

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

CIVIL DIVISION

**AMERICA FIRST ENTERPRISES d/b/a
OLIVER OUTDOOR,**

Appellant,

v.

**ZONING HEARING BOARD OF THE
BOROUGH OF TARENTUM,**

Appellee.

) **CASE NO: SA-19-000438**
) **SA-20-000433**
)

) **CONSOLIDATED TO:**
) **CASE NO: SA-19-000438**
)

) **TYPE OF PLEADING:**
) **APPELLEE’S BRIEF IN SUPPORT OF**
) **JUNE 10, 2019 AND JUNE 29, 2020**
) **DECISIONS OF THE BOROUGH OF**
) **TARENTUM ZONING HEARING**
) **BOARD**
)

) **FILED ON BEHALF OF APPELLEE,**
) **ZONING HEARING BOARD OF THE**
) **BOROUGH OF TARENTUM**
)

) **COUNSEL OF RECORD FOR THIS**
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)	CASE NO: SA-19-000438
Appellant,)	SA-20-000433
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vs.)	CONSOLIDATED TO:
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Appellee.)	
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APPELLEE’S BRIEF IN SUPPORT OF JUNE 10, 2019 AND JUNE 29, 2020 DECISIONS OF THE BOROUGH OF TARENTUM ZONING HEARING BOARD

AND NOW, comes the **ZONING HEARING BOARD OF THE BOROUGH OF TARENTUM** by and through its attorney, **LARRY D. LOPERFITO, ESQUIRE** and the law firm of **GEARY, LOPERFITO & GENERELLI, LLC** and presents the following Brief in Support of the June 10, 2019 and June 29, 2020 decisions of the Borough of Tarentum Zoning Hearing Board. When the Borough of Tarentum is discussed, it shall be referred to as the “Borough”.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

On May 29, 2019, the ZHB held a public hearing on Appellant’s Application for a Permit to erect an illuminated pole sign with (2) two, 20 (twenty) LED faces on a forty-eight (48) inch diameter pole, to be located within an easement allegedly granted by the owner of the particular parcel of land and located adjacent to the Tarentum Bridge and within the Borough’s Commercial Center District of the Borough (hereinafter referred to as the CC District). The proposed illuminated sign was to be situate only five (5) feet adjacent to the Tarentum Bridge and a mere

ten (10) feet above the road and with billboard dimensions of 14 feet in height and 48 feet in width for visible signage totaling 672 square feet on each side of the proposed sign. The Zoning Officer denied Appellant's Application based on the location presented and Appellant appealed said determination to the ZHB.

On May 29, 2019, following the presentation of testimony, the ZHB, relying, in part, upon §265-402 of the Borough's Zoning Code and upon the lack to substantial testimony in support of a variance or perceived special exception, denied Appellant's Application on the basis that billboards are not a permitted use within the CC District. ***§265-402(c) Zoning Ordinance of Borough of Tarentum***. The ZHB determined the record did not support the necessary and required elements of §265-1404 and §265-1405 of the Borough's Code. Following their vote, the ZHB issued a written decision dated June 10, 2019, which was sent to Appellant. The decision of the ZHB made clear that "illuminated billboards are not permitted in the CC Zone and are permitted only in certain overlay districts". ***ZHB Decision of May 29, 2019, Conclusion 11***.

On June 27, 2019, Appellant filed a Land Use Appeal of the ZHB's denial of its Application to the Allegheny County Court of Common Pleas at Case No. SA-19-000438 (hereinafter referred to as the "First Land Use Appeal"). On December 3, 2019, the matter was remanded back to the ZHB, by Order of Court issued by the Honorable Joseph James, to conduct an evidentiary hearing on the limited issue of whether the Borough's Zoning ordinance is de facto exclusionary in regard to the placement of billboards in the Borough. Due to the impact of COVID-19, the hearing scheduled for March 26, 2020 was cancelled. Notice of said cancellation was advertised in the Trib. Total Media and the Valley News Dispatch edition on March 20, 2020. On June 29, 2020, the ZHB of the Borough held the rescheduled public hearing to hear the remand from the Court of Common Pleas on the limited issue of whether the Zoning Ordinance is de facto exclusionary. At

the time of the remanded proceeding, all parties and interested persons and entities were heard on the specific remanded issue and were afforded the opportunity to present relevant evidence and cross examine witnesses. The ZHB issued findings of fact and conclusions of law and factually found and concluded that the Zoning Ordinance was not de fact exclusionary, said decision dated June 29, 2020.

In its decision, the Board found 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 3rd 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, §265-401 Authorized Zoning Districts, §265-409 RC District, §265-502 Specific Conditional Use Standards, §265-702 Signs, §265-406 and Wooster CV and photos with proposed sign illustration.)

b. Appellant R-B – §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 – §265-406 RFO Riverfront Overlay and RRO – Rural Resource Overlay Districts.

d. Appellant R-D – Tarentum Borough Ordinance §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 no 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 4th 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 §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.

In addition, the ZHB Concluded as follows:

- 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).
- 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.
- 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.
- 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.
- 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.
- That the Tarentum Borough Zoning Ordinance in Section 265-401(F) recognizes Roadway Commercial Districts.
- That the lot, piece or parcel of land in the appeal of Oliver Outdoor is situate in the CC Commercial District.
- 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.

