IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Joseph and Judith McCarry, Appellants	:	
	:	No. 914 C.D. 2012
v.	:	
	:	Submitted: October 10, 2013
Springfield Township Zoning Hearing Board and Springfield Township	:	

BEFORE: HONORABLE P. KEVIN BROBSON, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge (P.)
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McCULLOUGH FILED: December 12, 2013

Joseph and Judith McCarry (Landowners) appeal from the April 12, 2012 order of the Court of Common Pleas of Delaware County (trial court), which affirmed the decision of the Springfield Township Zoning Hearing Board (ZHB) denying Landowners' substantive challenge to section 143-19(B)(2)(a) of the Springfield Township Zoning Ordinance (Ordinance). The Ordinance provision regulates the parking of commercial vehicles in residential neighborhoods and includes restrictions on vehicle height and weight and the size of lettering and advertising permitted on vehicle doors. Landowners contend that section 143-19(B)(2)(a) of the Ordinance is unconstitutional, on its face and/or as applied.

The relevant facts are not in dispute. Landowners own property located at 45 Thornbridge Road in the Township's "B" residential district. Landowners'

adult son (Son) also lives at the residence. He is employed by John Meehan & Son (Meehan), an air conditioning and refrigeration repair company, and operates a van owned by Meehan. As part of his employment, Son is required to remain "on-call" and respond immediately to client emergencies. Therefore, Son must have access to the van at all times and must park his work vehicle at or near Landowners' property.

The Ordinance defines a commercial vehicle as:

> A vehicle used as a commercial vehicle in connection with a commercial enterprise, trade, profession or industry by the owners or users of said vehicle and which may or may not bear any sign, lettering or commercial advertising or ostensibly display items such as ladder racks, tool racks and the like which would indicate a commercial trade, professional or industrial use or capability. Any vehicle other than a personal or recreational vehicle (as defined herein) which exceeds a gross vehicle weight of 9500 pounds or is greater than 84 inches in height, whether or not engaged in a commercial enterprise, trade, profession or industry, and which may or may not bear commercial aspects such as signs or an attached ladder or tool racks shall also be considered a "commercial vehicle" in this ordinance….

(Reproduced Record (R.R.) at 123a.) Thus, the Ordinance's classification of commercial vehicles includes vehicles actually used for commercial purposes, whether or not that use is apparent, and all vehicles that exceed a certain height and weight, other than personal or recreational vehicles.

Section 143-19(B)(2)(a) of the Ordinance restricts the parking of commercial vehicles in residential districts as follows:

> [Parking in residential districts is permitted], provided that no private driveway or off-street parking area shall be used for the storage or parking of any commercial vehicle, except that a single commercial vehicle which does not have more than four wheels and which does not exceed a gross weight of 9,500 pounds or is greater than 84 inches in height may

> be stored or parked, per residential lot, in the following instances:
>
> > When construction or other work is being done on the premises and the parking or storage is of a temporary nature. (for the purpose of this section, "storage" or "parking" shall be defined as the leaving of such vehicle or truck unattended for a period in excess of two hours);
> >
> > The commercial vehicle is parked completely within a garage;
> >
> > The commercial vehicle is parked behind the front building line of the residence of the premises; or
> >
> > All lettering and commercial advertising of any nature (other than the lettering contained on the front doors within an area of two square feet) is covered by any opaque neutral covering of vinyl or other similar material.

(R.R. at 122a.) The commercial vehicle parking regulations apply to the township's A, B, C, and D residential districts.

The van operated by Son has large lettering on its side, reading "John Meehan & Son" with the words "Air Conditioning and Refrigeration" below. The van also displays the company's logo, and the van's door contains signage stating "24 hour service" and provides the company's phone number. Two ladders are attached to a rack on the roof of the van. On June 12, 2009, the Township's Department of Code Enforcement issued a notice of abatement to Landowners based on Son's parking of a commercial van in the driveway with signage that exceeds the Ordinance's size restrictions.

Landowners appealed to the ZHB. Landowners did not contest the fact that Son parked the van in their driveway or that such conduct is in violation of the Ordinance. The sole basis of Landowners' appeal was a challenge to the

constitutionality of section 143-19(B)(2)(a). Specifically, Landowners asserted that the size restriction for signage on commercial vehicles violates their constitutional rights to free speech, equal protection, and due process.

The ZHB held a hearing on August 20, 2009. William Cervino, the Township's Director of Code Enforcement, and Michael LeFevre, Township Manager, testified that public hearings were held prior to the adoption of the Ordinance in 1996. They stated that the purposes of the Ordinance include the promotion, protection, and facilitation of the public health, safety, morals, and general welfare.

Joseph McCarry (McCarry) testified that he parks his own commercial vehicle, a white truck, in front of his house. McCarry testified that Son's truck does not fit in his garage and that he cannot park it behind his front property line. McCarry was asked whether the lettering on Son's van could be covered by opaque neutral covering, and he answered "no." McCarry testified: "I don't feel - - I am not asking him to do it. I told him that I wouldn't expect him to do it. If he did he wouldn't be proud of what you [sic] are doing and it's almost like hiding it, walking in the back door of a restaurant, walking in the back. I am not allowing him to do it. It's not going to happen." (N.T. at 51.)

