

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

AMERICA FIRST ENTERPRISES LLP d/b/a OLIVER OUTDOOR, CIVIL DIVISION
Oliver Outdoor,

Appellant,

SA-20-000433

v.

ZONING HEARING BOARD OF THE
BOROUGH OF TARENTUM,
PENNSYLVANIA,

Appellee.

**NOTICE OF APPEAL OF LAND USE
DECISION**

Filed on behalf of Appellant,
**America First Enterprises, LLP d/b/a Oliver
Outdoor**

Counsel of Record for this Party:

APPELLEE:

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ALLEGHENY COUNTY, PA

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA
CIVIL DIVISION

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| AMERICA FIRST ENTERPRISES LLP d/b/a |) | |
| OLIVER OUTDOOR, |) | |
| |) | |
| Appellant, |) | No: |
| |) | |
| v. |) | |
| |) | |
| ZONING HEARING BOARD OF |) | |
| BOROUGH OF TARENTUM, |) | |
| PENNSYLVANIA, |) | |
| |) | |
| Appellee. |) | |

NOTICE OF APPEAL OF LAND USE DECISION

Appellant, America First Enterprises LLP, d/b/a Oliver Outdoor, and incorrectly designated below as American First Enterprises (hereinafter referred to as “Oliver Outdoor” or “Appellant”), by and through its undersigned counsel, hereby files the within Appeal pursuant to 53 P.S. § 11001-A, et seq., from the August 13, 2020 written decision of the Tarentum Borough Zoning Hearing Board, following a remand by the Court of Common Pleas in Case No. SA 19-000438 as follows:

1. Appellant is an equitable owner of an easement in a certain parcel of property located at 107 E. Fourth Street in the Commercial Center or CC zoning district of the Borough of Tarentum, Allegheny County, Pennsylvania (hereinafter referred to as the “Property”).
2. Appellee is the Zoning Hearing Board for the Borough of Tarentum, Allegheny County, Pennsylvania, with a business office located at 318 E. Second Ave, Tarentum, Pennsylvania 15084 (hereinafter referred to as “Appellee”, “Board” or the “ZHB”).
3. On May 29, 2019, the ZHB voted to deny Appellant Oliver Outdoor’s appeal of a determination of the Zoning Officer to deny its Application for a Permit for an illuminated pole sign with two faces. A copy of a June 10, 2019 letter from the ZHB (the “2019 ZHB

Decision”), transmitting to Appellant Oliver Outdoor the so-called “Conclusions of Zoning Hearing Board” following the May 29, 2019 vote, is attached as **Exhibit A**.

4. On June 27, 2019, Appellant duly filed a Land Use Appeal of the 2019 ZHB Decision to the Allegheny County Court of Common Pleas at Case No. SA 19-000438 (hereinafter referred to as the “First Land Use Appeal”), the averments of which are incorporated herein by reference as if fully set forth at length. A copy of this First Land Use Appeal is attached as **Exhibit B**.

5. After the parties had submitted briefs and presented their positions at argument before the Court, the Court then issued an order on December 3, 2019, remanding the case to the ZHB for another evidentiary hearing as to whether the Borough’s Zoning Ordinance was de facto exclusionary. A copy of the Remand Order is attached as **Exhibit C**.

6. After several delays, including but not limited to the interruptions caused by the current COVID 19 pandemic, the ZHB held an evidentiary hearing on June 29, 2020 pursuant to the Remand Order, and voted at the end of the same hearing that the Zoning Ordinance was not de facto exclusionary.

7. Subsequent to the evidentiary hearing on remand, the ZHB issued another written Decision which it had dated June 29, 2020 but was not transmitted to Appellant until August 13, 2020. (hereinafter “2020 ZHB Decision”) A copy of the August 13, 2020 email transmission of this Decision to Appellant’s counsel, with the 2020 ZHB Decision itself, is attached as **Exhibit D**.

8. At the remand hearing before the ZHB, Appellant Oliver Outdoor once again provided evidence of the inherent conflicts and contradictions throughout the Borough’s Zoning Ordinance regarding billboards, which as a result, rendered the Zoning Ordinance de facto exclusionary.

9. In addition, the Borough also submitted evidence at the hearing, which actually supported Appellant's consistent position throughout these proceedings, that the "Official" Zoning Ordinance and Official Zoning Map provided to the public does not indicate any property which is zoning for billboard use, and thus is de facto exclusionary.