- 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.
- That Section 265-409(B)(12) of the Tarentum Borough Code identifies billboards as a permitted use in the RC, Roadway Commercial District.
- 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.
- 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.
- That, in accordance with the testimony of Mike Nestico, the correct and approved size for billboards in the RC District would be 48 feet.
- 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.
- 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.
- 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.

- 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.
- 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).

II. STANDARD OF REVIEW

When the lower court does not take any additional evidence, this court’s scope of review “is limited to determining whether the local governing body committed an error of law or an abuse of discretion.” *Marshall v. Charlestown Twp. Bd. of Supr’s*, 169 A.3d 162,167-68 (Pa. Commw. Ct. 2017). “An abuse of discretion will only be found where the zoning hearing board’s findings are not supported by substantial evidence.” *Id.* Substantial evidence is defined as “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Id.* (citing *Valley View Civic Assoc’n v. Zoning Bd. of Adjustment*, 462 A.2d 637, 640 (1983)). It is specifically noted that no further requests for testimony, post remand have been presented to the Court.

A zoning hearing board is the ultimate judge of credibility and resolves all conflicts of evidence. *DiMatteo v. Millcreek Twp. Zoning Hearing Bd.*, 147 A.3d 969, 974 (Pa. Commw. Ct. 2016) (citing *Eichlin v. Zoning Hearing Bd. of New Hope Borough*, 147 A.2d 1173,1175 (Pa. Commw. Ct. 1996)). If the zoning hearing board’s findings of fact are based upon substantial evidence, those findings of fact are binding upon this court for purposes of appellate review. *Id.* at 947. The court’s responsibility in judicial review is not to draw independent inferences from [the record] either to support a reversal or to affirm the granting of the special exception.” *Mill-Bridge Realty, Inc. v. Zoning Bd. of Adjustment*, 286 A.2d 483, 486 (Pa. Commw. 1972). When the evidence can support either result, this court may not usurp the Board’s duty to pass upon the factual validity of the evidence presented. *Id.*

III. LEGAL ARGUMENT

A. **THE ZHB PROPERLY DENIED APPELLANT’S REQUEST FOR A VARIANCE AT THE INITIAL MAY 29, 2019 PROCEEDING AS THE VARIANCE REQUEST WAS NOT SUPPORTED BY ADEQUATE EVIDENCE.**

§265-1404(b) of the Zoning Code of Tarentum Borough (hereinafter referred to as the “Code”) expressly states:

“The Board shall grant a variance, only when findings of fact are supported by all of the following where relevant in a given case and therefore constitute an unnecessary hardship inflicted by this Chapter:

1. That there are unique physical circumstances or conditions, including irregularity, narrowness, or shallowness of lot size or shape, or exceptional topographical property and that the unnecessary hardship is due to such conditions and not the circumstances or conditions generally created by the provisions of this Chapter in the neighborhood in which the property is located.
2. That because of such physical circumstances or conditions, there is no possibility that the property can be developed in strict conformity with the provisions of this Chapter and that the authorization of a variance is therefore necessary to enable the reasonable use of the property.
3. That such unnecessary hardship has not been created by the appellant.
4. That the variance, if authorized, will not alter the essential character of the neighborhood in which the property is located, nor substantially or permanently impair the appropriate use or development of adjacent property, nor be detrimental to the public welfare.
5. That the variance, if authorized, will represent the minimum variance that will afford relief and will represent the least modification possible of the regulation in issue. (Code of Borough of Tarentum Section 265-1404).”

See the Zoning Code of Tarentum Borough §265-1402(B)(1)-(5).

The Pennsylvania Supreme Court has repeatedly held that “reasons for granting a variance must be substantial, serious, and compelling.” *Valley View Civic Association v. Zoning Bd. of Adjustment*, 462 A.2d 637, 640 (Pa. 1983) (citing *Girsh Appeal*, 263 A.2d 395 (Pa. 1970)). It is well established that the party seeking a variance bears the burden of establishing the elements

required for granting a variance are met. *Id.* “An applicant’s burden is a *heavy* one, and a variance should be granted sparingly and only under exceptional circumstances.” *Rittenhouse Row v. Aspite*, 917 A.2d 880, 885 (Pa. Commw. Ct. 2006) (citing *Appeal of Lester M. Prange, Inc.*, 6747 A.2d 279 (Pa. Commw. Ct. 1994)). Applicants requesting a variance must provide adequate evidence to establish each of the necessary elements to support its application on record. *Doris Terry Revocable Living Trust v. Zoning Bd. of Adjustment of Cty Pittsburgh*, 873 A.2d 57, 64 (Pa. Commw. Ct. 2005). In *Doris*, the Commonwealth Court held that an applicant requesting a variance did not present evidence on each of the relevant criteria and, thus, the applicant did not prove the necessary hardship. *Id.* Absent sufficient evidence to support each of the required elements needed for a variance, a zoning board does not have the discretion to grant a variance. *Id.* at 63.

