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CASE REVIEW

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Outdoor Media Dimensions, Inc. v. Department of Transportation – Supreme Court of Oregon, decided March 23, 2006.

This case involved a challenge to billboards that had been erected without permits. The trial court affirmed the administrative action of the Oregon DOT declaring the signs illegal. Outdoor Media appealed to the Oregon Court of Appeals on the basis that the Oregon Motorist Information Act (OMIA) violated the due process clause, the First Amendment and the Equal Protection Clause. The appeals court rejected all arguments and Outdoor Media appealed.

The initial issue for consideration involved prior restraint of First Amendment rights. Outdoor Media argued that because it had to obtain a permit prior to erecting the sign, this was an impermissible prior restraint. The court held that although it was a prior restraint, the content neutral permit scheme of the Department was not an impermissible prior restraint.

The court then looked at the issue regarding regulation of content. The Supreme Court held that the scheme of regulation did not prohibit any particular type of speech and that it was facially content neutral and did not violate free speech.

The court then looked at the distinction between on-premise and off-premise signs. Outdoor Media had argued that because a landowner could advertise its activities without obtaining a permit, this favored the speech of the landowner versus a typical permitted outdoor advertising sign. The Oregon Supreme Court held that this was an impermissible restriction on free speech. Because of the impermissible restriction, the Supreme Court struck the permitting and fee requirements for all outdoor advertising signs.

City of Oakbrook Terrace v. Suburban Bank and Trust Company – Illinois Appeals Court, March 24, 2006

The City enacted an ordinance requiring all off-premises free standing signs to be removed within eight (8) years after the passage of the ordinance. The City later modified the ordinance to impose size and height restrictions and a two-year amortization period for nonconforming signs. After the period ran, the City filed an action to remove signs in violation of the new ordinance. From the court's granting of summary judgment in favor of the sign owners, the City appeals.

After determining that the court had jurisdiction to hear the appeal, the appeals court examined the dismissal of the city's case by summary judgment. The first issue involved the home rule powers of the city. The billboard owners argued that requiring removal of the signs without just compensation under the state's condemnation law was a violation of the act. The Supreme Court determined that the amortization period set up in the city ordinance was not just compensation under the act and therefore impinged upon the duties of the courts to determine just compensation. For this reason, the ordinance was an improper exercise of home rule authority because it impinged upon the authority of a state entity, namely, the courts.

Commissioner of Transportation v. Rocky Mountain, LLC, et al – Supreme Court of Connecticut, decided April 11, 2006.

This is an eminent domain case where a billboard belonging to Viacom was condemned by the Commissioner of Transportation. Viacom contended that their billboard constituted a separate real property interest and that compensation, including income and damages, should be awarded for both the billboard and the easement. The trial court determined that the billboard was personal property and should be compensated accordingly. The court awarded damages to Viacom on the value of its easement as improved by the billboard. After the judgment was entered, Viacom moved to rectify the judgment and provide additional payment for the value of the billboard structure itself. Both parties appealed.

The initial issue reviewed by the court was whether the Motion for Rectification by Viacom reopened the judgment and rendered the original judgment moot. The appeals court held that the original judgment had been opened. However, the court was without subject matter jurisdiction as to the value of the billboard structure. Viacom had failed to apply for payment of damages under the administrative process within the Transportation Department and, as such, had failed to exhaust its administrative remedies. Because it failed to exhaust its administrative remedies, the court was without subject matter jurisdiction to pay any damages for the value of the boards. Although Viacom argued a number of avenues for subject matter jurisdiction, the appeals court determined that no action was begun by the Commissioner to obtain the billboards. In fact, the Commissioner notified Viacom that they needed to remove the board from the property. The end result was to void the modification of the original judgment, allowing the appeal of the underlying original judgment.

