[Cite as *Lamar Advertising v. Boardman Twp. Bd. of Zoning Appeals*, 2009-Ohio-6755.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

LAMAR ADVERTISING,	)	
	)	CASE NO. 08 MA 210
APPELLEE,	)	
	)	
- VS -	)	OPINION
	)	
BOARDMAN TOWNSHIP BOARD OF ZONING APPEALS,	)	
	)	
APPELLANT.	)	

CHARACTER OF PROCEEDINGS: Civil Appeal from Common Pleas Court, Case No. 2007 CV 290.

JUDGMENT: Affirmed.

APPEARANCES:

For Appellee:

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JUDGES:
Hon. Mary DeGenaro
Hon. Joseph J. Vukovich
Hon. Gene Donofrio

Dated: December 3, 2009

[Cite as *Lamar Advertising v. Boardman Twp. Bd. of Zoning Appeals*, 2009-Ohio-6755.]
DeGenaro, J.

{¶1} This timely appeal comes for consideration upon the record in the trial court, the briefs of the parties, and their oral arguments before this court. Appellant, Boardman Township Board of Zoning Appeals ("BZA") appeals the September 26, 2008 decision of the Mahoning County Court of Common Pleas that reversed and vacated the BZA's decision and held that Lamar Advertising's conversion from a traditional billboard to a multiple-message digital billboard was not subject to Article XII Section J (hereinafter cited as "XII(J)") of the Boardman Township Zoning Ordinance ("Ordinance"), regarding continuances of non-conforming structures and uses. Central to the decision was whether a billboard qualified as a structure or a use under the Ordinance, and whether the increase in the frequency of the display of advertisements constituted more than a 25% increase "of the existing service capacity if the use is conducted all or partly in the open."

{¶2} The BZA argues that the trial court exceeded the scope of its review by making its own factual determinations and erroneously found that the BZA's decision was unconstitutional, illegal, arbitrary, capricious and unsupported by the preponderance of the substantial, reliable and probative evidence in the record.

{¶3} The trial court limited its review to an analysis of the legal significance of certain terms within the Ordinance, and did not exceed the allowable scope of review. The term "service capacity" is undefined in the Ordinance, and its applicability to the use of a billboard is unclear. The trial court did not err as a matter of law by construing XII(J) of the Ordinance in favor of Lamar, especially given the ambiguity involved in the language of the Ordinance. Accordingly, the decision of the trial court is affirmed.

FACTS AND PROCEDURAL HISTORY

{¶4} The billboard at issue in this case is located at the corner of Market Street and Western Reserve Road in Boardman. The billboard has two frames, allowing for signs to be posted on each side. Lamar has maintained a zoning permit for the billboard since 1999. Pursuant to a change in the Ordinance in 2000, the billboard at issue became non-conforming as it is five feet higher than XII(H) now allows.

{¶5} On June 1, 2007, as Lamar was installing a digital screen onto the South-facing side of the billboard, Zoning Inspector Crivelli arrived and told Lamar to stop the

installation. Crivelli informed Lamar that they would need to obtain a permit to build the new structure, pursuant to XVI(C) of the Ordinance. During subsequent correspondence between the parties, Crivelli additionally stated that the new format of advertisement, which displays up to six advertisements in eight-second intervals, constituted over a 25% increase of the previously existing service capacity of the structure, in contravention of XII(J) of the Ordinance.

{¶6} Lamar appealed the decision to the BZA on July 9, 2007. Lamar urged the BZA to find that a permit is not required for the placement of a digital screen onto the billboard. Lamar further urged the BZA to find that the concept of "existing service capacity" pursuant to XII(J) did not apply to the display of advertisements on billboards. In the alternative, Lamar requested that the BZA grant a variance to permit the use of a digital screen on the billboard. On July 17, 2007, the BZA held a hearing on Lamar's appeal.