Additionally, the owner of a property cannot create a hardship and then request a variance to remedy the same. *Arter v. Philadelphia Zoning Bd. of Adjustment*, 916 A.2d 1222, _ (Pa. Commw. Ct. 2007). In order to establish an unnecessary hardship, an applicant for a zoning variance must prove that either the physical characteristics of the property are such that the property could not be used for any permitted purpose or only for a permitted purpose at prohibitive expense or that the characteristics of the property are such that it would have no value or only distress value for any use approved by the zoning ordinance. *Bernotas v. Zoning Hearing Bd. of City of Bethlehem*, 68 A.3d 1042 (Pa. Commw. Ct. 2013); *Solebury Tp. v. Solebury Tp. Zoning Hearing Bd.*, 914 A.2d 972 (Pa. Commw. Ct. 2007); *Rittenhouse Row v. Aspite*, 917 A.2d 880 (Pa. Commw. Ct. 2006).

Pursuant to the requirements of the Tarentum Zoning Code, §265-1404(B)(1-5), a variance shall only be granted when findings of fact are supported by all of the required subsection of the

code provisions and must constitute an unnecessary hardship inflicted by this chapter. For the following reasons, the ZHB argues it did not abuse its discretion, nor did an error of law occur, because Appellant failed to meet its heavy burden to satisfy the above listed requirements needed for the ZHB to have granted them a variance.

i. The Appellant failed to establish that their alleged hardship was the result of unique physical characteristics of the property.

Nowhere in the record is there any mention of any unique physical circumstances or conditions of the Appellant's property, which would render the property useless or profitless. Additionally, Appellant has failed to establish that due to the physical circumstances or conditions of their property, there is no possibility that it can be developed in strict conformity with the provisions of §265-402. While billboards are not a permitted use in the CC District, which is Appellant's proposed location for their billboard, Appellant's property (not owned by the Appellant by subject to an easement agreement only), located in the CC District, still remains suitable for the many other uses prescribed in §265-402 of the Code. Additionally, the property has consistently been developed in conformity with the provisions of the Chapter as no billboards are currently erected within this district and any and all requests to permit such a construction have been denied.

Because Appellant has failed to provide any sufficient evidence to support a finding that their alleged hardship is the result of unique physical characteristics of their property, Appellant has consequently failed to meet its burden. Appellants cannot contend. That the circumstances or conditions generally created by the provisions of the zoning code, in the neighborhood or district are sufficient to form a basis for a variance. Thus, the ZHB did not err as a matter of law in denying Appellant's application.

ii. The Appellant failed to establish that its alleged unnecessary hardship was not self-inflicted.

The Appellant is well aware that billboards are not a permitted use within the CC District. Billboards are however permitted in other Districts, such as the RC District. Thus, the ZHB argues the Appellant's alleged hardship is self-inflicted because billboards were never permitted where the leased property is located. Further, as established above, all of the available permitted uses remain available for the owners of the property and Appellant. While it is likely the Appellant will assert it is the zoning map defects which creates the unnecessary hardship, this argument would be misleading as it is the physical characteristics of the property in question to be considered not the physical characteristics of the borough at large.

iii. Appellant failed to establish that, if a variance had been authorized, it would not alter the essential character of the neighborhood in which the property is located.

Appellant failed to present sufficient evidence demonstrating their proposed billboard would not alter the essential character of the neighborhood where it would be placed, and therefore again failed to meet its burden. Conversely, there was evidence to support that the billboard *would* alter the essential character of the neighborhood. Specifically, a local resident testified, "We're a historic town and it's going to block part of the view of Tarentum as you come across the bridge, I think that's something that means a lot to us and it means a lot to the public". See the Zoning Hearing Transcript of May 29, 2019, P. 48, L. 21-24. Additionally, as set forth in §265- 402 of the Code, the purpose of the CC District is to promote the character and vitality of Tarentum's traditional downtown through the preservation of existing structures and development and redevelopment of commercial and residential structures and uses. Accordingly, the erection of a billboard that is not traditionally placed in that area would undoubtedly alter the essential character of the neighborhood. Therefore, Appellant has failed to establish that its proposed billboard would

not alter the character of the CC District, thus the Zoning Board did not err as a matter of law in determining as such.

- iv. The Appellant failed to establish that the variance, if authorized, would represent the minimum variance that will afford relief and will represent the least modification possible of the regulation in issue.*

Appellant failed to produce sufficient evidence to establish that the variance would represent the minimum variance necessary to afford them relief. Appellant did establish what it believed to be benefits the billboard would have on the community; however, this lacks relevance to the required substantial evidence that it must produce as Appellant failed to identify how its approval would represent a minimum variance. The record is devoid of evidence to support the allegation of Appellant. For this reason and the reasons set forth above, the Appellant clearly failed to meet the heavy burden necessary to establish that a variance should be granted. Therefore, the ZHB had no authority to grant a variance in this matter. Thus, the ZHB's denial of Appellant's application was proper.

B. THE CONCLUSIONS OF THE ZONING HEARING BOARD PROVIDED ON JUNE 10, 2019 COMPLY WITH SECTION 908 OF THE PENNSYLVANIA MUNICIPALITIES PLANNING CODE.

ZHB contends that the document entitled "Conclusions of Zoning Hearing Board" dated June 10, 2019, is sufficient to enable meaningful judicial review, and therefore, satisfies the requirements of §908(9) of the Pennsylvania Municipalities Planning Code ("MPC").

