

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Bruce L. Rothrock and Rothrock :
Motor Sales, Inc., :
Appellants :
v. : No. 2127 C.D. 2007
Zoning Hearing Board of South : Submitted: June 9, 2008
Whitehall Township and Township :
of South Whitehall :

BEFORE: HONORABLE BERNARD L. MCGINLEY, Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE KELLEY

FILED: September 8, 2008

Bruce L. Rothrock and Rothrock Motor Sales, Inc. (collectively, Rothrock) appeal from an order of the Court of Common Pleas of Lehigh County (trial court), which affirmed the decision of the Zoning Hearing Board of South Whitehall Township (Board) denying Rothrock’s request for a favorable interpretation of Section 12.39(h)(1) of the Zoning Ordinance of South Whitehall Township (Ordinance) and rejecting Rothrock’s argument with regard to vested rights. For the reasons that follow, we vacate and remand with instructions to quash the appeal.

Bruce L. Rothrock owns and operates Rothrock Motor Sales, Inc. – a car dealership business – on a 17 acre parcel located at 1648 Plaza Lane in South Whitehall Township (Township). The property is located in an H-C, Highway

Commercial Zoning District, which is classified as a commercial zoning district under the Ordinance. Rothrock's automobile dealership is a use permitted by right under the Ordinance. On the property, Rothrock operates a free-standing, double-sided, light emitting diode (LED) sign, which measures approximately ten feet by seven feet and can accommodate an electronic change of copy. The LED sign was installed by Rothrock in September 2003 and had replaced an electronic sign with fixed letters. The LED sign displays a sequence of changing messages; the copy changes every five to eight seconds and includes the date, time, temperature and occasional promotional messages involving the car dealership.

On August 19, 2005, the zoning officer for the Township issued a civil enforcement notice against Rothrock alleging that the LED sign was in violation of Section 12.39(h)(1) of the Ordinance, which prohibits signs with flashing, animated or intermittent illumination. The notice advised that full compliance may be achieved by ceasing and desisting from having the LED sign perform rapidly changing, scrolling, flashing, animated, and/or intermittent messages.

On December 21, 2005, Rothrock filed an untimely notice of appeal with the Board. By agreement of counsel, no objection was made to Rothrock filing an appeal *nunc pro tunc*. With the appeal, Rothrock sought a favorable interpretation of Section 12.39(h)(1) of the Ordinance that the LED sign did not violate the Ordinance or a determination that Rothrock had acquired a vested right to continue to maintain and use the LED sign as a result of a sign permit issued by the Township's zoning officer. Rothrock asserts that the appeal was later amended to include issues of vested rights, waiver or estoppel by letter dated October 30, 2006, which is disputed by the Board. A hearing before the Board was held.

The testimony and evidence at the hearing revealed that on September 18, 2003, Rothrock filed an electrical permit, building/zoning permit and a sign permit with the Township in order to replace the display face portion of an existing free-standing sign on the property with a “message center.” The sign specifications accompanying the permit application provided that the sign contractor was going to “Manufacture and install one (1) new D/F Internally Illuminated top cabinet finished red with white acrylic faces and red vinyl overlay. New D/F with amber monochrome copy, computer controlled with graphics capability.” Permits for the proposed sign were approved in 2003 and the sign was purchased and installed for \$46,000 shortly thereafter.

The issuance of the sign permit was made expressly subject to the condition that the sign would not violate Section 12.39(h)(1). After receiving a complaint regarding the operation of the LED sign, the zoning officer personally observed the sign in operation, which displayed rapid scrolling motion and fire burst displays, and issued the civil enforcement notice. Bruce Rothrock testified that the message board had been changed for the Fourth of July weekend, without his permission, to promote a holiday car sales event and included animated messages and displays. Except for that weekend sale, Rothrock denied that the sign has been used in that manner.

By order dated March 9, 2007, the Board denied Rothrock’s interpretation request that the LED sign did not violate the Ordinance and rejected his request to continue operating the LED sign under the vested rights doctrine. From this decision, Rothrock filed a timely appeal with the trial court. The trial court did not take any additional evidence. By order dated October 17, 2007, the trial court affirmed the order of the Board. Additionally, the trial court denied and dismissed Rothrock’s issues regarding laches, waiver and a challenge to the

validity and constitutionality of the Ordinance on the basis that those issues were not raised before the Board. Rothrock then filed the instant appeal and raises the following issues for our review:

1. Whether Rothrock's LED sign was operated in a manner that violated the express prohibitions of Section 12.39(h) (1) of the Ordinance.
2. Did the Board commit an error of law when it decided that commercial advertisements are inappropriate where the Ordinance makes no distinction between the types of messages that are approved and restricted?
3. Where Rothrock provided clear and convincing evidence that rights had in fact vested as a result of the issuance of a sign permit in favor of Rothrock, did the Board commit a manifest abuse of discretion and/or error of law in ruling against Rothrock.
4. Did Rothrock provide sufficient evidence to establish vested rights?
5. Where Rothrock properly raised the issue of waiver/laches, and where the Board failed to issue a ruling as it relates to waiver/laches, should Rothrock have been permitted to continued usage of the sign.