10. In particular, Appellant submitted evidence to the ZHB establishing that, the Official Zoning Ordinance authorizes the following base zoning districts:

- (a) Commercial Center, CC;
- (b) Highway Commercial and Manufacturing District, HC-M;
- (c) Mixed Density Residential District, R-2;
- (d) Single Family Residential District R-1;
- (e) Public District, P-1; and
- (f) Roadway Commercial District, RC.

See, Section 265-401, "Authorization of Districts," attached to the First Land Use Appeal as its Exhibit 5.

11. Section 265-401 also enumerates certain overlay districts which are authorized, namely: a) RFO Riverfront Overlay, and b) Floodplain District; but no other zoning districts or overlay districts are authorized under Section 265-401.

12. "Billboard" is defined by the Zoning Ordinance as "A sign, upon which advertising matter of any character is printed, posted or lettered, which is erected upon a property bearing no establishment or principal building." Section 265-202, Definitions.

13. Appellant further submitted evidence that, of the zoning districts expressly authorized by Section 265-401 of the Zoning Ordinance, only the RC Roadway Commercial District permits the use of a billboard as a permitted use; this would be a permitted use, not a

conditional use, in that district. Section 265-409, attached to the First Land Use Appeal as its Exhibit 6.

14. However, the Official Zoning Map attached to the Zoning Ordinance published and sold by the Borough to the public shows that there is no property zoned in the RC or Roadway Commercial District; indeed, the RC district cannot be found anywhere on the Official Zoning Map. See, First Land Use Appeal's Exhibit 1.

15. Later in the Zoning Ordinance, under the provisions dealing with Specific Conditional Use Standards, Section 265-502(B) states that "billboards are authorized as a conditional use as follows in the C-3 heavy commercial district on otherwise vacant parcels of land....." A copy of Section 265-502(B) is attached as the First Land Use Appeal's Exhibit 7 (Emphasis added).

16. The Official Zoning Ordinance, however, does not have an authorized zoning district of C-3, nor does the Official Zoning Map show that district, or any property being zoning C-3. See Exhibit 1 of the First Land Use Appeal.

17. Later in the Zoning Ordinance, under Article VII for Signs, General Standards, Section 265-702(I) states "Billboards, as defined, shall be permitted in the RRO Rural Resource Overlay District. (See Section 265-406, Subsection F.)" A copy of Section 265-702(I) is attached as First Land Use Appeal's Exhibit 8.

18. But there is no Section 265-406, Subsection F, nor are there any regulations in the Official Zoning Ordinance for the so-called" RRO Rural Resource District." A copy of Section 265-406 is attached as First Land Use Appeal's Exhibit 9.

19. While the Zoning Map attached to the Official Zoning Ordinance does appear to indicate an additional overlay district called the "RRO Rural Resource (sic) Overlay" within the R-1 Single Family Residential District, this alleged RRO Rural Resource Overlay District is not

authorized by Section 265-401, and the Zoning Ordinance does not contain any regulations regarding this District, other than the sole stray reference to it in the Sign Regulations in Section 265-702(I) (which in turn refers to a regulation Section 265-406(F), which does not exist). See First Land Use Appeal's Exhibit 1, 5, 8 and 9.

20. Thus, under the current Official Zoning Ordinance's hard copy published by the Borough and sold to the public, there is no property in the Borough which is authorized for the use of billboards (illuminated or otherwise).

21. Based upon an inspection of the Borough's ordinance record book and the Official Zoning Ordinance provided to the public, it is impossible for the public to discern what property would be authorized for the use of billboards.

22. Mr. Oliver, on behalf of Appellant Oliver Outdoor, testified at the remand Hearing that he had been in the sign industry since 2004, had been involved in other matters and cases involving exclusionary zoning, and based upon his review of the Zoning Ordinance and experience in the outdoor advertising industry, he believed he was permitted to seek a permit for the Property since "because it doesn't permit them anywhere, so I believed, to, that it would permit them anywhere because of that." See, e.g., June 29, 2020 Transcript of the remand Hearing, relevant portions of which are attached as **Exhibit E** (hereinafter "Transcript"), p. 21 ll. 12-17; p. 24 ll. 12-25; p. 25 ll. 7-9.

