STATE OF MICHIGAN

COURT OF APPEALS

INTERNATIONAL OUTDOOR, INC., Plaintiff-Appellant,	UNPUBLISHED May 1, 2014
v	No. 313153 Macomb Circuit Court
CITY OF ROSEVILLE, Defendant-Appellee.	LC No. 2011-003814-CZ

Before: BORRELLO, P.J., and WHITBECK and K. F. KELLY, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting summary disposition to defendant pursuant to MCR 2.116(C)(10), and denying plaintiff summary disposition. For the reasons set forth in this opinion, we affirm.

I. FACTS AND PROCEDURAL HISTORY

This appeal arose out of plaintiff's attempt to erect a billboard in Roseville, Michigan. Defendant regulates billboards within city limits pursuant to § 264 *et seq.* (Sign Ordinance), and § 370 *et seq.* (Zoning Ordinance). Plaintiff applied to defendant's Building Department for a permit to erect a billboard 70 feet in height, 672 square feet in size, and 365 feet from property used and/or zoned as residential. The Building Department denied plaintiff's application and plaintiff subsequently applied to the Zoning Board of Appeals (ZBA) for variances. The ZBA conducted a hearing and denied the variances. Plaintiff then commenced the instant action in the circuit court, challenging the constitutionality of the ordinances, and the ZBA's application of the ordinances in granting or denying the variances. Defendant moved for summary disposition under MCR 2.116(C)(8) and (C)(10). Plaintiff then also moved for summary disposition under MCR 2.116(C)(10). After a hearing on these motions, the circuit court granted summary disposition in favor of defendant under MCR 2.116(C)(10), and denied plaintiff's summary disposition motion. Plaintiff now appeals.

II. STANDARD OF REVIEW

This Court reviews de novo a lower court's decision on a motion for summary disposition. *Johnson v Recca*, 492 Mich 169, 173; 821 NW2d 520 (2012). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 206; 815 NW2d 412 (2012). This Court reviews a

"motion brought under MCR 2.116(C)(10) by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). Review is limited to the evidence that had been presented to the lower court at the time the motion was decided. *Innovative Adult Foster Care, Inc v Ragin*, 285 Mich App 466, 476; 776 NW2d 398 (2009). Summary disposition under MCR 2.116(C)(10) is appropriately granted "if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Greene v AP Products, Ltd*, 475 Mich 502, 507; 717 NW2d 855 (2006). A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds could differ. *Debano-Griffin v Lake County*, 493 Mich 167, 175; 828 NW2d 634 (2013).

This Court reviews the underlying issues regarding the interpretation and application of a township's ordinance de novo as a question of law. *Great Lakes Soc v Georgetown Twp*, 281 Mich App 396, 407–408; 761 NW2d 371 (2008). This Court also reviews a plaintiff's constitutional challenges de novo. *Thomas v Pogats*, 249 Mich App 718, 724; 644 NW2d 59 (2002). The decision of a ZBA should be affirmed unless "it is contrary to law, based on improper procedure, not supported by competent, material, and substantial evidence on the record, or an abuse of discretion." *Janssen v Holland Charter Twp Zoning Bd of Appeals*, 252 Mich App 197, 201; 651 NW2d 464 (2002). This Court gives "great deference" to the findings of the circuit court and ZBA. *Norman Corp v City of E Tawas*, 263 Mich App 194, 203; 687 NW2d 861 (2004), citing *Cryderman v Birmingham*, 171 Mich App 15, 20; 429 NW2d 625 (1988).

III. PRIOR RESTRAINT

On appeal, plaintiff argues that defendant's ordinances, as applied, constitute an unconstitutional prior restraint because defendant has not applied the stated objective standards for permitting billboards in a consistent manner. Defendant argues that the ZBA has followed a practice of ignoring or waiving those standards on an ad hoc and discretionary basis, and relies solely on subjective criteria and considerations in granting or denying variance requests. Defendant asserts that when the ZBA has denied billboard variances, it has stated that the proposed billboard "will not be in harmony with the general purpose and intent of Roseville's sign ordinance [Section 264-A(1)(a), (b), or (c)] and will be injurious to the neighborhood or otherwise detrimental to the public welfare and therefore, is hereby denied." These, defendant argues, are the "standards" that several relevant cases held create an unconstitutional prior restraint.