{¶7} Brian Conley, Vice President and General Manager of Lamar Advertising, stated that the images on the digital screen would not involve moving video or flashing lights. The blueprints provided indicate that the screens are comprised of 420 L.E.D. boards, requiring cooling fans and 84 power supplies. The surface area of the screen would be the same as the billboard's previous dimensions. Because the billboard is located on a State-controlled highway, the maximum frequency of advertisements allowed by State regulations is once every eight seconds. The screen is remotely programmed to display the advertisements, and the use of cranes and crews of people would thus no longer be required to change the advertisements. Concerns were raised at the hearing regarding vandalism of the board, the amount of illumination emitted by the screen, and traffic safety. The BZA raised further concerns about and the possibility of digital screens being installed on all billboards in the township, including areas abutting residential districts. The BZA expressed that it wanted to be able to review the issue of digital billboards on a case-by-case basis. The BZA noted that the technology of billboards has outpaced the language of the Ordinance, and that they should consider updating the Ordinance.

{¶8} At the close of evidence, Inspector Crivelli requested that the BZA provide

three separate decisions: 1) Whether the installation of a digital screen onto a billboard requires a permit pursuant to XVI(C) for new construction; 2) Whether the increased frequency of advertisements on a billboard violates XII(J); and 3) Whether Lamar should be granted a variance for the specific billboard at issue. During deliberation, members of the BZA addressed the use-increase of the billboard, and noted that they should affirm the Zoning Inspector's decision regarding XII(J) if they wanted to retain the ability to review the addition of each new digital billboard in the township.

{¶9} On July 26, 2007, the BZA issued a decision, overturning the Zoning Inspector's decision that Lamar needed a permit for new billboard construction pursuant to XVI(C), and affirming the decision that the installation of a digital screen on a non-conforming billboard exceeded the service capacity limitations of XII(J). The BZA approved a variance to permit Lamar to permanently place a digital screen onto the South-facing side of the billboard at Market Street and Western Reserve Road, and granted a "Rebuild" allowance in the event that the billboard is damaged or destroyed at some point in the future.

{¶10} On August 9, 2007, Lamar appealed the BZA's decision to the trial court, specifically taking issue with the BZA's decision that XII(J) applied and that the digital signs constituted an increase in service capacity. Lamar filed the administrative hearing transcript with the trial court, and both parties briefed the issue before the trial court. The trial court requested that the parties submit proposed judgment entries, and decided the matter subsequent to a non-oral hearing.

{¶11} Lamar argued to the trial court that the Ordinance only refers to billboards as structures, thus XII(J) only applies to the billboard's qualities as a structure. Since the billboard's cubical contents were not being expanded by over 25%, XII(J) did not apply. Lamar further argued that alternating digital advertisements do not constitute an increased use of the billboard, and instead pose less of a burden on the property. Lamar pointed out that the term "service capacity" is undefined in the Ordinance, contended that the term only envisions an increased burden on the land, and should otherwise be liberally construed in his favor. Lamar contended that he previously had the capacity to change the previous billboard signs as many times as he wished, but developments in

technology only recently made such a thing economically logical.

{¶12} The BZA argued that the sole subject of Lamar's appeal was regarding "service capacity," and thus did not address Lamar's arguments regarding use versus structure. The BZA asserted that the term "service capacity" should be given its plain and ordinary meaning. The BZA noted that the traditional use of a billboard involves displaying one advertisement in a single time period, and that an increase to six advertisements in a time period is more than a 25% increase. Even if Lamar were to have changed the previous billboard advertisements as frequently as desired, it would not have been possible to change them every eight seconds. The BZA asserted that it should have the ability to review each request to change from a regular non-conforming billboard to a digital screen non-conforming billboard.

{¶13} In its September 26, 2008 judgment, the trial court found that the Ordinance addresses billboards as structures rather than uses. The trial court found that any structural change involved in the installation of a digital screen did not violate the language of XII(J) that applied to structures. The trial court further found that "the ability of Appellant to change the message on billboards electronically and more frequently does not change the capacity of the billboard nor increase the degree of nonconformity." The trial court concluded that Lamar's installation of a digital screen onto its billboard "does not violate and is not subject to Article XII, Section J" of the Ordinance, and reversed and vacated the decision of the BZA. The BZA timely filed an appeal to the trial court's decision.

ANALYSIS

Trial Court Standard of Review of Administrative Appeal Decision

{¶14} In its first of two assignments of error, the BZA asserts:

{¶15} "The trial court erred by failing to evaluate the subject administrative appeal by the applicable standards of review."