23. Additionally, at the remand Hearing, the Borough Manager testified that, having only held his position since 2018, he had undergone "research" into Borough records regarding the Zoning Ordinance subsequent to Appellant's First Land Use Appeal, and acknowledged there was "**a lot of confusion**" regarding the same. Transcript p. 33 ll. 2-25; p. 34 ll. 1-25; p. 35 ll. 9-16 (emphasis added).

24. At the remand Hearing, the Borough Manager also admitted that yet another version of the Zoning Ordinance made available on the Borough's official website through a link to a web-based service called eCode360, was indeed "inaccurate" and contained numerous provisions which conflicted with those in the hard copy Official Zoning Ordinance sold to the public. Transcript p. 36 ll. 16-25, p. 59 ll. 21-25, p. 60 ll. 1-25, p. 61 ll. 1-25.

25. The Borough Manager further admitted that a document presented to this Court by counsel for the ZHB during argument regarding the First Land Use Appeal, in support of the ZHB's assertion that Section 265-406 did contain provisions for the RRO Rural Resource Overlay District in opposition to Appellant's position, was in fact inaccurate, and conceded that the RRO District was no longer supposed to exist. June 29, 2020 Transcript, p. 60 ll. 8-25, p. 61 ll. 1-21.

26. The Borough Manager further admitted that these inaccuracies continue even as of the day of the remand Hearing in 2020, and, despite knowing of the conflicts between the Zoning Ordinances on the Borough website, the Borough has not removed the link to eCode 360 to the inaccurate version of the zoning ordinance. Transcript, p. 62 ll. 2-25; p. 63 ll. 22-25; p. 64 ll. 1-25; p. 65 ll. 1-7.

27. The Borough thus has admitted that there is a clear ambiguity regarding the billboard provisions of the Zoning Ordinance.

28. The Borough Manager also testified that he had discovered minutes from a public hearing of the Borough in 2013, which discussed the removal of the RRO district with the new RC District, and that according to the minutes, the new RC District was significantly different from, and did not include the same areas. Transcript, p. 59 ll. 9-20 ("Q. So that's a big change? A. Sure.")

29. The Borough Manager admitted he had not spoken with the solicitor present at the hearing in 2013, nor anyone else at that hearing. Transcript, p. 58 ll. 20-25; p. 59 ll. 1-8.

30. The Borough Manager acknowledged that the so-called minutes from this 2013 meeting were not kept with the Borough's ordinances. Transcript, p. 66 ll. 4-6.

31. The Borough Manager also testified that he had elsewhere "located" a draft zoning map, which purportedly related to the 2013 minutes and showed the area of the new RC district.

32. The Borough Manager further admitted this "draft zoning map", purportedly illustrating the RC District, was not kept with either the Borough's minutes nor the official ordinances. Transcript p. 53 ll. 17-25; p. 54 ll. 1-16. ("Q. Where [was the draft map] in the borough files? A. I don't know specifically. We came upon it **after kind of digging and researching and trying to gather --- put the pieces of the puzzle together**, as you referenced earlier.")(emphasis added).

33. The Borough Manager was not present at the 2013 public hearing, nor did he speak with the then solicitor or any other official in attendance; he also admitted that the Borough's engineers also could not authenticate this "draft" zoning map he had uncovered somewhere in the Borough's files. Transcript p. 55 ll. 11-24.

34. The Borough Manager further admitted that this "draft zoning map" would not have been made available to any member of the public requesting a copy of the zoning ordinances;

Q. Just to be clear, the document you've identified as the Draft Zoning Map that you had found, that's not kept with the ordinances in the borough's office, is it?

A. No, because as you saw, in the back of the main published book that we have is, you know, an incorrect map.

Q. So anyone coming in and asking for a copy of the ordinance will not see this?

A. They will now, obviously after going through this process and learning of the existence of this map, but no, you know, when the applicant came in, whenever it was, a year and a half ago, we sat down, we spoke about the different districts and things like that where a billboard could go in, I didn't have that map at that time.

So we discussed, again, what the text of the ordinance said, which you, know, doesn't ----

Q. In fact, you didn't even know about this at this time?

A. Oh, that's right.

June 29, 2020 Transcript p. 67 ll. 10-25, p. 68 ll. 1-7. (emphasis added)

35. As the Borough's own Manager could not at the time of the instant Application discern what, if any properties were zoned RC, it was clearly impossible for Appellant or any other member of the public to do so.