The appeals court then turned to a review of the judge's evaluation of the easement and refusal to value the billboard as real property. Viacom had argued that the billboard was real property and that it derived income by the rental value of the billboard face. The trial court had determined that the billboard structure was personal property. The Supreme Court supported the decision of the trial court and held that the valuation of the easement as real property was the appropriate methodology. It should be pointed out that income from the sign structure was incorporated into the valuation of

the easement by the trial court. The Supreme Court held that this was appropriate. The original judgment of the lower court was therefore affirmed.

Cracker Barrel Old Country Store, Inc. v. Town of Plainfield, Court of Appeals of Indiana, decided May 24, 2006.

In this action, Cracker Barrel built an on-premise sign that complied with the county ordinances. The property was subsequently annexed by the City and the sign was declared nonconforming within the City's ordinances. Cracker Barrel wanted to change the sign faces which was declared permissible by the City so long as the sign was not removed from the top of the pole. The contractor ignored the agreement between the City and Cracker Barrel and removed the top of the sign. As a result, the City declared the sign illegal and required its removal. The trial court issued an order requiring removal of the sign and Cracker Barrel appealed.

The appeals court looked at the definition of moving a sign. Under the ordinance, the appeals court held that any moving of the sign regardless of whether it was replaced would constitute a violation and rendered the nonconforming sign illegal.

Clayton Holding Company v. Board of Adjustment of the Township of Union, New Jersey Appellate Court, decided June 13, 2006.

In this case, Clayton filed an application for a variance of zoning ordinances to build a sign that was taller, larger, and nearer other signs than was allowed in the local ordinances. The city council, after holding a hearing, determined that the variance should be granted and a permit for construction of the sign issued. A local citizen filed suit challenging the decision of the City. The trial court determined that the City had been arbitrary and capricious and lacked substantial evidence in making the decision to allow the variance. Specifically, the trial court determined that the only reason for extra height would be to give the sign better visibility than surrounding signs. The "clutter" cited by the sign company was uniform for all of the local signs. The increased size was only required because of the extra height that had been afforded the sign. On appeal, the appeals court determined that the trial judge had made the appropriate decision in reversing the city council.

Billboards by Johnson, Inc. v. Township of Algoma, Michigan Court of Appeals, decided July 20, 2006.

The billboard company in this case had obtained permits for billboards on a parcel of property containing a strip mall. The City denied a permit to the billboard company because its ordinances on billboards restricted each parcel of property in this particular area to one principle use. Because of the existence of the strip mall, the billboard could not be erected. The billboard company brought an action on constitutional issues, preemption by state law of the ordinance, and the interpretation of "principle use" by the City. The trial court determined that the constitutional issues were

without merit, that the state law did not preempt the City ordinance because the City ordinance was an allowable spacing regulation and that the billboards, were a principle use under the ordinance. The billboard company appealed.

The Michigan Court of Appeals looked at state statutes regarding the preemption issue and determined that the ordinance in question was an appropriate spacing regulation. The ordinance controlled spacing by allowing only one principle use. for each parcel of property in the area and as such increased the spacing between billboards.

Regarding the issue of principle use, the billboard company argued that the state statutes indicated a legislative intent to declare billboards as a secondary use. However, the court rejected this argument and held that the interpretation of the ordinance was appropriate. As to the constitutional issues, the court simply held they were without merit.

KH Outdoor, LLC v. City of Trussville, 11th Circuit Court of Appeals, Alabama, August 4, 2006.

This case involved an application to the City by KH Outdoor for permits on eleven (11) billboards. The City had an ordinance which restricted billboards to interstate highways within the city limits. KH Outdoor filed suit against the City and Federal court raising a number of constitutional challenges. The U.S. District Court found that the ordinance unconstitutionally favored commercial speech over non-commercial speech because the definition of billboards in the ordinance said that signs could not contain non-commercial messages. Under this reasoning, non-commercial messages could not be as large as commercial messages. The District Court granted an injunction prohibiting the City from enforcing its sign ordinance. On appeal, the City argued that KH Outdoor lacked standing to bring the First Amendment claim. This was denied by the appeals court. The court, after significant discussion of the Metro Media decision, determined that the section of the ordinance did in fact favor commercial speech over non-commercial speech by restricting the size of the sign that could hold non-commercial speech. Therefore, the decision of the District Court was upheld.