§908(9) of the MPC requires that "where an application for zoning relief is contested, the board's decision must be accompanied by findings of fact and conclusions, as well as the reasons for the findings." 53 P.S. §10908(9). Specifically, "a zoning board must render an opinion delineating sufficient findings to support its conclusions in order to provide for meaningful judicial review." *Borough of Youngsville v. Zoning Hearing Bd.*, 450 A.2d 1086, 1089 (Pa. Commw.

Ct. 1982). However, “there is no requirement that [the ZHB] cite specific evidence in support of each of its findings.” *Taliaferro v. Darby Twp. Zoning Hearing Bd.*, 873 A.2d 807, 816 (**Pa. Commw. Ct. 2005**). “a zoning board’s opinion is sufficient if it provides an adequate explanation of its resolution of the factual questions involved and sets forth its reasoning in such a way as to show its decision was. *Id.* (citing *Borough of Youngsville v. Zoning Hearing Bd.*, 450 A.2d 1086 (**Pa. Commw. Ct. 1982**)). So long as a board’s decision is clear and substantially reflects application of the law governing the matter, the decision is sufficient to enable effective review. *Id.* Moreover, “determination as to the credibility of witnesses and the weight to be given to evidence as to the credibility of witnesses and the weight to be given to evidence are matters left solely to the ZHB in performance of its factfinding role.” *Pennsy Supply, Inc. v. Zoning Hearing Bd.*, 987 A.2d 1243, 1248 (**Pa. Commw. Ct. 2008**) (citing *Borough of Youngsville v. Zoning Hearing Bd.*, 450 A.2d 1086, 1089 (**Pa. Commw. Ct. 1982**)).

However, should the court determine a board's findings of facts and conclusions of law to be insufficient as a matter of law, the board’s decision shall still be considered valid. The Commonwealth Court held “there is no doubt that the Code requires that the Board make findings, reach conclusions, and give reasons, but it does not mandate a decision in favor of the petitioners in the event that timely decision of the Board is not “accompanied” by the findings, conclusions, and reasons.” *Morgan v. Lower Salford Township Zoning Hearing Bd.*, 283 A.2d 95, 96 (**Pa. Commw. Ct. 1971**). The Commonwealth Court specifically held:

“It seems to us quite clear that when the Legislature uses the language that the decision must be accompanied by findings, conclusions and reasons, the decision itself is separate from them. Otherwise, the Legislature would have used language specifying that the decision must include findings, conclusions, and reasons. On the other hand, the Legislature could have quite

easily stated that if the Board failed to render its decision and accompany it with the required findings, conclusions and reasons within the required time, the decision would be deemed to be in favor of the applicant. It did not do so. . . . We cannot enlarge the plain language of Section 908(9) to invoke a result contrary to its provisions.” *Morgan at 96*.

Furthermore, the Commonwealth Court explicitly determined in *Mullen v. Zoning Hearing Board of Collingdale Borough*, “Precedent clearly indicates that a decision not supported by written facts and findings is still valid.” *Packard v. Commonwealth, 426 A.2d 1220, 1221 (Pa. Commw. Ct. 1981)*. In *Packard*, the Court concluded a letter stating an application was denied, which did not contain specific findings, and was prepared by the solicitor of the Board was sufficient to memorialize the decision made by the Board and satisfied the timeliness requirement and properly notified the applicant so he could take an appeal. *Id.*

The ZHB’s June 10, 2019 “Conclusions of Zoning Hearing Board” complies with the aforementioned standard, as the ZHB’s decision substantially reflects the application of the relevant law governing variances and special exceptions. Specifically, the Board clarified that its denial was based upon the fact that billboards are not a permitted use in the CC District and provided its findings to the Appellant of its decision within the required 45-day time period. Appellant failed to sufficiently establish the required elements needed to support a variance pursuant to §265-1404 of the Zoning Ordinance. Moreover, Appellant failed to sufficiently establish the necessary elements to support a special exception pursuant to §265-1405. As such, the ZHB’s June 10, 2019 decision must be upheld as valid, as it complies with the MPC. In the alternative, should the court determine the June 10, 2019 decision to be insufficient, it is nonetheless valid, as it sufficiently delineated its decision and allowed the Appellant to take an appeal.

C. APPELLANT FAILED TO MEET ITS HEAVY BURDEN TO DEMONSTRATE, THROUGH SUFFICIENT EVIDENCE, THAT THE ZONING ORDINANCE IS DE FACTO EXCLUSIONARY AS TO BILLBOARDS IN THE BOROUGH.

