

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Stephen Rusek,	:	
Petitioner	:	
	:	
v.	:	No. 459 C.D. 2008
	:	Submitted: August 29, 2008
Department of Transportation,	:	
Respondent	:	

BEFORE: HONORABLE DAN PELLEGRINI, Judge  
HONORABLE MARY HANNAH LEAVITT, Judge  
HONORABLE JOSEPH F. McCLOSKEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION  
BY SENIOR JUDGE McCLOSKEY

FILED: October 14, 2008

Stephen Rusek (Petitioner) petitions for review of an order of the Secretary of the Pennsylvania Department of Transportation (DOT) denying his exceptions filed in response to a Hearing Officer’s proposed report requiring the removal of a billboard on his property. We now affirm.

Petitioner is the owner of real estate located at 1760 Butler Logan Road, Tarentum, Allegheny County, Pennsylvania. The real property is located in a Corridor Perimeter Overlay Zoning District (CPO District) in the Township of Frazer (Township).<sup>1</sup>

On January 27, 2005, Petitioner submitted a conditional use application to the Frazer Township Board of Supervisors (Supervisors) to permit the construction of a

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<sup>1</sup> Petitioner “opted” to have the property so designated. (R.R. at 153a). According to Section 1406 of the Township Zoning Ordinance, construction of a billboard is permitted as a “conditional use” in an Overlay Zoning District provided that enumerated conditions are met. Id.

billboard on his real property. The billboard was to face and target the newly constructed Pittsburgh Mills Mall.<sup>2</sup>

Subsequently, on April 5, 2005, after a public hearing, the Supervisors approved Petitioner's conditional use application and allowed for the construction of the billboard along the Tawney Run Road portion of the real property. (R.R. at 177a). The Supervisors also required Petitioner to apply for and obtain variances related to the minimum side yard setback requirements. Subsequent to the conditional use approval, Petitioner's request for variances was approved by the Frazer Township Zoning Hearing Board.

On or about May 5, 2005, Petitioner contacted Carl Fetcko, a DOT employee at its District 11 Office located in Bridgeville, Pennsylvania, by telephone.<sup>3</sup> On June 1, 2005, Petitioner notified the Township's Zoning Officer that a DOT permit was not required. Nevertheless, the Township's Zoning Officer requested that Petitioner obtain written documentation from DOT supporting that statement. Consequently, Petitioner again contacted Mr. Fetcko, who informed him that DOT had a policy wherein it did not provide written confirmation that a permit was not required but that he would fax him a list of the controlled highways located near his property which did not include Tawney Run Road. Mr. Fetcko faxed the list to Petitioner the same

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<sup>2</sup> The application for conditional use indicated that the proposed billboard would "face Route 28." (R.R. at 149a). It also indicated that the approximate cost of the work involved was \$10,000.00. Id.

<sup>3</sup> The record contains three different spellings for Mr. Fetcko's name. Petitioner's petition and notice of appeal to DOT refers to "Mr. Fetchko." (R.R. at 214a). The transcript from the hearing before DOT's Hearing Officer refers to "Mr. Fetco." (R.R. at 116a). DOT's reply brief to the present petition for review and District 11's reply brief to Petitioner's exceptions refer to "Mr. Fetcko." Thus, we will respectfully refer to him as "Mr. Fetcko."

day.<sup>4</sup> Petitioner provided a copy of the list to the Township Zoning Officer as evidence that a permit was not required by DOT.

Next, on October 19, 2005, the Township issued a building permit to Petitioner for the construction of the billboard along Tawney Run Road. Petitioner began construction and completed the project.

Subsequently, Petitioner received a letter from DOT, dated December 15, 2006, indicating that the billboard was illegal and requesting that it be removed within thirty days of the receipt of the citation. DOT indicated that the billboard was erected without an outdoor advertising device permit required by the Outdoor Advertising Control Act of 1971, Act of December 15, 1971, P.L. 596, as amended, 36 P.S. §§ 2718.101 – 2718.115. Specifically, DOT alleged that the billboard violated Section 5(c)(2)(i) of the Outdoor Advertising Control Act, 36 P.S. § 2718.105(c)(2)(i) because it was located within 500 feet of the Pittsburgh Mills Boulevard interchange, Exit 12A of State Route 28, which was a limited access highway at that location. DOT also alleged that the billboard was located within a zone that was “neither a zoned nor unzoned commercial or industrial area...” (R.R. at 199a). DOT demanded that Petitioner remove the billboard or risk penalties, including fines and imprisonment.

On January 11, 2007, Petitioner filed an appeal from the citation and a hearing was held on February 26, 2007, before a DOT Hearing Officer. Subsequently, on October 26, 2007, DOT’s Hearing Officer issued a proposed report requiring the removal of the billboard as he concluded that Petitioner’s vested right claim was without merit because he had never applied for or been issued a permit by DOT.

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<sup>4</sup> The list, entitled “District 11.0 Controlled Highways,” does not list Tawney Run Road as a controlled highway, but does list State Route 28 as a controlled highway. (R.R. at 194a).