Plaintiff argues on appeal that the circuit court properly found that defendant's billboards regulations are narrow, objective, and definite and do not operate as a prior restraint. Had plaintiff's billboard met those regulations defendant argues, there would be no need for a variance. Further, plaintiff argues that contrary to defendant's assertions of ignoring those standards or applying them on an ad hoc basis, each variance is reviewed on a case-by-case basis. In this case, plaintiff asserts, the determination of the ZBA was based on the particular factors of this site as it related to the ordinance, public safety, aesthetics, and preservation of harmony in the area. Defendant therefore contends that no constitutional violations occurred.

We begin our analysis by noting that it is undisputed that the provisions of the ordinances regulating billboards are narrow, objective, and definite standards, and that plaintiff's proposed billboard did not fall within the standards set forth in the ordinances. Instead, plaintiff contends that the ZBA has exercised its unbridled discretion in determining whether to approve or deny variance requests, and thus, the Sign Ordinance, as applied, is an unconstitutional prior restraint.

A licensing scheme that gives public officials the power to deny use of a forum in advance of actual expression is a prior restraint on First Amendment liberties. *Southeastern Promotions, Ltd v Conrad*, 420 US 546, 558; 95 S Ct 1239; 43 L Ed 2d 448 (1975). "Any system of prior restraints on expression bears a heavy presumption against its constitutional validity." *Van Buren Twp v Garter Belt Inc*, 258 Mich App 594, 622; 673 NW2d 111 (2003), citing *Bantam Books, Inc v Sullivan*, 372 US 58, 70; 83 S Ct 631; 9 L Ed 2d 584 (1963). A law subjecting the exercise of First Amendment freedoms to the prior restraint of a license must contain narrow, objective, and definite standards to guide the licensing authority. *Michigan Up & Out of Poverty Now Coal v State*, 210 Mich App 162, 171; 533 NW2d 339 (1995), citing *Shuttlesworth v City of Birmingham*, 394 US 147, 150–51; 89 S Ct 935; 22 L Ed 2d 162 (1969). Moreover, a licensing law that places "unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship." *Michigan Up & Out*, 210 Mich App at 171.

Under the Michigan Zoning Enabling Act, a township's ZBA is a municipal administrative body charged with the power to interpret the ordinance, hear appeals, grant variances, and perform various other functions that may arise in the administration of the zoning ordinance. MCL 125.3601(1); MCL 125.3603(1); *Sun Communities v Leroy Twp*, 241 Mich App 665, 670; 617 NW2d 42 (2000). Under the Michigan Zoning Enabling Act:

> (7) If there are practical difficulties for nonuse variances as provided in subsection (8) or unnecessary hardship for use variances as provided in subsection (9) in the way of carrying out the strict letter of the zoning ordinance, the zoning board of appeals *may* grant a variance in accordance with this section, so that the spirit of the zoning ordinance is observed, public safety secured, and substantial justice done. The ordinance shall establish procedures for the review and standards for approval of all types of variances. The zoning board of appeals may impose conditions as otherwise allowed under this act. [MCL 125.3604(7) (emphasis added).]

Likewise, defendant's Sign Ordinance provides, in pertinent part, as follows:

> (B) The Board of Appeals shall also have the power to authorize a variance from the strict application of this chapter where such application will result in practical difficulty or unnecessary hardship to the person owning or having the beneficial use of the property or sign for which a variance is sought.
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> * * *
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> (C) Variances.

> (1) A variance may be allowed by the Board of Appeals only in cases involving practical difficulty or unnecessary hardship and only when the evidence in the official record of the appeal supports all of the following affirmative findings:
>
> (a) That the alleged practical difficulty or unnecessary hardship, or both, is exceptional and peculiar to the property of the person requesting the variance and results from conditions which do not exist generally throughout the city.
>
> (b) That the alleged practical difficulty or unnecessary hardship, or both, which will result from a failure to grant the variance includes substantially more than mere inconvenience.
>
> (c) That, considering the public benefits intended to be secured by this chapter, the individual hardship that will be suffered by failure to grant the variance and the rights of others whose property would be affected by the allowance of the variance, allowing the variance will result in substantial justice being done. [Roseville Ordinance, § 264-15(B)-(C).]

The language of both the statute and ordinance allow the ZBA discretion in determining whether to grant or deny a variance based upon a finding that a practical difficulty or unnecessary hardship exists. Therefore, we find that the Sign Ordinance was enacted in compliance with MCL 125.3604(7).