Municipalities, under their police powers, have “a significant interest” in regulating billboards and other advertising because they are seen from the street, can “distract drivers,” constitute “traffic hazards,” and the effects of billboards on development can harm an area. *Spriggs v. S. Strabane Twp. Zoning Hearing Bd.*, 786 A.2d 333, 336 (Pa. Commw. Ct. 2001). Generally, “a Municipality chooses to regulate signs under its zoning ordinance.” *Interstate Outdoor Adver., L.P. Zoning Hearing Bd.*, 39 A.3d. 1019, 1025 (Pa. Commw. Ct. 2012). “The zoning authority can establish rigorous objective standards in its ordinance for size, placement, materials or coloration of signs to ensure that their offensiveness is minimized as much as possible.” *Id.* (citing to *Atlantic Refining and Marketing Corp. v. Bd. of Commissioners of York Twp.*, 608 A.2d 592, 594 (Pa. Commw. Ct. 1992)). It is well established law in Pennsylvania that zoning ordinances are presumed to be valid. *Protect PT v. Penn Twp. Zoning Hearing Bd.*, 220 A.3d 1174, 1183 (Pa. Commw. Ct. 2019). A party challenging the validity of a zoning ordinance bears the heavy burden of establishing invalidity. *Id.* “In order to overcome this presumption of constitutionality, the challenger must demonstrate that the ordinance totally excludes an otherwise legitimate use.” *Interstate Outdoor Adver. V. Zoning Hearing Bd. of Warrington Twp.*, 39 A.3d. 1019, 1024-25 (Pa. Commw. Ct. 2012). “Unless the challenger demonstrates that the ordinance in question completely or effectively excludes a legitimate use, the challenger has failed to carry its burden.” *Id.*

“To prove total or effective exclusion of a permitted use, the challenger can show that the ordinance is either de jure or de facto exclusionary. *Id.* “A de jure exclusion exists where an ordinance, on its face, totally bans a legitimate use.” *Id.* On the other hand, “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.” *Id.* (emphasis added). “If the challenger meets this heavy burden, the burden then shifts to the municipality to show, though evidence, that the total exclusion ‘bears a substantial relationship to the public health, safety, morality, or welfare.’” *Twp. of Exeter v. Zoning Hearing Bd. of Exeter Twp.*, 962 A.2d 653, 661 (Pa. 2009). (Emphasis added.) Such a showing by the municipality will rescue an otherwise exclusionary ordinance from a constitutional challenge.

Appellant argues that the Zoning Ordinance, as applied, places a complete bar on the use of billboards in the borough and is therefore a de facto exclusion on billboards. This is inaccurate. The ZHB found and concluded that there is no de facto exclusion of billboards in the Borough, as proven by the existence of a substantial electronic billboard in the RC District, and further, that Appellant has failed to adduce any evidence demonstrating that the ordinance, as applied, acts to exclude billboards in the Borough. The ZHB asserts that the standard is not whether billboards are excluded in any specific district but must be excluded on a de facto basis, within the entire Borough in order for the court to find that the Borough has, in a de facto manner, excluded billboards within the Borough of Tarentum.

In *Interstate Outdoor*, an applicant appealed for permits to construct a two-sided, 50-foot-high billboard on two lots it leased in the township’s commercial district. The applications were denied because, pursuant to the ordinance, off premises signs were only permitted in the Planned Industrial Districts and could only be 25 feet high. *Interstate Outdoor*, 39 A.3d at 1021. The company appealed the Board’s decision to the trial court, arguing, that the provisions of the relevant zoning ordinance created a de facto exclusion of billboards in the township because they argued it was impracticable to build smaller billboards and sought site specific relief based on the

plans it had submitted. *Id.* Both the lower court and the Commonwealth Court held that there was substantial evidence to support the zoning board's finding that the ordinance did not constitute a de facto exclusion of billboards because there were existing billboards that complied with the ordinance within the Township and found that the company failed to meet its burden to prove that erecting a conforming billboard was economically impracticable. *Id.*

The first consideration here is whether Appellant has overcome the presumed constitutionality of the Zoning Ordinance by showing it totally excludes billboards as a use within the Borough. Contrary to Appellant's arguments, the Code does not exclude billboards as a use within the Borough. Pursuant to §265-702 of the Code, Billboards shall be permitted in the RRO Rural Resource Overlay District. In response to the Borough's solicitor question, "you are saying that billboards are permitted [within the Rural Resource Overlay]; the Appellant, through counsel, stated, "well there's one thing that says that's where billboards are permitted." See the Zoning Hearing Transcript, at P. 26, L. 9-13. In fact, there is an existing billboard already erected in this area within the area identified as the RC, Roadway Commercial District as identified in §265-409 of the zoning code of the Borough of Tarentum which is a permitted principal use in said zone or district.

Pursuant to §265-409 of the code, billboards are a permitted use within the RC District of the Borough, which was "designed to encourage innovative commercial development along the Borough's Route 28 corridor while retaining the essential characteristics of the region and protecting the Borough's natural features." Zoning Code of Borough of Tarentum, §265-409(A). Appellant's counsel acknowledged that the Borough does in fact have a zone where billboards are permitted. Appellant's counsel directly stated during the Zoning Hearing of May 29, 2019, "the most important thing I wanted to bring to your attention in our conversation this evening was that

the billboards you've already approved on Route 28 are reaching people who are zooming past Tarentum." *See* the Hearing Zoning Transcript of May 29, 2019, at P. 34, L. 20-24. Based upon the ordinance and recorded testimony, it is apparent that the RC District falls along the Borough's Corridor of Route 28, where a billboard already exists.