Bradley Outdoor, Inc. v. City of Florence, Alabama Appeals Court, decided September 8, 2006.

In this case, Bradley Outdoor filed permit applications for several billboards in an area outside of the City of Florence. By legislative act, the City had zoning authority over the given area outside of its city limits. Under its zoning authority, the City issued a moratorium on all new billboard permits. Bradley filed suit for Writ of Mandamus. The trial court granted summary judgment against Bradley and Bradley appealed.

On appeal, Bradley argued that the extra territorial zoning authority granted to the City was a violation of the state constitution. The appeals court held that because

the statute addressed the circumstances of this particular city, specifically, and addressed a need that was not addressed anywhere in the statutes, the grant of zoning authority was not in violation of the state constitution.

Infinity Outdoor, Inc. v. Delaware and Raritan Canal Commission, New Jersey Appeals Court, decided October 12, 2006.

This case involved location of a billboard near a park. The area where the billboard was to be located was commercial and industrial but, because of its proximity to the park, had to be approved by the Canal Commission. The Canal Commission denied the permit citing aesthetic reasons. The billboard company then filed an amended application implementing trees to mask the billboard from the park. The Commission denied the permit again as incomplete on a technical issue. The appeals court upheld the denial on the basis that the Commission's determination was supported by substantial evidence, was not arbitrary or unreasonable, and comported with legislative policies.

Tinsley Media, LLC v. Pickens County, GA, 11th Court of Appeals, decided October 12, 2006.

The county passed on ordinance banning all billboards. Tinsley Media filed a permit request for billboards which were denied and Tinsley sued in local federal court claiming constitutional claims. During the pendency in the trial court, the county voided the old ordinances and passed a new set of ordinances. The main issue with the ordinances seemed to be the lack of a purpose. The new ordinance contained a purpose. Because the new ordinance had fixed the problems, the county claimed in the trial court that the issue was moot. The trial court determined that Tinsley had no standing to challenge the ordinance and that the ordinance issue was moot. On appeal, the 11th Circuit determined that the issue was not moot because Tinsley had claimed damages under the old ordinance. The Court further determined that Tinsley had standing to challenge on First Amendment grounds. The Appeals Court, however, did affirm the dismissal of Tinsley's challenges as to procedural safeguards.

Adams Outdoor Advertising, LP v. Zoning Hearing Board of Smithfield Township, Pennsylvania Appeals Court, decided October 18, 2006.

This case involved a city ordinance that required a landowner to remove any billboards from his property before developing the property in some other way. Adams had a lease with the landowner for a number of legal billboards on the property. The landowner presented development plans to the City for the property. The City informed the landowner of the ordinance and the landowner notified Adams that it would have to remove the billboards and that the lease was being terminated. Adams filed suit and the trial court held for the City.

On appeal, Adams argued first that the ordinance amounted to an impermissible amortization process. The court, however, reasoned that this was not an amortization matter because the acts to remove the billboard originated in the decision of the landowner. The landowner had the onus of removing the boards by whatever means at its disposal. Next, Adams argued that the ordinance constituted a constitutional violation because it differentiated between on-premise and off-premise advertising. The appeals court citing Metro Media and decided that there was no problem with labeling the signs as on-premise and off-premise, per se, so long as the content of the board was unaffected. Adams then argued a First Amendment challenge to which the court replied that the regulating scheme was content-neutral. The next argument involved an illegal taking of the billboard without compensation to which the court replied that the act of removing the board was not a state act, but that of the landowner. The final argument regarding ambiguity of the ordinance was dismissed by the court as being without merit.

