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Supreme Court Reverses Ban on Electronic Billboards

On September 15, the Supreme Court of New Jersey in *E&J Equities v. Board of Adjustment of Franklin Township*, 2016 N.J. LEXIS 890 (Sept. 15, 2016), reversed a decision of the Franklin Township Zoning Board of Adjustment and invalidated a township ordinance prohibiting the placement of electronic billboards along Interstate 287 in the township. The genesis of the case was in 2010 when the township adopted an ordinance regulating signs, including billboards, permitted in zoning districts proximate to an interstate highway. Digital billboards were expressly prohibited anywhere in the township. The township alleged that digital billboards were barred based on aesthetic and public safety concerns and, in particular, noted "there was no conclusive source or documentation that digital billboards were safe" nor were there "reasonable standards" for the regulation of digital billboards.

From 2008 to 2009, Franklin Township held public hearings concerning revisions and updates to its sign ordinance, including billboards. During that time, plaintiff filed an application with the Franklin Township Zoning Board of Adjustment for a conditional use variance to construct and install a digital billboard on property in a light industrial zone adjacent to Interstate 287. While the application was pending in March 2010, the Township adopted an ordinance prohibiting digital billboards. At that time, a number of studies showed that digital billboards have no statistically significant relationship with the occurrence of traffic accidents. A neighboring municipality had permitted the installation of a digital billboard along a portion of Interstate 287, under New Jersey Department of Transportation regulations (N.J.A.C. 16:41C-11.1) establishing minimum distance and other requirements. Under those regulations, based on the amount of frontage of Interstate 287 in the township, one digital billboard would be permitted. The NJDOT had issued a permit for the digital billboard subject to plaintiff's obtaining local zoning approval. Ultimately, the township zoning board voted 4 to 3 to approve the application, which equated to a denial because of the supermajority approval required for conditional use variances under N.J.S.A. 40:55D-70(d)(3).

The plaintiff appealed the zoning board's decision to the Law Division in lieu of prerogative writs, and the Law Division concluded that the "Ordinance banned an entire medium of speech and burdened commercial speech." Applying an intermediate scrutiny standard, the Law Division determined the township had failed to establish that a total ban on digital or electronic billboards served a legitimate government interest, and that the ordinance was not narrowly drawn to advance that interest. In reversing the zoning board's decision, the Law Division found that "one digital billboard, by itself, was not likely to have any more of an impact on [T]ownship aesthetics than a static billboard." The court also noted that the township had failed to demonstrate that a complete ban on digital billboards advanced its stated interest in traffic safety given that the plaintiff's traffic safety studies found no correlation between the installation of digital billboards and any increase in traffic accidents. In finding that the township's ban on digital billboards was more expansive than necessary to advance the identified governmental interests, the Law Division declared the ordinance invalid.

The township appealed the Law Division's decision to the Appellate Division, which reversed the Law Division and reinstated the zoning board's decision and the ordinance, finding that it "is universally recognized that [the] government has a legitimate, even substantial, interest in preserving the aesthetics of its community and in promoting traffic safety," and that the township's stated reasons provided "a rational objective basis" for the Township's decision to refrain from digital billboards as a permitted use.

On certification, the Supreme Court reversed the Appellate Division and declared the ordinance unconstitutional. The court applied the "time, place, manner, intermediate scrutiny standard" for commercial speech. In so doing, it noted that "when a governmental entity restricts speech, it must do more than simply invoke government interests that have been recognized over time as substantial. In other words, there must be a modicum of support for the invoked government interest." With regard to aesthetics, the court found that the record provided no basis to discern how the three permitted static billboards

were more aesthetically palatable than a single digital billboard. The court found a considerable amount of available literature would permit the township to adopt appropriate regulations for digital billboards, and it noted that the NJDOT had, in fact, promulgated regulations on the very issue. The court likewise dismissed the public safety debate because the "record is also bereft of any examination of the safety impact of the installation of three static billboards." It found that "the numbers standing alone do not lead inexorably to the conclusion that the installation of a single digital billboard in the Township will exacerbate the accident rate. ... In short, bare numbers do not carry the public safety debate." The court concluded that "in the fact of a record founded only on unsupported suppositions, fears, and concerns, we need not address whether the course taken by the governing body is reasonable under all of the circumstances."

In ultimately reversing the Appellate Division and holding that the ordinance was unconstitutional, the court stated that "a governing body seeking to restrict expression cannot simply invoke those interests with scant factual support informing its decision-making and expect to withstand a constitutional challenge. In the end, the record provides no explanation of the qualitative differences between three static billboards and a single digital billboard. The record also belies the assertion that no standards existed to address aesthetic and public safety concerns."

Most zoning and development applications for development do not involve free-speech issues. However, municipalities should take note that mere window dressing in support of protecting aesthetics and public safety does not pass muster as protecting "substantial" government interests absent at least a modicum of support for the invoked interest. Here, there was a virtual disconnect between the ordinance and common sense, because the township presented no empirical data suggesting that digital billboards cause more accidents than static billboards, or that they are less aesthetically pleasing than static billboards, particularly when located in the township's light manufacturing zone and adjacent to a major interstate highway.

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