In response to the proposed report, on November 27, 2007, Petitioner filed exceptions with the Secretary of DOT. Petitioner asserted that DOT's Hearing Officer made numerous errors. He asserted, *inter alia*, that the Hearing Officer erred because he failed to find that the billboard construction was a "very large investment and great financial risk" to him. (R.R. at 274a). He also asserted that the Hearing Officer erred in failing to find that he relied on the representations of Mr. Fetcko to his detriment. Petitioner further asserted that the Hearing Officer erred by failing to find that Mr. Fetcko never advised him that he should file a permit application as a safeguard and that he would have "gladly" filed such an application if requested to do so. (R.R. at 277a).

Nevertheless, the Secretary denied the exceptions and the DOT Hearing Officer's proposed report was accepted as final on February 21, 2008. Petitioner then filed the present petition for review to this Court.

On appeal,<sup>5</sup> Petitioner sets forth two arguments which are similar to the arguments made in his exceptions. First, he argues that DOT's Hearing Officer committed an error of law when he determined that Petitioner had not acquired a vested right in the permit from the Township because he established all of the elements necessary to support such a vested right. Petitioner argues that he performed the utmost diligence in the pursuit of constructing the billboard and attempted to obtain any and all

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<sup>5</sup> The Court's scope of review in an appeal from an administrative agency's adjudication is limited to determining whether constitutional rights have been violated, an error of law has been committed or whether any necessary findings of fact are not supported by substantial evidence. 2 Pa. C. S. § 704; Penn Advertising, Inc. v. Department of Transportation, 608 A.2d 1115 (Pa. Cmwlth.), petition for allowance of appeal denied, 532 Pa. 666, 616 A.2d 987 (1992).

approvals necessary in order to avoid any problems.<sup>6</sup> Petitioner argues that the construction of the billboard was a “great financial risk” and, as such, he would not have risked the financial future of his family without performing such “exhaustive due diligence.” (Petitioner’s Brief at 14).<sup>7</sup> Petitioner argues that he acted with due diligence as he contacted Mr. Fetcko on two occasions to “ascertain and begin the Application and approval process” related to the billboard construction. He asserts that he told Mr. Fetcko that he wanted to construct a billboard “directly across and visible from the Pittsburgh Mills Mall” and that Mr. Fetcko did not ask him to submit a map or pictures of the real property. (Petitioner’s Brief at 15). Petitioner argues that he informed Mr. Fetcko that his property bordered Tawney Run Road and not State Route 28 and that Mr. Fetcko’s conclusion that a permit was not necessary was given only “after [he] specifically informed him the whereabouts and location of his property.” (Petitioner’s Brief at 16).<sup>8</sup>

Petitioner argues that the evidence supports that he acted in good faith because the “record is void of any evidence which would suggest that [he] obtained or use[d] his township permit in bad faith.” (Petitioner’s Brief at 17). Petitioner argues

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<sup>6</sup> Petitioner asserts that he filed a conditional use application with the Township, attended the public meetings of the Planning Commission and the Supervisors, attended a public hearing and ultimately gained approval. He asserts that he complied with the nine conditions set forth in the Supervisor’s conditional approval letter. Petitioner also asserts that he contacted the Allegheny County Airport Authority and the Frazer Township Transportation Authority to ensure compliance with their requirements.

<sup>7</sup> Petitioner asserts that the cost of the billboard was more than half of the amount that he has saved for his retirement and that he would have abandoned the project “if at any time he was denied a permit by any necessary body.” (Petitioner’s Brief at 14).

<sup>8</sup> Petitioner argues that DOT presented no credible evidence to refute Petitioner’s testimony regarding the multiple conversations he had with Mr. Fetcko and the permit requirements. (Petitioner’s Brief at 16, fn.11).

that he “could not conceive of any further approval” he would have needed from DOT as a result of the conversations with Mr. Fetcko. (Petitioner’s Brief at 18). Petitioner asserts that the Township Zoning Officer also testified that he acted in good faith and was “forthright and honest with him on every issue that was presented.” (Petitioner’s Brief at 18).

Petitioner argues that he expended substantial sums of unrecoverable funds because he expended \$45,000 in costs for the construction of the billboard. He asserts that that amount is more than half of the \$70,000 purchase price of the real property. Petitioner also argues that if Mr. Fetcko had told him that he needed a permit, he would have abandoned the construction of the billboard and would have only expended between \$1,500 and \$2,000 at that point.

Petitioner asserts that no resident appealed the issuance of the Township permit after the numerous public meetings and hearings. Thus, he argues that the fact that no resident appealed is “certainly another circumstance which would have indicated to [him] that his permit was in order.” (Petitioner’s Brief at 19). Finally, Petitioner argues that there is no record evidence to establish that the billboard affects the individual property rights of others or public health, safety or welfare. Thus, he argues that he has established the five factors necessary to obtain a vested right in the continued use of the billboard and DOT cannot order the removal of the billboard. We disagree.

