1:00 A.M. or before 6:00 A.M.
- (c) Billboards may not be placed closer than 500 feet (500') from any point on another billboard.
- (d) An annual billboard permit fee shall be paid to the Borough, upon inspection, at a rate set by Council for resolution, as may be amended from time to time.

12. That Section 265-409(E)(1) identifies in writing billboard size of “forty-two” however, in numerical form identifies 48 feet (48') within the same provision.

13. That, in accordance with the testimony of Mike Nestico, the correct and approved size for billboards in the RC District would be 48 feet.

14. The Board concludes that no Zoning Hearing for the application of Ross Grimm for the placement of a billboard in the RC, Route 28 Corridor District was ever held by the Zoning Hearing Board of the Borough of Tarentum.

15. The Board concludes, pursuant to the testimony of Ross Grimm that no hearing was held on the application for billboard presented by Ross Grimm and that the same was granted either by action of the Code Officer or by action of the Borough Council without a hearing or legal proceeding.

16. That the Borough of Tarentum does not *de facto* prohibit billboards within the Borough of Tarentum as evidenced by the placement and location of the Grimm billboard in the RC District.

17. That the applicant, America First Enterprises, LLP d/b/a Oliver Outdoor filed their application in the CC District which has never been a permitted location for the placement of billboards in the Borough of Tarentum, nor was said area ever contemplated as part of an Overlay District for the placement of the billboards.

18. The Borough concludes as a matter of law that the unintentional omission of the RC District on the official map is ministerial in nature and does not affect the validity of 265-409(e).

### **DISCUSSION AND DECISION**

Pennsylvania law presumes that zoning ordinances are “valid and constitutional, [and] thus places a heavy burden on anyone challenging the ordinance to prove contrary.” *Benham v. Board of Supervisors of Middletown Twp.*, 22 Pa.Cmwlth. 245, 349 A.2d 484, 487 (Pa.Comm. Ct. 1975); *Ficco v. Board of Supervisors of Hempfield Twp.*, 677 A.2d 897, 899 (Pa.Comm. Ct. 1996). “This presumption can be overcome by proof that the ordinance totally excludes an otherwise legitimate use.” *Farrell v. Worcester Twp. Bd. of Supervisors*, 85 Pa.Cmwlth. 163, 481 A.2d 986, 989 (Pa.Comm. Ct. 1984). Exclusionary ordinances take two forms: *de jure* and *de facto*. *De jure* exclusion exists where “the ordinance, on its face, totally bans a legitimate use.” *Farrell*, 481 A.2d at 989. *De facto* exclusion exists “where an ordinance permits a use on its face, but when applied acts to prohibit the use throughout the municipality.” *Id.*; see *Borough of Edgewood v. Lamanti's Pizzeria*, 124 Pa.Cmwlth. 325, 556 A.2d 22, 24 (Pa.Comm. Ct. 1989).

It must first be considered whether the challenging party has overcome the presumed constitutionality of an ordinance by showing it excludes billboards as a use. *Id.* If it is determined that the challenger has done so, then the Court considers whether the municipality has salvaged the ordinance by presenting evidence to show that the exclusionary regulation bears a substantial

relationship to the public health, safety, morality or welfare. *Id.* Furthermore, in *Realty Enterprises, LLC v. Marple Township*, 213 A. 3d 333 (Pa. Cmwlth. 2019), the Commonwealth provided that the change to a zoning map was merely a ministerial task that had no effect on the validity of the Ordinance, which was properly enacted and recorded. Therefore, the failure of a township to revise its zoning map did not render zoning ordinance ineffective. *Id.*

This hearing was the result of a remand from the Court of Common Pleas of Allegheny County on the limited issue of whether the Zoning Ordinance of the Borough of Tarentum is *de facto* exclusionary. During the hearing, the Borough of Tarentum presented testimony from the Borough Manager, Mike Nestico, regarding official Borough records identifying actions of Borough Council through transcripts of actual Borough meeting wherein, the Council of the Borough of Tarentum amended the Zoning Ordinance of the Borough of Tarentum to identify billboards as a permitted use in the RC District along the Route 28 corridor. The Borough Manager further identified expansions of the billboard Ordinance in subsequent 2014 Ordinances to expand the size from 42 feet in width to 48 feet in width. The Borough of Tarentum also presented the compelling testimony of Ross Grimm who testified that he was granted a permit for the placement of a billboard without the necessity to appear before a Zoning Hearing Board or any other governing body and that the approval was granted either directly by a Code Officer or by the Council of the Borough of Tarentum without any quasi-judicial proceeding.

Overall, Section 265-409(E) of the Borough code, which appears in the official Borough Code supplied to and relied upon by the Appellant, provides that billboards are an authorized permitted use in the RC District. Pursuant to the testimony of Mr. Nestico and Ross Grimm, it was accepted that Mr. Grimm erected a billboard in the RC District. Mr. Grimm's billboard application was granted either by action of the Code Officer or by action of the Borough Council, i.e. without a

hearing or legal proceeding. Accordingly, the Zoning Hearing Board concludes that there is a valid ordinance which permits billboards in the RC District of the Borough of Tarentum, a place where there is in fact a permitted billboard erected. Therefore, the Zoning Ordinance of the Borough of Tarentum in regard to billboards is not *de facto* exclusionary.

The Board acknowledges that the RC District does not appear on Borough's official zoning map. However, as Mr. Nestico testified, the regular Council minutes from February 18, 2013 (the minutes pursuant to the adoption of the RC District) outlined "the first change is per the citizens who live northwest of new Route 28 in West Tarentum. They wanted the Rural Resource Overlay removed and the new Ordinance so removes it. It will no longer be in existence." A map titled "Draft Zoning Map" was admitted into the record by the Borough, which the Board determines accurately reflects the RC District as described in the February 13, 2018 minutes.

Based upon the ordinance and testimony, it becomes apparent that RC District falls along the Borough's Corridor of Route 28, where there is a billboard already in place. There is case law to support that an error in a map is a ministerial error which should not alter the validity of an ordinance. *Realty Enterprises, LLC v. Marple Township*, 213 A. 3d 333 (Pa. Cmwlth. 2019). Thus, the Board has determined that the unintentional omission of the RC District on the official map is ministerial, and it does not affect the validity of 265-409(E).

In summation, the Tarentum Zoning Hearing Board finds that the Zoning Ordinance of the Borough of Tarentum in regard to billboards is not *de facto* exclusionary.

### **CONCLUSION AND ORDER**

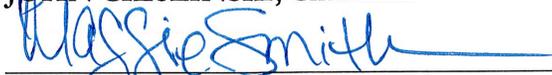
And now this 29<sup>th</sup> day of June, 2020, the Zoning Hearing Board of the Borough of Tarentum, following an evidentiary proceeding, determines that the Zoning Ordinance of the

Borough of Tarentum is not *de facto* exclusionary as to the issue of the placement of billboards within the Borough of Tarentum.

BY THE BOARD:



JOHN CIESLINSKI, Chairman



MAGGIE SMITH



TIM KUHN



CYNTHIA KRAMER



ROLAND FIGURE