{¶16} The BZA argues that the trial court used an improper standard of review because it failed to determine whether the decision of the BZA was supported by a preponderance of reliable, probative and substantial evidence, and inappropriately

stepped into the shoes of the BZA by making its own factual determinations.

{¶17} Pursuant to R.C. 2506.01, a party may appeal an administrative decision to a court of common pleas. The court of common pleas then reviews the administrative decision to determine whether the decision was "unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence on the whole record." R.C. 2506.04. The court of common pleas, acting as an appellate court, must defer to the administrative agency's underlying determination of factual matters. See *Paine Funeral Home v. Bd. of Embalmers & Funeral Directors of Ohio*, 150 Ohio App.3d 291, 2002-Ohio-6474, 780 N.E.2d 1036, at ¶9. A trial court should not merely substitute its judgment for that of the BZA, but if the BZA has enforced the Ordinance in an unreasonable or arbitrary manner, the trial court must reverse the decision of the BZA. *Kisil v. City of Sandusky* (1984), 12 Ohio St.3d 30, 34, 12 OBR 26, 465 N.E.2d 848.

{¶18} The BZA seems to take issue with the fact that the trial court did not weigh the underlying evidence in its opinion. It is true that the trial court did not include any findings of fact to support its legal conclusions. However the parties' arguments on appeal did not involve any disputes as to the underlying evidence, and instead revolved around the legal significance of terms in the Ordinance.

{¶19} The BZA further asserts that the trial court made independent factual findings by finding that the conversion to a digital billboard was not a structural extension of or addition to the nonconforming sign exceeding 25% of the existing service capacity. However, this finding by the trial court is a differing legal conclusion from that of the BZA, and not a finding of fact.

{¶20} Looking at the language used by the trial court in its judgment entry, the issue before the trial court was solely a question of law, i.e. the meaning of certain terms used in the Ordinance. Though the trial court provided no analysis to demonstrate the reasoning behind its conclusions, the trial court's decision indicates that it reversed the BZA's decision because it believed the BZA's construction of the terms of its Ordinance was erroneous as a matter of law. Because the trial court reversed the decision of the

BZA on an issue of law, the trial court did not exceed its scope of review for administrative appeals.

{¶21} As a final argument, the BZA takes issue with the trial court's interpretation of the term "service capacity." The BZA's arguments with the legal reasoning of the trial court's decision have no effect on whether the trial court used an inappropriate standard of review. The BZA's arguments on this point are more appropriate to its second assignment of error, and will be discussed therein.

{¶22} Given the foregoing, the BZA's first assignment of error is meritless.

Trial Court's Construction of Ordinance Language

{¶23} In its second assignment of error, the BZA asserts:

{¶24} "The trial court erred by finding that the actions of the BZA was unconstitutional, illegal, arbitrary, capricious and unsupported by the preponderance of the substantial, reliable and probative evidence in the Record."

{¶25} The BZA argues that its decision below was presumptively valid, and that the trial court should have deferred to its broad authority to interpret the meaning of its own Ordinance provisions. Specifically, the BZA asserts that it was reasonable to require a case-by-case review of changes in non-conforming uses. The BZA also asserts that the trial court invalidly construed the term "service capacity" too narrowly, instead of using the plain meaning of the term.

{¶26} Pursuant to R.C. 2506.04, an appellate court's review of an administrative appeal is even more limited in scope than that of the trial court. *Henley v. Youngstown Bd. of Zoning Appeals*, 90 Ohio St.3d 142, 147, 2000-Ohio-493, 735 N.E.2d 433. The appellate court is only to review the decision of the trial court on questions of law, and is not to weigh the evidence. Id. "It is incumbent on the trial court to examine the evidence. Such is not the charge of the appellate court. * * * The fact that the court of appeals, or this court, might have arrived at a different conclusion than the administrative agency is immaterial. Appellate courts must not substitute their judgment for those of an administrative agency or a trial court absent the approved criteria for doing so." Id., quoting *Lorain City School Dist. Bd. of Edn. v. State Emp. Relations Bd.* (1988), 40 Ohio

St.3d 257, 261, 533 N.E.2d 264. Thus, absent an error as a matter of law, this court must not disturb the judgment of the trial court.