36. A de facto exclusion exists where an ordinance appears to permit a use on its face, but when applied, acts to prohibit the use throughout the municipality. See., e.g., Macioce v. Zoning Hearing Board of Borough of Baldwin, 850 A.2d 882, 887 (Pa.Comm. 2004).

37. The current Zoning Ordinance is de facto exclusionary regarding the use of billboards, based upon the ordinance documents made available to the public by the Borough.

38. Any reasonable examination of the Borough's Zoning Ordinance and Official Map by a member of the public, as well as the Borough's official ordinance record book, would not have "answered the puzzle" created by the conflicting Zoning Ordinance provisions (as well as the link to the admittedly inaccurate eCode 360 version of the Zoning Ordinance prominently featured and promoted on the Borough's own website), and would not have revealed the location of any properties for which billboards would have been permitted.

39. Since "billboards are not objectionable per se, a blanket prohibition on billboards without justification cannot pass constitutional muster." Township of Exeter v. Zoning Hearing Board, 599 Pa. 568, 962 A.2d 653 (2009).

40. Here, there is no property publicly identified in any authorized district which is permitted the use of a billboard: the sole authorized district is the RC District, but there is no property zoned in the RC District, as per the “official” Zoning Map and the Zoning Ordinance, or elsewhere in the Borough’s ordinance record.

41. There also is absolutely no evidence in the hearing record from the Borough or other objector, showing that such an exclusion bears a substantial relationship to the public health, safety, morality or welfare.

42. The Zoning Ordinance, with its de facto exclusion of the use of billboards, is invalid and unconstitutional.

43. It was an error of law and an abuse of discretion for the Board not to find a de facto exclusion of billboards under the Zoning Ordinance, particularly given the Borough Manager’s admission of the myriad of conflicting and contradictory provisions regarding billboards.

44. It is further an error of law and abuse of discretion for the Board to find the conflicts between the Official Zoning Map, and the “draft” zoning map, together with the Zoning Ordinance, were simply mere “ministerial error.”

45. Contrary to the findings and conclusions of the 2020 Written Decision, it is not apparent to the public what, if any, areas would be in the RC District, and an inspection of the official ordinance books – even the records of past meeting minutes – would not resolve the conflict, particularly since the geographic boundaries of old RRO District and the allegedly new RC District are not the same and are different and distinct.

46. The ZHB erred as a matter of law in relying upon the case of Realty Enterprises LLC v. Marple Township, 213 A.3d 33 (Pa.Commw. 2019) to conclude these conflicting provisions and map were simply a “ministerial error”, where the zoning ordinance in that case

was not subject to a de facto exclusion claim but rather a procedural defect claim to invalidate the ordinance, where the appellant also had actual knowledge of the amendment at issue but chose to wait to challenge, and where the case also did not involve the myriad of conflicting provisions within the ordinance itself as is here, such that was impossible for a member of the public to discern whether billboards could be properly placed on any property.

47. It was also an error of law and abuse of discretion for the ZHB to conclude the zoning ordinance was not de facto exclusionary here, based upon the testimony of Ross Grimm obtaining a billboard permit for his property at some point, where Mr. Grimm himself could not recall when he obtained the permit, and only recalled his property was zoned “highway commercial”, and where the Zoning Officer testified he was not involved with that application, and also did not know whether the Grimm property was zoned RC or RRO at the time, and where the Borough Manager further testified that council minutes showed Mr. Grimm had been trying to put a billboard on his property since at least 2010 (when it was zoned RRO and permitted under the prior ordinance) but had filed for an application in 2015, and no documents regarding that application were presented into evidence to the ZHB.

48. It was an error of law and an abuse of discretion to find that the zoning ordinance was not de facto exclusionary, based upon denials of other variance applications for billboards, where there is no evidence that any of those variance applications raised the issue of the Zoning Ordinance’s de facto exclusion of billboards.

49. Given the Zoning Ordinance’s improper exclusion of a legitimate use on its face, the “sole remedy is to allow the use somewhere in the municipality and equity dictates that this opportunity fall to the successful litigant.” Lamar Advertising of Penn, LLC v. Zoning Hearing Board of the Borough of Deer Lake, 915 A.2d 705, 710 (Pa. Commw. 2007).