As a preliminary matter, this Court must first address jurisdiction and Rothrock's "*nunc pro tunc*" appeal to the Board. It is well-settled that issues of subject matter jurisdiction cannot be waived and may be raised by a party for the first time on appeal or *sua sponte* by the court. Riverwatch Condominium Owners Ass'n v. Restoration Development Corp., 931 A.2d 133 (Pa. Cmwlth. 2007); Chartiers Valley School Dist. v. Board of Property Assessment, Appeals and Review, 622 A.2d 420 (Pa. Cmwlth. 1993). Jurisdiction of the subject matter cannot be acquired by a court through consent, waiver, or estoppel of the parties.

Appeal of Bell, 396 Pa. 592, 152 A.2d 731 (1959); In re Borough of Valley-Hi, 420 A.2d 15 (Pa. Cmwlt. 1980).

The failure to timely appeal an administrative agency's action is a jurisdictional defect. Sofronski v. Civil Service Commission, City of Philadelphia, 695 A.2d 921 (Pa. Cmwlt. 1997); Falcon Oil Co. v. Department of Environmental Resources, 609 A.2d 876 (Pa. Cmwlt. 1992). The time for taking an appeal cannot be extended as a matter of grace or mere indulgence. Bass v. Commonwealth, 485 Pa. 256, 401 A.2d 1133 (1979); Sofronski. The appellant must justify the delay in filing the appeal. Sofronski; DiJohn v. Unemployment Compensation Board of Review, 687 A.2d 1213 (Pa. Cmwlt. 1997). An appeal *nunc pro tunc* may be permitted, but only where the appellant proves that the delay in filing the appeal was caused by extraordinary circumstances involving fraud or some breakdown in the administrative process or non-negligent circumstances related to the appellant or counsel or a third party. Cook v. Unemployment Compensation Board of Review, 543 Pa. 381, 671 A.2d 1130 (1996); Sofronski; J.C. v. Department of Public Welfare, 720 A.2d 193 (Pa. Cmwlt. 1998). The appellant must also establish that (1) the appeal was filed within a short time after learning of and having an opportunity to address the untimeliness; (2) the elapsed time period is of very short duration; and (3) the appellee is not prejudiced by the delay. Cook; Sofronski.

Here, the zoning enforcement notice was mailed to Rothrock on August 19, 2005. Reproduced Record (R.R.) at 11a-12a. The appeal period is thirty (30) days after notice has been served. Rothrock filed its notice of appeal on December 21, 2005, which was well beyond the appeal period and therefore late. The notice of appeal itself acknowledges that it was not filed on a timely basis, but asserts that it was agreed by counsel on both sides that the request for an

interpretation could be made on a *nunc pro tunc* basis. R.R. at 2a. As stated above, jurisdiction of the subject matter cannot be acquired by the hearing tribunal through the consent of the parties. Appeal of Bell. There is no assertion that the delay in filing was caused by any extraordinary circumstances warranting an appeal *nunc pro tunc*. The record is void of any evidence which could support an appeal *nunc pro tunc*. As a result, the Board lacked jurisdiction to hear Rothrock's untimely appeal. Likewise, this Court lacks jurisdiction to consider the merits of Rothrock's appeal.

Accordingly, we vacate the order of the trial court and remand with instructions to vacate the order of the Board and quash Rothrock's appeal.

JAMES R. KELLEY, Senior Judge

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Appellants	:	
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Zoning Hearing Board of South	:	
Whitehall Township and Township	:	
of South Whitehall	:	

ORDER

AND NOW, this 8th day of September, 2008, the order of the Court of Common Pleas of Lehigh County in the above-captioned matter is hereby VACATED and this matter is REMANDED with instructions to vacate the order of the Zoning Hearing Board of South Whitehall Township and quash Appellants' appeal.

Jurisdiction relinquished.

JAMES R. KELLEY, Senior Judge