Township of Exeter v. Zoning Hearing Board of Exeter Township, Commonwealth Court of Pennsylvania, decided November 1, 2006.

Land Displays, Inc. filed application for eleven (11) billboards in the Township of Exeter. Each proposed 300 or 672 sq. ft and a height of 44 ft thereby violating the ordinance, which allowed a maximum of 25 sq ft and a height of 25 ft. Land Displays appealed the denial of the permits to the Zoning Hearing Board, which declared the sign ordinance unconstitutional. The reasoning of the Zoning Hearing Board was that since the industry standards are much larger, this effectively prohibited all billboards. The trial court affirmed the decision of the Zoning Hearing Board. The Township of Exeter appealed, arguing that the ordinance was not a complete ban on billboards. The appeals court held that it was error for the Zoning Hearing Board to decide that the ordinance was a complete ban of billboards just because it did not conform to the industry standards. Advertisers could erect billboards within the limits and there was a sufficient basis for requiring the limits by the Township.

Missouri Highways and Transportation Commission v. Muslet, Missouri Court of Appeals, decided November 28, 2006.

This case is a condemnation action. The court determined the overall value of the property as required by state law. It had then apportioned the award by giving 94% to the landowner and only 6% to the owner of a billboard on the property. From this the billboard owner appealed. The trial court had relied on language in the lease between the landowner and the billboard company which indicated that only the value of the sign would be considered in any sale. The appeals court said that the language of the lease was too ambiguous to waive the right to compensation.

Clear Channel Outdoor v. Seattle Popular Monorail Authority, Washington Court of Appeals, decided January 22, 2007.

In this case, Clear Channel Outdoor had a lease on property that was condemned. However, several years prior to the condemnation, the lease had terminated on its own and all that remained was a month-to-month lease. The Monorail Authority which purchased the property through eminent domain paid nothing to Clear Channel and, upon taking possession notified Clear Channel that its month-to-month lease was terminated. Clear Channel filed an inverse condemnation suit for compensation which the trial court dismissed. On appeal, the Washington Court of Appeals opined that a month-to-month lease did not constitute an interest in realty. As such, Clear Channel was not entitled to compensation for that month-to-month lease.

Brooks v. State of Texas, Court of Appeals of Texas, decided February 15, 2007

This case is an unusual case in that it is a criminal case and a criminal appeal involving a sign. The Defendant, Brooks, erected a sign outside of Houston after receiving only a permit from the Texas Department of Transportation. He failed to apply for any permit with the City. As a result of his erection of the sign, the City filed a criminal affidavit and charged him with criminal violation of its sign ordinance. After his conviction, Brooks appealed to the county court and eventually the appeals court. On appeal, Brooks argued that the City had no jurisdiction in an extra-territorial jurisdiction of the sort here where the sign was actually located along an interstate. The appeals court looked at the language of the statute and determined that the plain language of the statute established the guilt of the defendant.

Lamar Advantage Holding Company v. Arkansas State Highway Commission, Supreme Court of Arkansas, decided March 22, 2007.

This is a condemnation case. The property on which Lamar had a billboard was condemned for highway purposes. At the condemnation trial, Rodolfo Aguilar testified as to the value of the billboard and easement. The trial court held that because Dr. Aguilar included business income in his analysis, his entire testimony was thrown out. The trial court then granted summary judgment for the Commission limiting payment to Lamar to the depreciated value of the sign structure. On appeal, the Arkansas Supreme Court determined that while business income is not a proper element to be considered in condemnation cases, the rental value of the property, which may include some percentage of the property's rental income, is appropriate. The court remanded to the trial court for development of the testimony along these lines.

Martin v. Mississippi Transportation Commission, Mississippi Court of Appeals, decided April 10, 2007.

