

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Center Township :
 :
 v. : No. 2720 C.D. 2010
 : Argued: November 15, 2011
Center Township Zoning Hearing :
Board and Jerome P. Oliver, Sr. :
 :
Appeal of: Jerome P. Oliver, Sr. :

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE PELLEGRINI

FILED: December 9, 2011

Jerome P. Oliver, Sr. (Landowner) appeals from an order of the Court of Common Pleas of Butler County (trial court) vacating the Center Township Zoning Hearing Board's (Zoning Board) decision because it lacked jurisdiction to hear a substantive challenge filed after Center Township (Township) began the curative amendment process.

On April 20, 2009, Landowner filed five sign applications with the Township to erect five 12-foot x 24-foot billboards.¹ The zoning officer denied

¹ All of the signs proposed by Landowner would be freestanding signs and would be located in a C-1 zoning district with the exception of one located in an R-3 zoning district. **(Footnote continued on next page...)**

Landowner's applications because Section 20-1606-B of the Zoning Ordinance (Ordinance) totally excluded off-premises signs as a permitted use in the Township, including billboards.² On April 29, 2009, the Township Board of Supervisors determined that Section 20-1606-B of its Ordinance was substantively

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Landowner proposed that two of the signs would be V-shaped digital signs mounted on a unipole lighted by bulbs, for which the brightness could be adjusted. The signs would produce still images for multiple advertisers that would change every six to eight seconds. The other signs would not be digital and would be lighted externally by spotlights shining on them.

² Section 20-16.6 of the Ordinance deals with Prohibited Signs. It specifically provides:

The following signs are expressly prohibited unless specifically stated otherwise in this Ordinance:

16.6.1 Any sign which flashes, rotates, oscillates or has a motorized part that is visible from a public right-of-way.

16.6.2 Off premises signs, including billboards.

(Reproduced Record at 81a.)

Section 20-202.205 defines a "sign" as "any device, fixture, placard, or structure that uses any color, form, graphic, illumination, symbol or writing, to advertise, announce the purpose of, identify or to communicate information of any kind to the public."

Section 20-202.159 defines "off-premises sign" as "any sign that advertises or informs, in any manner, businesses, services, goods, persons or events, at some location other than that upon which the sign is located, including billboards."

Section 20-202.22 defines "billboard" as "an off-premises sign owned by a person, corporation or other entity that advertises an establishment, merchandise, service or entertainment which is not sold, produced, manufactured or furnished at the property in which the sign is located."

(Zoning Board's August 27, 2009 decision at 3.)

invalid and initiated the curative amendment process pursuant to Section 609.2 of the Pennsylvania Municipalities Planning Code (MPC), 53 P.S. §10609.2(1).³ On May 20, 2009, Landowner filed an appeal with the Zoning Board from the denial of his sign applications pursuant to Section 909.1(a)(3) of the MPC, 53 P.S. §10909.1(a)(3).⁴ He also filed a validity challenge to Section 20-1606-B of the

³ Act of July 31, 1968, P.L. 805, *as amended*, 53 P.S. §10609.2. This Section was added by Section 2 of the Act of October 5, 1978, P.L. 1067. Section 609.2 provides:

If a municipality determines that its zoning ordinance or any portion thereof is substantially invalid, it shall take the following actions:

(1) A municipality shall declare by formal action, its zoning ordinance or portions thereof substantively invalid and propose to prepare a curative amendment to overcome such invalidity. Within 30 days following such declaration and proposal the governing body of the municipality shall:

(i) By resolution make specific findings setting forth the declared invalidity of the zoning ordinance which may include:

(A) References to specific uses which are either not permitted or not permitted in sufficient quantity;

(B) Reference to a class of use or uses which require revision; or

(C) Reference to the entire ordinance which requires revisions;

(ii) Begin to prepare and consider a curative amendment to the zoning ordinance to correct the declared invalidity.

⁴ Added by Section 87 of the Act of December 21, 1988, P.L. 1329. That section provides that a zoning hearing board shall have exclusive jurisdiction to hear and render final **(Footnote continued on next page...)**

Ordinance pursuant to 53 P.S. §10909.1(a)(1)⁵ alleging that the Ordinance was a total *de jure* exclusion of off-premises advertising in general and to billboards in particular, and constituted a total *de facto* exclusion of “industry standard billboards” from the Township. The Township challenged the Zoning Board’s jurisdiction to hear the matter citing the Curative Amendment Pending Ordinance doctrine at 53 P.S. §10609.2(3).

By decision dated August 27, 2009, the Zoning Board determined that the Curative Amendment Pending Ordinance doctrine did not bar its jurisdiction because Landowner submitted his original sign applications before the Township initiated the curative amendment process and the Township’s Ordinance prohibiting billboard signs was *de jure* exclusionary, thus entitling Landowner to site specific relief. On October 14, 2009, the Township enacted the curative ordinance amendment. A second hearing was held by the Zoning Board on October 27, 2009, at which it determined that site specific relief was not all

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adjudications in the following matters: ... “(3) Appeals from the determination of the zoning officer, including, but not limited to, the granting or denial of any permit, or failure to act on the application therefore, the issuance of any cease and desist order or the registration or refusal to register any nonconforming use, structure or lot.”

⁵ 53 P.S. §10909.1(a)(1) provides:

The zoning hearing board shall have exclusive jurisdiction to hear and render final adjudications in the following matters:

(I) Substantive challenges to the validity of any land use ordinance, except those brought before the governing body pursuant to sections 609.1 and 916.1(a)(2).

encompassing and ordered that the proposed billboards had to abide by all other generally applicable zoning restrictions. Specifically, Landowner was not permitted to use flashing or digital signs and the billboards could only be illuminated by interior lighting or no lighting at all. The Township appealed to the trial court alleging that the Zoning Board lacked jurisdiction over the matter, and Landowner appealed regarding the site restriction requirements.