During the hearing of June 29, 2020, the Borough of Tarentum presented the testimony of Ross Alan Grimm. Mr. Grimm testified that he applied for and was granted a permit for the erection of an LED billboard for property which was zoned in the Highway Commercial District. Transcript of June 29, 2020, P. 78, L. 8-19. Mr. Grimm was asked directly if he was required to proceed through a quasi-judicial hearing in order to obtain his billboard permit and he clearly indicated that he was granted his billboard permit because the same was a permitted use. Zoning Hearing Transcript of June 29, 2020, P. 78, L. 20-25. Under cross-examination by legal counsel for America First Enterprises d/b/a Oliver Outdoor, Mr. Grimm was asked "but you don't know if the letters - - it was RC or RRO?" Zoning Hearing Transcript of June 29, 2020, P. 80, L. 5-6. Mr. Grimm clearly stated in response "it was RC - - it was Highway Commercial District." Zoning Hearing Transcript of June 29, 2020, P. 80, L. 7-8. This testimony, in conjunction with the provisions of the Zoning Ordinance provide clear and direct information, from the municipality and in direct testimony by an applicant that the Zoning Ordinance is not exclusionary and provides, within the Borough a zone or district where a billboard is a permitted use.

There are existing billboards within said district presently, granted by application and permit only and not through a quasi-judicial process, evidencing that the zoning ordinance, as applied, does not completely exclude the use of billboards in the Borough. Overall, the Appellant failed to show through sufficient evidence that the zoning ordinance is a de facto exclusion, and

therefore failed to establish they are entitled to site specific relief. Thus, the ZHB did not err in concluding as such.

D. THE ZONING HEARING BOARD’S DENIAL OF APPELLANT’S REQUEST FOR A SPECIAL EXCEPTION AT THE HEARING OF MAY 29, 2019 WAS PROPER AS APPELLANT’S REQUEST WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

Pursuant to Section 265-1405 of the Code, the ZHB is authorized to consider special exceptions. The Code specifically states:

“Special exceptions for nonconforming uses shall be evaluated by the following criteria at a minimum:

1. The impact of any proposed use on the neighborhood of which it is a part compared with the impact of the existing nonconforming use. A proposed use shall not present a greater adverse impact as compared with the existing use.
2. The impact of an expansion of the nonconforming use and the manner in which the expansion changes or redefines the impact of the current nonconforming use.
3. The extent to which a proposed expansion changes the scale of use such that the use itself may be changed such that it does not present an adverse impact on the neighborhood and district in which it is located. The expansion shall be considered a natural outgrowth necessary to the economic vitality and sustainability of the current nonconforming use.
4. The consistency of any proposed expansion with the current character of a neighborhood or district.
5. The change in parking required and traffic circulation associated with any proposed expansion or change in use.”

Zoning Code of Tarentum Borough §265-1405(C)(1)-(5).

“A petitioner who seeks a special exception must show that the proposed use is allowable under the terms of the ordinance which permits special exceptions.” *Lower Merion Twp. v. Enokay, Inc.*, 233 A.2d 883, 885 (Pa. 1967). As such, the applicant has the duty of presenting sufficient evidence that shows, at the time of the hearing, the applicant meets the ordinance

requirements and is entitled to the Special Exception. *Edgemont Township vs. Springston Lake Montessori School, Inc. and the Zoning Hearing Board*, 622 A.2d 418, 419 (Pa. Commw. Ct. 1993). “A special exception is properly denied if the applicant fails to carry his burden of establishing that the proposed use satisfied the requirements of the ordinance or where, even if such requirements are met, protestants can show that the proposed use would be adverse to the public health, safety and welfare.” *Hannon v. Zoning Hearing Bd. of the Cty of Wilkes-Barre*, 379 A.2d 641, 642 (Pa. Commw. Ct. 1977) (citing *Lower Merion Twp. v. Enokay, Inc.*, 233 A.2d 883 (Pa. 1967)). A local zoning board has the authority to analyze information that an applicant submits to determine whether the proposal for a special exception complies with the Ordinance’s requirements. *Overbrook Farms Club, et al. vs. Zoning Board of Adjustment of Philadelphia*, 405 A.2d 580, 583 (Pa. Commw. Ct. 1979). When presented with an application for a Special Exception, the Zoning Hearing Board should not grant a Special Exception if any part of the application can be shown to violate any of the Zoning Ordinance requirements in any respect. *Id.* at 581.

Appellant failed to set forth any evidence to adequately demonstrate that erecting a billboard in the CC District is a use consistent with the essential character of the community and neighborhood within that District, as set forth in § 265-1405 of the Code. As the court is limited to reviewing only the record in this case, it is apparent that the Board did not abuse its discretion. When the evidence can support either result, this Court may not usurp the ZHB's unfulfilled duty to pass upon the factual validity of the evidence presented. Due to Appellant’s failure to provide sufficient evidence in support of its request for a special exception, the ZHB’s denial was proper.

- i. Any discrepancies between the Ecode360 version of the Borough’s Zoning Ordinance and the accurate version do not, in and of themselves, demonstrate that the Zoning Ordinance is de facto exclusionary as to billboards.*

Appellant raises issue with the apparent discrepancies between the actual version of the Borough’s Zoning ordinance and the one listed on the website, Ecode360. Appellant uses this issue

to avoid the real issue at bar, which is that their proposed billboard was to be placed in the CC District, which in no way permits the use of billboards, and there is no overlay district that encompasses the CC District that does permit the installation of electronic billboards.