In this case, the Mississippi Transportation Commission was condemning land that contained two billboards. The sites for the billboards were leased from the

landowner in two separate leases. At trial, the appraiser for MTC testified as to the valuation of the property interest and the value of the sign. Martin's attorney objected because the appraiser used the opinion of a sign construction company for the basis of his value and moved to strike his testimony. The jury returned a verdict which was considerably less than the appraisal by the billboard company's expert. The billboard company moved for an additum which was denied. The billboard company appealed to the Mississippi Court of Appeals which determined that the appraiser for MTC merely passed through information from the construction company and had no independent expertise with regard to the value of the sign structure. Because the expert should have been stricken, the MTC had not met its burden to present a prima facie case and the case was therefore remanded for a new trial.

State Department of Transportation v. Sanford, Court of Civil Appeals of Alabama, decided May 11, 2007.

The Sanfords allowed an individual to place a billboard on their property. The third-party obtained a permit from the Alabama DOT and erected the sign. The sign remained for three years before the third-party removed it. Subsequently, the Sanfords erected another billboard on their property without obtaining a permit. Alabama DOT informed the Sanfords that the permit of the third-party was still viable and, as such, no other permit could be issued on the property. To complicate matters, the third-party filed a request for a permit on adjacent property along the same highway. This proposed billboard would be within 500 feet of the Sanford's billboard. The Sanfords filed suit against Alabama DOT without naming the third-party. The trial court determined that the permit of the third-party was no longer viable and ordered the Alabama DOT to issue a permit to the Sanfords. It further ordered the Alabama DOT to issue a permit to the third-party. The Alabama DOT appealed the decision and the Court of Appeals determined that allowing both permits would place the two billboards within 500 feet of each other. This would violate the spacing law of the State and could not be allowed. The Court of Appeals remanded the case to the trial court to determine whether the billboard on the Sanford's property may be permitted under the spacing requirements.

Adams Outdoor Advertising, L.P. v. Board of Zoning Appeals of the City of Virginia Beach, Supreme Court of Virginia, decided June 8, 2007.

In this case, Adams Outdoor Advertising had a billboard lawfully erected which became nonconforming when Virginia Beach banned all billboards in the City. Adams installed a digital face on the billboard. Virginia Beach notified Adams that it must take the board down because it had violated the ordinance that prohibits structurally altering or increasing the size of the nonconforming board. Before the Zoning Board, Adams argued that the billboard was not structurally altered despite the 3,500 pound weight of the digital board and that the size was not altered because the face remained the same dimensions. The Zoning Board held for the City and required Adams to remove the Board. Adams appealed the decision to trial court and the trial court upheld the Zoning

Board. Adams also argued that, even if the modification was a violation, it had remedied this by removing the digital face. The trial court held that the billboard must be removed and Adams appealed. The Supreme Court on appeal agreed with the trial court that just because the surface area of the sign was not changed, the size can mean a depth dimension or a weight dimension. Under this reasoning the Supreme Court upheld the decision of the trial court. The interesting thing to note about this case is that Adams did not present an argument on the issue of whether removing the digital face and replacing it with the original face had remedied the problem. Because it had not made an argument, the Supreme Court did not address this issue.

City of Philadelphia v. Steen Outdoor Advertising, Commonwealth Court of Pennsylvania, decided June 18, 2007.

In this case, Steen obtained a permit to erect an auxiliary sign which was essentially similar to an on-premise sign. However, Steen advertised other material on the sign that had nothing to do with the on-premise business. After a long, convoluted array of appeals and arguments about amending, the trial court required Steen to remove his sign and pay a substantial fine. Steen appealed and the Appellate Court affirmed as to everything except the trial court's failure to allow Steen to present mitigating evidence. On remand, the trial court was ordered to hear the mitigating evidence and consider it accordingly.

Lamar Advertising Company v. Texas Department of Transportation, Texas Court of Appeals, decided June 20, 2007.