The trial court found that the Zoning Board lacked jurisdiction to hear the substantive challenge because, while Landowner filed his applications before the Township initiated proceedings to cure the Ordinance's total exclusion of billboards, it did not submit his validity challenge either by filing a direct filing to the Zoning Board under 53 P.S. §10909.1(a)(1) or by submitting his own curative amendment to the Township under Section 609.1(a) of the MPC, 53 P.S. §10609.1,⁶ and Section 909.1(b)(4) of the MPC, 53 P.S. §10909.1(b)(4),⁷ prior to

⁶ Added by Section 93 of the Act of June 1, 1972. That section provides:

A landowner who desires to challenge on substantive grounds the validity of a zoning ordinance or map or any provision thereof, which prohibits or restricts the use or development of land in which he has an interest may submit a curative amendment to the governing body with a written request that his challenge and proposed amendment be heard and decided as provided in section 916.1.

⁷ Section 909.1(b)(4) of the MPC provides:

(b) The governing body or, except as to clauses (3), (4) and (5), the planning agency, if designated, shall have exclusive jurisdiction to hear and render final adjudications in the following matters:

(Footnote continued on next page...)

April 29, 2009, when the Township declared the Ordinance provision illegal. Therefore, the Zoning Board had no jurisdiction to hear his substantive challenge after that date. This appeal by Landowner followed.⁸ Landowner is requesting that we remand the matter to the trial court for disposition of his appeal of his site-specific relief ordered by the Zoning Board.

When a landowner wants to challenge the validity of a zoning ordinance, he or she may do so under the MPC either by: (1) submitting a challenge to the Zoning Board under Section 909.1(a), which allows challenges except for those brought before the governing body pursuant to Sections 609.1 and 916.9(1)(2); or (2) by submitting a challenge to the governing body of the municipality under Section 909.1(b)(4) with a request for a curative amendment under Section 609.1. Under Section 609.1(a), a landowner may submit to the governing body a written request that his challenge and proposed amendment be heard and decided. Under Section 916.1, a landowner shall submit a curative amendment to the governing body with a written request for a curative amendment. The only caveat to these challenges is found in Section 609.2(3) which provides:

(continued...)

(4) Applications for curative amendment to a zoning ordinance pursuant to sections 609.1 and 916.(a)(2).

⁸ In a zoning appeal where the trial court has taken no additional evidence, our scope of review is limited to determining whether the zoning hearing board has committed an error of law or an abuse of discretion. *Catholic Social Services Housing Corporation v. Zoning Hearing Board of Edwardsville Borough*, 18 A.3d 404 (Pa. Cmwlth. 2011). An abuse of discretion occurs when the findings of the zoning hearing board are not supported by substantial evidence. *Id.* Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Id.*

Upon the initiation of the procedures, as set forth in clause (1), the governing body shall not be required to entertain or consider any landowner's curative amendment filed under section 609.1 nor shall the zoning hearing board be required to give a report requested under section 909.1 or 916.1 subsequent to the declaration and proposal based upon the grounds identical to or substantially similar to those specified in the resolution required by clause (1)(a). Upon completion of the procedures as set forth in clauses (1) and (2), no rights to a cure pursuant to the provisions of sections 609.1 and 916.1 shall, from the date of the declaration and proposal, accrue to any landowner on the basis of the substantive invalidity of the unamended zoning ordinance for which there has been a curative amendment pursuant to this section. (Emphasis added.)

Landowner contends that because he filed his sign applications for the billboards before the Township “initiated proceedings” to cure the amendment, the Zoning Board had jurisdiction to hear his challenge to the validity of the Township’s Ordinance. He makes this argument despite not having raised his validity challenge directly to the Zoning Board pursuant to Section 909.1(a)(1) or Section 916.1(a) *prior to* the Township initiating the curative amendment process under Section 609.2 of the MPC or by submitting his own curative amendment to the Township under Section 609.1(a) of the MPC.⁹

⁹ In contending that he is entitled to site specific relief, Landowner relies on *Casey v. Zoning Hearing Board of Warwick Township*, 459 Pa. 219, 328 A.2d 464 (1974), for the proposition that a challenge to a curative amendment by a landowner cannot be thwarted by a municipality by adopting a curative provision when it was not considered prior to the time of the challenger’s application. However, in *Casey*, the curative amendment of the township was not pending at the time of the applicant’s challenge.

However, the submission of a request for approval of an application does not provide the Zoning Board with jurisdiction to hear a curative amendment application when the curative amendment application is filed subsequent to the request for the sign applications and only with the appeal from the denial of the sign request. Those proceedings – the request and appeal from the denial of a sign application and a curative amendment application, are totally separate proceedings. Because under Section 609.2(3) of the MPC all substantive challenges are foreclosed, once the Township initiated the curative amendment process on April 29, 2009, Landowner's May 20, 2009 substantive challenge was not allowed, which necessarily takes away the Zoning Board's jurisdiction to hear that challenge.

Accordingly, because the Zoning Board lacked jurisdiction to hear Landowner's curative amendment application, the order of the trial court vacating the Zoning Board's decision is affirmed.

DAN PELLEGRINI, JUDGE

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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ORDER

AND NOW, this 9th day of December, 2011, the order of the Court of Common Pleas of Butler County, dated November 9, 2010, is affirmed.

DAN PELLEGRINI, JUDGE