The ZHB found that Landowners had an opportunity to comply with the Ordinance by covering the letters on the side of the vehicle with an opaque neutral covering when it is parked at the residence and that McCarry admittedly will not permit Son to cover the lettering. The ZHB also found that the concerns advanced by the Township, including: emergency identification of homes; identification of individuals near properties at night; emergency-related access to properties; storage of combustible and hazardous materials; attractive nuisance to children; noise;

signage and driver distraction in residential zones; and aesthetics, constitute public health, safety, and general welfare concerns. (ZHB's Finding of Fact No. 26.)

The ZHB observed that Landowners bore the burden of proving that the Ordinance is arbitrary and unreasonable and bears no substantial relationship to promoting public health, safety and welfare. *Keinath v. Township of Edgmont*, 964 A.2d 458 (Pa. Cmwlth. 2009). The ZHB further noted that Landowners presented no testimony, evidence, or case law supporting their position. Accordingly, the ZHB denied Landowners' substantive challenge to the validity of the Ordinance. The trial court affirmed the ZHB's decision, and Landowners now appeal to this Court.[1]

Discussion

As our Supreme Court noted in *Township of Exeter v. Zoning Hearing Board*, 599 Pa. 568, 579, 962 A.2d 653, 660 (2009), "[t]he standards by which Pennsylvania courts judge the constitutionality of zoning ordinances under Article I, section I of the Constitution of Pennsylvania . . . have been stated and restated in a long line of cases by this Court." More specifically, the Pennsylvania Supreme Court stated:

> It is clear that ordinances addressing the regulation of signs, billboards, and other outdoor advertising media are within the police power of a municipality. *Norate Corp. v. Zoning Bd. of Adjustment of Upper Moreland Township*, 417 Pa. 397, 207 A.2d 890, 894 (1965). Thus, a zoning authority is empowered to regulate, *inter alia,* billboard size. *See Atlantic Refining and Marketing Corp. v. Board of*

[1] Where, as here, the trial court takes no additional evidence, our scope of review is limited to determining whether the zoning board committed an error of law or an abuse of discretion in rendering its decision. *In re Heritage Building Group, Inc.*, 977 A.2d 606 (Pa. Cmwlth. 2009).

> *Commissioners of York Tp.*, . . . 608 A.2d 592, 594 (Pa. Cmwlth. 1992).

Township of Exeter, 599 Pa. at 581, 962 A.2d at 660. In other words, a zoning ordinance is presumptively constitutional, *Adams Outdoor Advertising, LP. v. Zoning Hearing Board of Smithfield Township*, 909 A.2d 469, 477 (Pa. Cmwlth. 2006), and a party challenging the constitutionality of a zoning ordinance bears a heavy burden of proving that the provisions of the ordinance are arbitrary and unreasonable. *Id.* In this case, Landowners contend that the Ordinance restrictions related to signage on commercial vehicles violate their constitutional rights to free speech, equal protection, and due process.[2]

With respect to free speech, Landowners cite several federal decisions related to free speech generally, but only one is relevant, *City of Ladue v. Gilleo*, 512 U.S. 43, 48 (1994) (concerning the regulation of signs), and is quoted by Landowners as follows:

> While signs are a form of expression protected by the Free Speech Clause, they pose distinctive problems that are subject to municipalities' police powers. Unlike oral speech, signs take up space and may obstruct views, distract motorists, displace alternative uses for land, and pose other problems that legitimately call for regulation. It is common ground that governments may regulate the characteristics of signs – just as they can, within reasonable bounds and absent censorial purpose, regulate audible expression in its capacity as noise.

[2] A constitutional challenge to a zoning ordinance may assert that the ordinance constitutes either a *de jure* or a *de facto* exclusion of a use within a municipality. *Township of Exeter v. Zoning Hearing Board*, 599 Pa. 568, 579, 962 A.2d 653, 659 (2009). A *de jure* exclusion is established where an ordinance bans a use on its face. To establish a *de facto* exclusion, a challenger must show that an ordinance which permits a use on its face prohibits the use throughout the municipality when it is applied. *Id.*

The above language lends no support to Landowners' arguments. The law is well settled that a municipality's interests in ensuring visibility for traffic safety "and the maintaining of a residential district free of commercial advertising" are public interests and bear a substantial relationship to the public health, safety, and general welfare of the municipality. *Wildman Arms, Inc. of Swarthmore v. Zoning Hearing Board of Swarthmore*, 328 A.2d 528, 530 (Pa. Cmwlth. 1974). *See also Judd v. Zoning Hearing Board of Middleton Township*, 460 A.2d 404, 406 (Pa. Cmwlth. 1983). Landowners acknowledge that municipalities have the right to regulate signs, and in making this argument, Landowners merely assert that the challenged Ordinance provision has no relationship to the health, welfare, safety, "or any of the other imaginary reasons . . . included in the [Board's] opinion." (Landowners' brief at 15.) However, Landowners presented no evidence or argument before the Board to support this assertion, and, as previously noted, the Board relied on the Township's evidence to find that the Township's concerns, including driver distraction in residential zones and aesthetics, constitute legitimate public health, safety, and general welfare concerns. Landowners offer no additional argument on appeal. Accordingly, Landowners' free speech argument must fail.