50. The conclusions in the Zoning Officer's Denial are erroneous, inaccurate, and should be overruled.

51. Likewise, the conclusions in the 2019 ZHB Decision and the 2020 ZHB Decision are erroneous, inaccurate, and should be overruled.

52. Notwithstanding the evidence showing the de facto exclusion of the billboard use under the current Zoning Ordinance, and the inability of the public to discern what, if any, property was within the RC District, the ZHB erroneously held that the Zoning Ordinance was not de facto exclusionary.

53. The 2020 ZHB Decision is not supported by substantial evidence, was erroneous, constitutes an abuse of discretion and is contrary to law.

54. The 2020 ZHB's Decision is arbitrary, capricious and without support in law or fact.

55. Appellant appeals the decision of the Tarentum ZHB for each of the following additional reasons.

56. Appellant's protected financial, property and due process rights were substantially and materially affected by the Tarentum ZHB's decision.

57. Statements, actions and decisions by the Tarentum ZHB and the Zoning Officer in connection with Appellant's use of this Property violated Appellant's constitutional and due process rights afforded Appellant by virtue of the United States and Pennsylvania Constitutions.

58. The Tarentum ZHB's June 29, 2020 Decision, issued to Appellant on August 13, 2020, was arbitrary, capricious, and discriminatory.

59. The Tarentum Borough Zoning Ordinance, in whole or in part, is unconstitutional and invalid.

60. The Tarentum Borough Zoning Ordinance is invalid, in that it does not permit the use of billboards anywhere in the Borough on its face, and is therefore de facto exclusionary.

61. The Borough failed to present to the ZHB any evidence that such an exclusion has a substantial relationship with public health, safety, morality or general welfare.

62. The ZHB further erred in refusing to permit Appellant to present evidence that the proposed location would not endanger or threaten public health, safety, morality or general welfare, when it wrongfully excluded Appellant's expert witness, Charles Wooster, P.E.

63. Pursuant to Section 603.1 of the Pennsylvania Municipalities Planning Code, any doubt in the interpretation of any restriction of a zoning ordinance shall be interpreted in favor of the property owner and against any implied extension of the restriction, 53 P.S. §10603.1.

64. The ZHB erred in failing to interpret the restrictions of the Zoning Ordinance here in favor of Appellant.

65. Appellant is entitled to site-specific relief from the Court under Section 1006-A of the MPC. Adams Outdoor Advertising v. Hanover Township Zoning Hearing Board, 633 A.2d 240 (Pa.Commw. 1992)(where there was a de facto exclusion of billboards in zoning, and township failed to produce evidence that would show the proposed sign would be injurious to the public health, safety and welfare of its citizens, court should have ordered township to issue sign permit as requested by appellant).

66. The Borough has to date failed to present any evidence at either hearing before the ZHB that would show the proposed sign would be injurious to the public health, safety and welfare of its citizens, and thus Appellant is entitled to site-specific relief as requested in its application.

67. The Tarentum Borough Zoning Ordinance is impermissibly ambiguous, vague, contradictory, incapable of objective criteria and violative of the United States and Pennsylvania Constitutions.

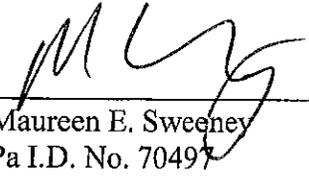
68. Appellant challenges the validity of the Tarentum Borough Zoning Ordinance on the basis that it is exclusionary, impermissibly vague, contradictory, incapable of objective criteria and violative of the United States and Pennsylvania Constitutions and the MPC.

WHEREFORE, Appellant America First Enterprises LLP d/b/a Oliver Outdoor respectfully requests that this Honorable Court sustain its appeal, vacate the 2019 and 2020 Decisions of the Zoning Hearing Board for the Borough of Tarentum, and further direct the Tarentum officials to issue a permit as outlined on the Application as site specific relief, authorized by Section 1006-A of the MPC.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

Submitted by: Appellant, America First Enterprises, LLP
d/b/a Oliver Outdoor

Signature: /s/ Maureen E. Sweeney

Name: Maureen E. Sweeney, Esquire

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