At the Zoning Hearing Board Hearing on May 29, 2019, multiple discussions were held on the record with regard to the specific language of the Zoning Ordinance and whether it applied to the CC District. The disagreement surrounded an apparent discrepancy within the Ordinance; however, the same did not impact whether any Overlay District encompassed the CC District. The CC District, clearly identified in the Ordinance as the Commercial Center, was designed with a purpose to promote the character and vitality of Tarentum's traditional downtown through "preservation of existing structures and development and redevelopment of commercial and residential structures and uses." **§265-402(a)**. The disagreement further encompassed the provisions of §265-406 wherein a disagreement arose regarding whether a subsection (f) existed. This RFO Riverfront Overlay District as identified in Section 265-406, was designed to encourage innovated development in conjunction with complimentary protection of the Borough's nature features and assets, including its riverfront and wooded hillsides. **Zoning Ordinance §265-406(a)**. During the June 29, 2020 evidencing hearing, Michael Nestico, Borough Manager, was called to testify by the municipality regarding the different versions of the Zoning Ordinance which were available for the proceedings. Mr. Nestico relied upon transcribe testimony from Borough Council meetings which provided the background and clarity of the official Zoning Ordinances adopted by Tarentum Borough. Mr. Nestico indicated in his testimony that on the Borough's website there are two different version of the Zoning Ordinance. Transcript June 29, 2020, P. 36, L. 16-17. Mr. Nestico further indicated that one version is directly Ecode360 and indicated "that's a service that the Borough will send their ordinance to in order to be published in a consolidated

data base.” Transcript June 29, 2020, P. 36, L. 19-22. Mr. Nestico further indicated that on the website is the Borough’s own “pdf and Word document version of the existing documents.” Transcript June 29, 2020, P. 36, L. 23-25. Mr. Nestico went on to testify that in 2012, the Tarentum Borough held a public hearing and ultimately adopted Zoning Ordinance 12-02. Transcript June 29, 2020, P. 37, L. 8-10. Mr. Nestico testified “that the Ordinance took effect, as I said, in 2012 and it contained language about a Riverfront Overlay District and a Rural Recourse Overlay District where billboards were permitted. That language was only in effect for about one year, at which point, the Borough amended that Ordinance to remove that language from the section and put it into a new section which they called the Roadway Commercial District. RC District.” Transcript of June 29, 2020, P. 38, L. 5-14. Mr. Nestico further indicated that in 2013, Tarentum Borough adopted Zoning Ordinance 13-03 and went on to detail, on pages 40 through 42 the changes to the Zoning Code and the detailed description of the area which formed the basis for the Roadway Commercial District. Transcript of June 29, 2020, P. 40-42. The ZHB asserts, that the testimony, clearly presented, sets forth the basis for the clear enactment of the provisions of the Zoning Code, legally enforceable within the Borough of Tarentum.

The Borough acknowledged the problems associated with Ecode360 and the fact that the Borough has not updated Ecode360 for a number of years, thereby creating a potential void in information on an independent service referenced on the Borough website. In his testimony, Mr. Nestico indicated “what they did was they stripped the RRO language out of 406 and they added it to what is now 265-409, RC, Roadway Commercial District, which includes all the language about the use and conditions for that particular property, and it references Section E where billboards are authorized. So that Section E in the 2012 Ordinance was actually listed under Section 406 in what was, at that time, Section F. So they removed it from 406, Section F and into

409-E keeping much of the language the same regarding billboards and other sorts of uses.”
Transcript of June 29, 2020, P. 45, L. 18-25; P. 46, L. 1-5.

Regardless of any discrepancies in the language between the inaccurate version of the Zoning Ordinance and the accurate one, the CC District does not provide for a permitted use for billboards. The relevant matter before the ZHB, and subsequently before this Court, is whether the Borough de facto excludes Billboards. As demonstrated by the existing billboards in the permitted districts and the express provisions of the Zoning Ordinance, the Borough does permit billboards in the RC District and the C-3 Heavy Industrial District. Thus, the discrepancies between the Ecode360 version of the Borough’s Zoning Ordinance and the accurate version do not, in and of themselves, demonstrate that the Zoning Ordinance is de facto exclusionary as to billboards.

ii. The administrative error regarding the Official Zoning Map does not, in and of its itself, demonstrate that the Zoning Ordinance is de facto exclusionary of billboards.

As discussed above, during the June 29, 2020 ZHB evidentiary hearing, Mr. Nestico testified to the discrepancies that exist between the official Zoning Ordinance of the Borough and the version identified on the website owned by Ecode360. The Borough is currently 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.

As Appellant expressly acknowledges in its Brief for its first Land Use Appeal, of the zoning districts expressly authorized by §265-401 of the Zoning Ordinance, only the RC Roadway Commercial District permits the use of a billboard as a permitted use, and not a conditional use. See §265-409(B)(12). However, despite the already existing billboards in the Borough RC District, Appellant argues that after a review of the Official Zoning Map attached to the Zoning Ordinance,

as inaccurately listed on Ecode360, there appears to be no property zoned in the RC District. Nevertheless, the fact the map does not reflect the RC District is ministerial error which should not alter the validity of the ordinance and does not alter the fact the CC District does not permit billboards.