{¶27} During interpretation of a zoning ordinance, "a court must give the legislation a 'fair and reasonable construction with due regard for the conflicting interests involved.'" *Bd. of Trustees of Jefferson Tp. v. Sunset Ramblers Motorcycle Club, Inc*. (Feb. 3, 1993), 3d Dist. No. 3-92-42, quoting *Davis v. Miller* (1955), 163 Ohio St. 91, 93, 56 O.O. 163, 126 N.E.2d 49. If the meaning of a zoning regulation is unclear, "the cardinal rule in interpreting zoning legislation is to determine the intent of the legislative body and give effect to that meaning." Id.

{¶28} The interpretation of zoning regulations is to be based on a fundamental principle of real property law: "Zoning resolutions are in derogation of the common law and deprive a property owner of certain uses of his land to which he would otherwise be lawfully entitled." *Saunders v. Clark Cty. Zoning Dept.* (1981), 66 Ohio St.2d 259, 261, 20 O.O.3d 244, 421 N.E.2d 152. Zoning resolutions should be strictly construed in favor of the property owner, and their scope should not be enlarged to include limitations not clearly prescribed. Id.

{¶29} The BZA validly claims that it should generally be able to review changes in non-conforming uses. However, Boardman Township has limited itself in the way it can review such changes in XII(J) of its Ordinance. The applicable sections of the Ordinance are as follows:

{¶30} "ARTICLE XII – EXCEPTIONS AND SPECIAL PROVISIONS

{¶31} "* * *

{¶32} "H. SIGNS AND BILLBOARDS

{¶33} "a. Permits Required

{¶34} "1. No signs shall be erected that do not conform to these regulations.

{¶35} "2. A zoning permit is required prior to the erection of any sign unless specifically excepted by this regulation.

{¶36} "* * *

{¶37} "c. In All Other Districts [ie all non-residential districts]

{¶38} "There shall be no limitation upon the size, character and placement of signs and billboards except that:

{¶39} "* * *

{¶40} "2. No sign, billboard or advertising devise of any kind, otherwise permitted in any district, shall be so located as to constitute a traffic or safety hazard.

{¶41} "3. No signs, billboard or advertising devise of any kind are permitted which contain statements, words or pictures of obscene, pornographic, immoral character or which contain advertising that is false.

{¶42} "* * *

{¶43} "6. Exclusive of time and temperature signs, no signs are permitted using projectors to display on a screen or signs with flashing lights, running lights or sequential lights.

{¶44} "* * *

{¶45} "f. Off Premises Signs - Billboards

{¶46} "1. Said signs shall be located only on land, which is zoned agricultural, business, commercial or industrial.

{¶47} "2. Said signs shall conform to the following size and height limitations:

{¶48} "(a) Setback Front: such signs shall have a minimum setback of thirty-five (35) feet from front property line, measured from the point of sign structure or leading edge closest to the street.

{¶49} "(b) Other Setbacks: such sign shall be placed no closer than twenty-five (25) feet from all other property lines.

{¶50} "(c) Size: such signs may have two opposing sign faces each sign face not to exceed two hundred and fifty (250) square feet in area.

{¶51} "(d) Height: the highest point on the sign shall not exceed 25' above grade of street.

{¶52} "(e) Clear Area: clear area below sign face shall be a minimum of eight (8') feet.

{¶53} "(f) Lighting: all lighting shall be located so as not to interfere with motorists

or adjoining properties. Flashing, running or sequential lights are not permitted.

{¶54} "* * *

{¶55} "J. CONTINUANCE OF NON-CONFORMING USES

{¶56} "Uses, not conforming to the regulations of the District in which they are located at the time of enactment of this ordinance, shall be known and regarded as 'non-conforming'. A non-conforming building or use may be continued subsequent to adoption of this ordinance provided there shall thereafter be no structural extension of, or addition to, such nonconforming building or use exceeding; (1) twenty-five percent (25%) of the cubical contents of the building or buildings as existing at the time of enactment of this ordinance, or (2) twenty-five percent (25%) of the existing service capacity if the use is conducted all or partly in the open. Subsequent to such allowable addition to building or expansion of use, there shall be no further additions or expansion except in accordance with the regulations for the district in which such non-conforming building or use is located.