Regarding equal protection, the Equal Protection Clause of the Fourteenth Amendment provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV. As the trial court noted, land use ordinances "that [do] not classify by race, alienage, or national origin, will survive an attack based on the equal protection clause if the ordinance is reasonable, not arbitrary, and bears a rational relationship to a legitimate state objective." *Bawa Muhaiyaddeen v. Philadelphia Zoning Board of Adjustment*, 19 A.3d 36, 42 (Pa. Cmwlth. 2011) (citing *Congregation Kol Ami v. Abington Township*,

309 F.3d 120 (3d Cir. 2002)). Landowners challenge the Ordinance on the grounds that it does not apply to all similarly situated motor vehicles in the Township. Landowners maintain that the Ordinance applies only to vehicles the Township considers "commercial" and which weigh less than 9,500 pounds and are less than seven feet high. Landowners contend that the Ordinance focuses only on vehicles that have commercial writing on the sides and back, and they incorrectly assert that the Ordinance must be analyzed under the strict scrutiny standard, i.e., that it can only be upheld if it is narrowly drawn to serve a compelling state interest.

In *Adams Outdoor Advertising LP*, involving a landowner's challenge to an ordinance prohibiting off-premises signs, we explained that, "classification along non-suspect lines is permissible if there is a *rational basis* for doing so." *Id.* at 478 (emphasis added). Thus, a zoning authority can establish rigorous objective standards in its ordinance for size and placement of signs to insure that their offensiveness is minimized as much as possible. Ordinances utilizing such objective standards to regulate signs will be upheld so long as they are reasonably related "*to the clearly permissible objectives of maintaining the aesthetics of an area*" and addressing public safety concerns by preventing the distraction of passing motorists. *Atlantic Refining and Marketing Corp. v. Board of Commissioners of York Township*, 608 A.2d 592, 594 (Pa. Cmwlth. 1992) (emphasis added).

Here, the Board found that the objectives of the Ordinance were related to the permissible purposes of ensuring safety and maintaining aesthetics. The burden was on Landowners "to negate any reasonably conceivable state of facts that could provide a rational basis for the classification." *Adams Outdoor Advertising LP*, 909 A.2d at 478. Having offered only mere assertions, Landowners have not met that burden.

Finally, citing *Township of Exeter*, Landowners argue that even if the Ordinance were amended to impose restrictions on all vehicles within the same weight and size classification, the Ordinance would be in violation of due process because there is no rational reason to require that all lettering and other displays on the sides of vehicles parked in residential driveways be hidden from view. In making this argument, Landowners also assert that aesthetics may not furnish the sole reason to support a zoning regulation.

Township of Exeter involved an appeal by an outdoor advertising business from the denial of applications for billboard permits based on a failure to comply with a 25-square-foot size restriction set forth in the township's zoning ordinance. The appellant argued, among other things, that the ordinance requirement operated as a *de facto* exclusion of billboards in the township and thus deprived the appellant of its constitutional property rights and interests without due process of law.

Our Supreme Court acknowledged in *Township of Exeter* that property owners have a constitutionally protected right to enjoy their property and that governmental interference with this right is circumscribed by the due process provisions of the First and Fourteenth Amendments. The court also emphasized that this constitutionally protected right may be reasonably limited by zoning ordinances enacted by municipalities to protect or preserve the public health, safety, morality, and welfare. However, the court further recognized that, notwithstanding the presumed validity of zoning ordinances, an ordinance that totally excludes a particular business from an entire municipality must bear a more substantial relationship to the public health, safety, morals, and general welfare than an ordinance that merely confines such business to a specific area in the municipality. Ultimately, the court in *Township of Exeter* concluded that the size restrictions on

billboards in the township's ordinance amounted to a *de facto* exclusion of billboards as a use and remanded for findings as to whether the ordinance's exclusionary effect was justified based on the township's concerns for the public health, safety, morality, or welfare, including the township's concerns for aesthetics and traffic safety.

In contrast to the circumstances in *Township of Exeter*, in this case Landowners do not argue that they are unable to comply with the Ordinance, only that they are unwilling to do so. Thus, Landowners do not argue facts that could establish a finding of a *de facto* exclusion of a use. Moreover, in this case the Board did not base its decision solely on aesthetic concerns but specifically found that the purpose of the Ordinance included ensuring the safety of passing motorists.

Based on the foregoing, we conclude that Landowners have not met their burden of proving that the Ordinance provisions are arbitrary and unreasonable.

Accordingly, we affirm.

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PATRICIA A. McCULLOUGH, Judge

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ORDER

AND NOW, this 12th day of December, 2013, the April 12, 2012 order of the Court of Common Pleas of Delaware County is affirmed.

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PATRICIA A. McCULLOUGH, Judge