

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Lamar Advertising Company	:	
	:	
v.	:	No. 1497 C.D. 2007
	:	Argued: February 11, 2008
Forward Township Zoning Hearing Board	:	
	:	
Appeal of: Forward Township	:	

BEFORE: **HONORABLE BONNIE BRIGANCE LEADBETTER**, President Judge
 HONORABLE DAN PELLEGRINI, Judge
 HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION BY
PRESIDENT JUDGE LEADBETTER**

FILED: March 5, 2008

In a case involving applications to construct two billboards, Forward Township appeals from the order of the Court of Common Pleas of Allegheny County that reversed the Township Zoning Hearing Board's (ZHB) dismissal of Lamar Advertising Co.'s validity challenge and remanded for a decision consistent with common pleas' ruling in a closely related case concerning the same parties but a different lot.¹ The Township contends that common pleas erred in directing

¹ In the related case, as in the present one, Lamar appealed to the ZHB from the denial of a building permit for construction of a billboard on a lot in the B-1 District and challenged the ordinance as de jure exclusionary. In the related case, the ZHB found the ordinance to be exclusionary but required Lamar to position the sign on the lot so that the suspended sign face
(Footnote continued on next page...)

that the ZHB render a decision where Lamar had not yet obtained land development approval and where it did not contest the applicability of the setback as it had in the other case. A recent decision of our Supreme Court establishes that the proposed billboards do not constitute land development, thus, common pleas properly ruled on this issue. However, common pleas' ruling in the related case concerning the applicable setback was not sustained on appeal. Thus, its directive that, on remand, the matter be decided consistent with the related case cannot be sustained, but we affirm common pleas' order reversing the ZHB's dismissal and remanding the case.

After entering into a lease agreement with the landowner, Lamar applied for building permits to construct two double sided 14x48 foot billboards on a 4.69-acre strip of land between local road 330 (Scenery Drive) and State Route 51 located in the B-1 Business District. In December of 2005, the zoning officer denied the permits, stating in a letter that the signs encroach into the applicable setbacks. Lamar modified the plans to relocate the supporting poles to a position outside the restricted yard areas and to more clearly depict the location of the signs as being on a single undivided lot.² Nevertheless, Lamar did not receive building

(continued...)

did not intrude into the 50-foot front yard setback applicable in the B-1 District. Common pleas concluded that the 50-foot setback does not apply to the suspended sign face and, thus, directed site specific relief in accordance with Lamar's submitted plans. *Lamar Advertising Co. v. Forward Twp. Zoning Hearing Bd.*, (Docket No. SA-06-000413, order filed July 10, 2007). On appeal, we reversed. *Lamar Advertising Co. v. Forward Twp. Zoning Hearing Bd.* (Pa. Cmwlth. No. 1496 C.D. 2007, filed March 5, 2008).

² The originally submitted site plan for the billboards indicated that each sign would be located on a separate 2.34-acre lot. As explained at the hearing before the ZHB, the property owner had marked the location of the proposed billboards on a site plan prepared years prior in contemplation of a subdivision that was never pursued and was not being requested in the present application.

permits and so filed an appeal to the ZHB, challenging the ordinance as de jure exclusionary and requesting site specific relief or a variance to permit construction of the signs as depicted on the revised plans. The Township moved for dismissal of the appeal on the grounds that Lamar's failure to seek land development approval rendered the matter unripe. Following a hearing in April 2006, the ZHB concluded that the ordinance excluded billboards, thus, entitling Lamar to construct them on the selected site so long as it complied with the setbacks.³ Nevertheless, the ZHB dismissed the appeal on the ground that application for a building permit and appeal from the denial thereof was premature because Lamar had not obtained land development approval. Lamar appealed this ruling to common pleas, which concluded that the proposed billboard construction did not constitute land development and that Lamar was entitled to site specific relief. Common pleas remanded, directing the ZHB "to decide this matter consistent with the decision of this Court at SA 06-413 and the Opinion dated July 6, 2007." See Common Pleas' order filed July 10, 2007. Thereafter, the Township filed the present appeal, contending that pursuant to *Upper Southampton Township v. Upper Southampton Township Zoning Hearing Board*, 885 A.2d 85 (Pa. Cmwlth. 2005), the construction of new billboards on property leased for that purpose constituted land

³ In general, when de jure exclusion of a legitimate use results in substantive invalidity of a municipality's zoning ordinance, "the sole remedy is to allow the use somewhere in the municipality and equity dictates that this opportunity fall to the successful litigant." *Adams Outdoor Adver., Ltd. v. Borough of Coopersburg Zoning Hearing Bd.*, 625 A.2d 768, 770 (Pa. Cmwlth. 1993). Hence, when a landowner prevails in challenging the validity of an ordinance on the ground that it is exclusionary, relief must be site specific, that is, the landowner is entitled to proceed with his plans so long as the site is suitable and the plans conform to reasonable preexisting regulations, such as those related to size and setbacks. See *J.B. Steven, Inc. v. Bd. of Comm'rs of Wilkins Twp.*, 654 A.2d 135 (Pa. Cmwlth. 1995).

development, a process Lamar must complete before pursuing the present appeal to the ZHB.