{¶57} "A non-conforming use may not be changed to another non-conforming use disallowed by this ordinance in a district in which the original non-conforming use would be permitted."

{¶58} Thus, according to XII(J), the BZA may prohibit further nonconformities if 1) there is a structural increase of 25% of the cubical contents of the structure, 2) there is a use increase of 25% of the existing service capacity if the use is conducted all or partly in the open, or 3) if there is a change from one nonconformity to a different or additional kind of nonconformity.

{¶59} Had the BZA decided that, for example, all digital screens on billboards are generally prohibited as nonconforming uses, then the third of the above alternatives would have supported the BZA's decision. However, the BZA made no such finding. The trial court's opinion indicates that the BZA was unable to prohibit the change in Lamar's use of the billboard under the remaining two alternatives of XII(J), based on the trial court's construction of the meaning of the terms in those options. The trial court essentially gives alternate reasons for its holding: 1) that a billboard is only a structure

and not a use, and the absence of a 25% increase in the size of the structure prevents XII(J) from applying, and 2) assuming arguendo that the billboard constitutes a use, the use of digital screens does not change the service capacity of the billboard.

{¶60} First, the trial court made an overly broad statement of the law by finding that a billboard is only a structure and not a use. It is true that the billboard's prior nonconformity was one of size and was thus a structural nonconformity, and it is true that, insofar as the Ordinance governs the billboard's qualities as a structure, any structural change in the addition of the digital screen did not exceed the 25% limit. However, it appears that a billboard is regulated both for its use and for its qualities as a physical structure, just like any item subject to regulation by a zoning ordinance. See, e.g., *Coventry Twp. Bd. of Trustees v. Cheton* (May 8, 2007), Summit C.P. No. CV 2007-02-1068 (differentiating between a sign and the structure that supports the sign); *Metromedia, Inc. v. City of San Diego* (1981), 453 U.S. 490, 501-503, 101 S.Ct. 2882, 69 L.Ed.2d 800 (differentiating between ordinance provisions that regulate the structural characteristics of a sign, and provisions that regulate the contents or message of the sign).

{¶61} The billboard base, frame and board comprise its physical components, and the use of the billboard is the display of advertisement. Though leaving an advertisement to be viewed is more of a passive than an active use, it still remains a use of the structure. Thus the Ordinance governs both the use and structure of a billboard.

{¶62} As for the second of the trial court's findings, it is uncertain whether the change from a traditional to a digital billboard is contemplated in the phrase "existing service capacity if the use is conducted all or partly in the open." In the context of the use of a billboard, the owner of a billboard provides services for paying advertisers, and performs the services in the open by displaying the advertisements to the public. However, the application of "capacity" is difficult in this situation. Lamar's service capacity has increased in relation to its customers, but it is still unclear whether such an increase truly affects the impact of its services as conducted in the open. When members of the public drive by the billboards, they still see one sign displaying an advertisement.

{¶63} As Lamar indicated in the record below, a digital billboard would not serve more members of the public or cause more drivers to travel on the road, and the programmable format of a digital billboard would decrease the need for people to access the billboard structure. Lamar differentiates the passive service in the case at hand with a property where an active service is conducted with members of the public or otherwise creates more of a burden on the land.

{¶64} Pursuant to the argument presented by the BZA, it would not defy logic to apply the term "service capacity" to the digital display of advertisements. Thus, the display of multiple advertisements could reasonably be contemplated in the term "service capacity." However, it still is not clear if it was the intent of the legislative body to include this kind of billboard advertising in the term "service capacity," especially in light of the BZA's own admission that the technology of the situation has surpassed the language of the Ordinance.

{¶65} In any event, the term "service capacity" is ambiguous as applied in this context. Given the ambiguity, the trial court's decision to construe the language in favor of the private property owner, Lamar, was not clearly erroneous as a matter of law. Keeping in mind this court's narrow scope of review in the context of an administrative appeal, we conclude that the BZA's second assignment of error is meritless.

CONCLUSION

{¶66} The trial court did not exceed the permitted scope of review, and its interpretation of Ordinance terms was not erroneous as a matter of law. Accordingly, the judgment of the trial court is affirmed.

Vukovich, P.J., concurs.

Donofrio, J., concurs.