Lamar Advertising had tri-vision signs operating in Texas that had been allowed by the Texas Department of Transportation. In 1999, the Texas Department of Transportation modified its regulation to prohibit tri-vision signs. Lamar filed suit arguing that the change in law was an unconstitutional retroactive application. The trial court granted summary judgment to the Texas DOT on the basis that, despite their allowance of the tri-vision signs, the regulations of Texas DOT prior to 1999 had prohibited tri-vision signs. The appeals court accepted this argument and affirmed the lower court.

Proctor v. Orange Barrel Media, LLC, Court of Appeals of Ohio, decided June 21, 2007.

Proctor is the Director of the Ohio Department of Transportation, which raised an objection to a zoning scheme set up by the City of Columbus and Orange Barrel Media. Under this scheme, billboards were allowed in the areas of Routes 23 and 33, which are both U.S. highways. The trial court granted summary judgment to the City and Orange Barrel on the basis of sign spacing and lighting requirements. However, on appeal, the Ohio Court of Appeals determined that neither of the highways, which were the subject of this plan, were included under the Highway Beautification Act. The Court of Appeals therefore affirmed the decision of the trial court in favor of the City and Orange Barrel.

Fulton County v. Galberaith, Supreme Court of Georgia, decided June 25, 2007.

In this case, Fulton County banned all signs except on-premise signs. Galberaith filed a request for a sign permit and was denied. Galberaith filed an action and the trial court determined that the ordinance of Fulton County was in violation of the First Amendment and required the County to give Galberaith its permit. The County appealed to the Supreme Court of Georgia. The Supreme Court of Georgia reviewed the distinction between on-premise and off-premise signs and, quoting Metro Media, stated that the distinction between on-premise and off-premise is not necessarily a problem. However, after noting that the sign ordinance of Fulton County was much broader in coverage than the ordinance in Metro Media, it affirmed the decision of the trial court and declared the sign ordinance unconstitutional.

City of Brentwood v. Metropolitan Board of Zoning Appeals, Tennessee Court of Appeals, decided June 28, 2007.

This case involved the issuance of a permit to erect a billboard on a scenic-byway. Lamar requested a permit to erect a billboard on a highway that crossed a scenic-byway. The regulations controlling the scenic-byway prohibited any billboards built "along" the scenic-byway. Lamar's position, and the position of the Zoning Board that granted the permit, was that the billboard was in fact along the highway that crossed that scenic-byway. For this reason, the Zoning Board granted the permit. There was also a question as to spacing since the billboard was allegedly within 1000 feet of another billboard in the area. The City of Brentwood appealed the decision of the Zoning Board to local court, which affirmed the decision of the Zoning Board as to the "along the by-way" language and finding that the sign was not oriented to be seen from the by-way. As to the spacing issue, the court held that there was not sufficient information in the record provided (the actual tape of the original hearing had not been audible). The trial court therefore remanded the case to the Zoning Board for development of further evidence as to the relative location of the two billboards. The City of Brentwood appealed to the Tennessee Court of Appeals, which, after examining the orientation of the sign and the language of the regulations, agreed with the trial court that the sign was not oriented in such a manner to be seen from the scenic-byway. The fact that the sign could be seen at certain points was not sufficient to forbid the permitting of the sign. The Court of Appeals did remand the case back to the Zoning Board for determination of the spacing issue with some minor alterations of the trial court's remand. However, the Court of Appeals generally affirmed the decision of the trial court.

Covenant Media of South Carolina v. City of North Charleston U.S. Court of Appeals, 4th Circuit, decided July 6, 2007.

This case involved a First Amendment challenge to a city's sign ordinance. In this circumstance, however, the City of North Charleston failed to act on the applications filed by Covenant Media. Covenant Media filed suit and the City modified its

regulations. On appeal, the Court of Appeals held that although the trial court was in error finding a lack of standing on the part of Covenant Media, the regulation scheme was content-neutral and therefore the timing issue was of no consequence. The Court affirmed the district court's grant of summary judgment to the Cit of North Charleston.

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