A property owner that desires to acquire a vested right in an alleged illegal use must establish the following elements: 1) his own due diligence; 2) his good faith; 3) the expenditure of substantial unrecoverable funds; 4) the expiration of the applicable appeal period during which an appeal could have been taken from the issuance of the permit; and 5) an absence of injury to the public interest. Department of Environmental Resources v. Flynn, 344 A.2d 720 (Pa. Cmwlth. 1975). In order to acquire a vested

right, a valid permit must first be issued. Ferguson Township v. Zoning Hearing Board of Ferguson Township, 475 A.2d 910 (Pa. Cmwlth. 1984). The vested rights doctrine only applies to cases where the applicant, in good faith, relied upon a permit issued in error and has incurred significant unrecoverable costs. Chateau Woods, Inc. v. Lower Paxton Township, 772 A.2d 122 (Pa. Cmwlth. 2001). One cannot assert vested rights in a permit without having acquired such a permit. Kuszyk v. Zoning Hearing Board of Amity Township, 834 A.2d 661 (Pa. Cmwlth. 2003).

DOT's Hearing Officer concluded that the vested right doctrine did not apply to the present matter, according to established case law, because Petitioner never sought or obtained a permit from DOT. Although Petitioner attempts to set forth evidence as to how he has met the five elements necessary to establish his vested right in the billboard, it is undisputed that he never applied for, was denied or obtained a permit from DOT. Petitioner has not set forth authority to establish that because he successfully obtained various permits, variances, and conditional use approvals from the Township, such documents establish a vested right in a DOT permit. According to the principles established by this Court in Ferguson Township, as well as later cases, the doctrine of vested rights is inapplicable to a permit that was never issued. Thus, the Hearing Officer's conclusion is supported by substantial evidence and he did not commit an error of law when he concluded that because Petitioner had never obtained a permit from DOT, he could not claim a vested right in a permit that did not exist.

Second, Petitioner's argues that DOT's Hearing Officer committed an error of law by finding that DOT was not equitably estopped from requiring the removal of the billboard. He argues that DOT intentionally and/or negligently misrepresented that a permit was not required through Mr. Fetcko's responses. Petitioner argues that Mr. Fetcko never requested to view the location of the real property. Petitioner argues that

DOT's Hearing Officer erroneously determined that Mr. Fetcko's statement that a permit was not necessary was a conclusion of law and not a statement of fact. He asserts that this "interpretation" is "wholly without merit." (Petitioner's Brief at 21, fn. 17). Petitioner argues that Mr. Fetcko "knew or should have known" that he would rely on his representations. (Petitioner's Brief at 22). Petitioner argues that the medical issues suffered by Mr. Fetcko were "ignored" by DOT and DOT's Hearing Officer. (Petitioner's Brief at 22).

The doctrine of estoppel may be applied when an intentional or negligent misrepresentation of a material fact is made, knowing or having reason to know that another person will justifiably rely on such a misrepresentation, and where that person has been induced to act to his detriment because he did rely on the misrepresentation. Cicchiello v. Bloomsburg Zoning Hearing Board, 617 A.2d 835 (Pa. Cmwlth. 1992), petition for allowance of appeal denied, 537 Pa. 625, 641 A.2d 589 (1994). Estoppel is an unusual remedy granted only in extraordinary circumstances. Skarvelis v. Zoning Hearing Board of Borough of Dormont, 679 A.2d 278 (Pa. Cmwlth. 1996). The elements of estoppel must be proven by clear and convincing evidence. Id.

DOT's Hearing Officer concluded that the doctrine of equitable estoppel did not bar DOT from requiring the removal of the billboard because DOT did not misrepresent a material fact on which Petitioner justifiably relied. He concluded that Petitioner did not establish the existence of such a misrepresentation through clear, concise, persuasive or unequivocal evidence. The Hearing Officer reasoned that although the evidence corroborated the fact that Petitioner received a list of "controlled roads" from DOT, such information was a "completely irrelevant issue in the regulatory scheme for the placement of billboards." (Hearing Officer's Proposed Report at 7). According to the Outdoor Advertising Control Act, the Hearing Officer noted that the



relevant inquiries were how far the billboard would be from the controlled road and would any part of the advertising be visible from the controlled road. Finally, the Hearing Officer noted that Petitioner never asserted that he told DOT that the billboard would be within 200 feet of, and facing, Route 28, which were the issues related in part to DOT's requirement that the billboard be removed. Thus, we cannot say that the Hearing Officer erred as a matter of law in concluding that the doctrine of equitable estoppel did not apply to the present matter.

Accordingly, the order of the Secretary denying Petitioner's exceptions is affirmed.

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JOSEPH F. McCLOSKEY, Senior Judge

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Department of Transportation,	:	
Respondent	:	

**ORDER**

AND NOW, this 14<sup>th</sup> day of October, 2008, the order of the Secretary of the Department of Transportation, denying the exceptions filed by Stephen Rusek, is hereby affirmed.

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JOSEPH F. McCLOSKEY, Senior Judge