In *Realty Enterprises, LLC v. Marple Township*, the Court 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. *Realty Enterprises, LLC v. Marple Twp.*, 213 A.3d 333, 337 (Pa. Commw. Ct. 2019). Therefore, the failure of a township to revise its zoning map did not render the zoning ordinance ineffective. *Id.*

Appellant notes the ministerial error concerning the Official Zoning Map failure to delineate any property zoned as to be in the RC District, however, that does not invalidate the fact §265-409(B)(12) of the Code identifies billboards as a permitted use in the RC District. That Section provides that billboards are authorized permitted uses in the RC District, either as a principal or accessory use, subject to Pennsylvania Department of Transportation regulations. *See* §265-409(E) of the Borough Zoning Code. Further, the defect in the Map does not invalidate the fact the CC District, which is where the Appellant's proposed billboard was to be placed, does not permit the use billboards.

As in *Realty Enterprises*, the Borough's Official Zoning Map's failure to portray any property zoned within the RC District is merely a ministerial error and it has no effect on the validity of the Ordinance, which was properly enacted and recorded by the Borough. Thus, this ministerial error does not in and of itself demonstrate that the Zoning ordinance is de facto exclusionary on the use of billboards in the Borough, as evidenced by the existing billboards already in place in the permitted Districts.

iii. The ZHB properly refused to consider Appellant's expert witness testimony on the basis that the testimony was irrelevant to the matter to be considered by the ZHB on remand.

On December 3, 2019, Appellant's appeal was remanded back to the ZHB, by Order of Court issued by the Honorable Joseph James, to conduct an evidentiary hearing on the limited issue of whether the Borough's Zoning ordinance is de facto exclusionary in regard to the placement of billboards in the Borough. Therefore, the relevant matter before the ZHB at the hearing held on June 29, 2020 was only whether the Borough de facto excludes billboards.

During the hearing, Appellant called Charles Wooster 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. Upon the Tarentum Borough's request for an offer of proof, it was determined that the testimony was being presented merely 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. This testimony was not accepted by the ZHB as it determined that the testimony was not relevant for the remand hearing as all parties agreed that the sole purpose of the hearing was to determine whether the Zoning Ordinance was in fact de facto exclusionary. Notably, Appellant called no additional witnesses on direct examination at the remand hearing.

The discussion regarding whether Appellant is entitled to site-specific relief and whether their proposed site was reasonable is a secondary consideration to be determined once the primary determination that a zoning ordinance is de facto exclusionary has been made. The evidentiary hearing was held strictly to determine if the zoning ordinance was de facto exclusionary. The ZHB properly refused to consider Appellant's witness testimony as the proposed testimony concerning

site-specific relief was irrelevant to the matter on remand. The ZHB ultimately determined the Zoning Ordinance is not de facto exclusionary, therefore Appellant is not entitled to site-specific relief.

iv. Appellant is not entitled to site-specific relief.

“Where a zoning ordinance acts as an exclusion of a legitimate use . . . ‘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 Bd. of the Borough of Deer Lake*, 915 A.2d 705, 710 (Pa. Commw. Ct. 2007) (quoting *Adams Outdoor Advertising v. Borough of Coopersburg Zoning Hearing Bd.*, 625 A.2d 768,770 (Pa. Commw. 1993). “When making its determination, the Court is faced with whether the proposed location “is reasonable, and not injurious to the public health, safety, welfare, and morals.” *Deer Lake*, 915 A.2d at 711.

At the time of the evidentiary ZHB hearing on June 29, 2020, Appellant was required to provide substantial evidence to support its position to position that the Zoning Ordinance is de facto exclusionary of billboards in the Borough. As established above, Appellant has failed to provide such evidence that the Borough completely excludes billboards as a use. Further, the ministerial errors regarding the official zoning map and discrepancies between the Ecode360 version of the Zoning ordinance and the accurate version do not in and of themselves, establish a de facto exclusion of billboards.

Contrary to Appellant’s position, there are billboards that already exist in the RC District, which is where billboards are a permitted use, as opposed to the CC District which prohibits the use of billboards. Based on the conclusion that the Ordinance is not de facto exclusionary as to billboards in the Borough, Appellant is therefore not entitled to site-specific relief.

IV. CONCLUSION

For above stated reasons, Appellee, the Zoning Hearing Board of the Borough of Tarentum, respectfully requests that this Honorable Court affirm the Zoning Hearing Board's June 10, 2019 and July 29, 2020 decisions and dismiss Appellant's appeal.

Date: _____

Respectfully submitted,

/s/ Larry D. Loperfito
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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that a true and correct copy of the foregoing *Appellees'* ***Brief In Support Of June 10, 2019 Decision Of Borough Of Tarentum Zoning Hearing Board*** has been served on the following individual via First Class United States Mail, postage pre-paid, on the 16th day of December, 2020:

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CERTIFICATE OF COMPLIANCE

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

LARRY D. LOPERFITO, ESQUIRE
PA Supreme Court I.D.#55841