This argument lacks merit for the simple reason that our court's decision in *Upper Southampton* was reversed by our Supreme Court. *Upper Southampton Township v. Upper Southampton Township Zoning Hearing Bd.*, ___ Pa. ___, 934 A.2d 1162 (2007). The court concluded that, inasmuch as the construction of a billboard involves only the installation of a pole and the placement of the sign atop the pole and does not involve the construction of accessory buildings, fences or access roads, the concerns addressed in the land development process are not present. The Court rejected the contention that the conveyance of a leasehold interest to the billboard owner constituted the "division or allocation of land" so as to fall within the definition of "land development" in Section 107 of the Municipalities Planning Code (MPC), Act of July 31, 1968, P.L. 805, *as amended*, 53 P.S. § 10107,⁴ stating:

⁴Section 107, in pertinent part, defines "land development" as follows:

(1) The improvement of one lot or two or more contiguous lots, tracts or parcels of land for any purpose involving:

....

(ii) the division or allocation of land or space, whether initially or cumulatively, between or among two or more existing or prospective occupants by means of, or for the purpose of streets, common areas, leaseholds, condominiums, building groups or other features.

(2) A subdivision of land.

....

53 P.S. § 10107. Section 107 also, in pertinent part, defines "subdivision" as follows:

The division or redivision of a lot, tract or parcel of land by any means into two or more lots, tracts, parcels or other divisions of land including changes in existing lot lines for the purpose, whether immediate or future, of lease, partition by the court for distribution to heirs or devisees, transfer of ownership or building or lot development . .

..

The type of division or allocation of land contemplated by the MPC-e.g., a housing development, condominiums, or building groups-implicates many legitimate governmental concerns affecting the general public, such as sanitary sewer, water, storm water management, parking areas, driveways, roadways, curbs and sidewalks. The construction of a billboard simply does not give rise to any of those concerns.

....
In our view, it would be an absurd or unreasonable reading of the statute to conclude that a use that does not involve such development of the land becomes one merely because the property owners granted [the billboard company] the right to erect the billboards through leaseholds, rather than erecting the billboards on their own. The leases, by themselves, cannot convert a use of land that does not rise to the level of land development to a use that does.

___ Pa. at ___, ___, 934 A.2d at 1168-69, 1169-70. This analysis is controlling in the present case, where the proposed billboard construction involves nothing more than the installation of a pole and the attachment of the sign. *See Warminster Fiberglass Co. v. Upper Southampton Township*, ___ A.2d ___, ___ (Pa. Cmwlth. 2007) (No. 460 C.D. 2007, filed December 31, 2007) 2007 WL 4562814, *5 (citing Supreme Court’s decision in *Upper Southampton Township* to conclude that, “proposed construction of billboards cannot be considered as land development, regardless of whether Applicants will own the billboards or lease them to someone else.”). Nor does the fact that separate leases cover each of the two billboards make the arrangement a subdivision of the land itself. Hence, Lamar need not undergo land development approval and common pleas properly reversed the ZHB’s dismissal, on this ground, of Lamar’s validity challenge/variance application.

Inasmuch as the Township agrees that its Zoning Ordinance de jure excludes billboards, there can be no dispute that Lamar is entitled to erect the billboards on the site so long as they are placed in compliance with the applicable, reasonable preexisting regulations. *See J.B. Steven, Inc. v. Bd. of Comm'rs of Wilkins Twp.*, 654 A.2d 135, 139 (Pa. Cmwlth. 1995). Our earlier ruling, in the related case at No. 1496 C.D. 2007, establishes that the applicable restriction prohibits any encroachment of the sign into the front yard created by the 50-foot setback applicable in the B-1 Business District. Lamar's plans depict the billboards in locations that do not comply with this restriction and reveal that the land parcel is too narrow to permit full compliance. We, therefore, conclude that the matter must be remanded to the ZHB for consideration of Lamar's request for a variance.

Accordingly, we affirm.

BONNIE BRIGANCE LEADBETTER,
President Judge

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ORDER

AND NOW, this 5th day of March 2008, the order of the Court of Common Pleas of Allegheny County is hereby AFFIRMED, as modified in accordance with the foregoing opinion. The case is remanded to the court of common pleas for remand to the Forward Township Zoning Hearing Board for consideration of Lamar's request for a variance. Jurisdiction relinquished.

BONNIE BRIGANCE LEADBETTER,
President Judge