As previously stated, plaintiff asserts that the ordinance creates an unconstitutional prior restraint because the ZBA approves or denies variances without any real criteria upon which to base its decisions. However, plaintiff concedes that the Sign Ordinance sets forth a narrow, objective, and definite standard for permitting off-premises signs in a particular location. Roseville Ordinances, § 264-6(A)(1)(a)-(d); §370-57. Because plaintiff could not meet the strict application of the Sign Ordinance, it was required to present evidence that a practical difficulty or unnecessary hardship existed. Roseville Ordinance, § 264-15(B). As a reviewing board, the ZBA must exercise discretion in making its variance determinations, and any assertion otherwise would clearly undercut the purpose of the ZBA. Although the ZBA has discretion under the Sign Ordinance, contrary to defendant's conclusory assertions, the ordinance did not place unbridled discretion in the hands of the ZBA. Rather, the ordinance as stated and as applied stands for the proposition that if the petitioner does not meet the strict application of the ordinance, the ZBA reviews the variance request and considers whether a practical difficulty or unnecessary hardship exists based upon the evidence presented in that specific case. Roseville Ordinance, § 264-15(B)-(C). The practical difficulty or unnecessary hardship standard has repeatedly been upheld as a valid standard by which the ZBA reviews variance requests if the petitioner does not strictly adhere to the objective standards set forth in the ordinance. See *Norman Corp v City of E Tawas*, 263 Mich App 194, 203; 687 NW2d 861 (2004), lv den 472 Mich 894 (2005); *Janssen*, 252 Mich App at 201. Our review of the record evidence in this case, specifically the minutes of the ZBA, leads us to conclude, as did the circuit court, that defendant applied both the practical difficulty and undue hardship standards. Therefore, the Sign Ordinance did not place unbridled discretion in the hands of the ZBA, but rather, provided a standard from which the ZBA reviews variance applications. Consequently, the circuit court did not err in ruling that the Sign Ordinance, on its face, was constitutional.

Plaintiff additionally asserts that, had the ZBA applied the objective practical difficulty standard, it would have found that plaintiff did face a practical difficulty requiring variances for its proposed billboard, and the Sign Ordinance, as applied, imposes a prior restraint. Consequently, plaintiff argues, the ZBA's decision to deny the variance was not tethered to any constitutionally firm standards, but rather adopted on an ad hoc, arbitrary basis.

Non-use variances may be granted if a property owner might otherwise suffer a practical difficulty. *Norman Corp*, 263 Mich App at 203; Roseville Ordinance, § 264-15(B)-(C). A practical difficulty cannot be self-created. *Norman Corp*, 263 Mich App at 202. Non-use variances may be granted if a property owner might otherwise suffer a practical difficulty. *Norman Corp*, 263 Mich App at 203; Roseville Ordinance, § 264-15(B)-(C). A practical difficulty cannot be self-created. *Norman Corp*, 263 Mich App at 202. Plaintiff sought variances for height, size, and setback from residential zoned property, classifying this as a non-use variance. After the hearing, the ZBA denied all three variance requests and ruled that the variances were not in harmony with the general purpose and intent of Roseville Ordinance, § 264-6(A)(1)(b), § 264-6(A)(1)(c), and §370-57, relating to off-premises signs located in the Sign Overlay Zone. More specifically, the ZBA found that no undue hardship, unique circumstances or practical difficulty existed, or if they did exist, any undue hardship, unique circumstances, or practical difficulty was self-created by plaintiff's desire to erect a billboard at this location, size, and height. The ZBA also found that the location of the proposed billboard added driving distractions, traffic congestion, visual blight, and a traffic hazards. Moreover, the ZBA found that the proposed billboard would be aesthetically inconsistent with the residentially zoned property nearby.

At the hearing, concerns were raised by both council members and residents regarding the proposed billboards proximity to residential homes. In October 2010, defendant adopted a moratorium that remained in effect for 180 days in order to allow the Planning Commission to review the city's ordinances and regulations pertaining to billboards. This moratorium was a result of residents in the area complaining about the amount of billboards located near a residential used and/or zoned property. In April 2011, defendant adopted an amendment to the Zoning Ordinance to provide for regulations in the Sign Overlay Zone, and the provisions required a 500 foot setback from residential used and/or zoned property, Roseville Ordinance, § 370-57.

The ZBA applied the standard set forth in the Sign Ordinance in reviewing plaintiff's application for variances, and the findings were supported by competent, material, and substantial evidence. Because the record suggests that evidence was presented to support the ZBA's findings, the decision to deny the variance application was based on the standards set forth in the Sign Ordinance, and the ZBA did not deny plaintiff's variance application on an ad hoc and arbitrary basis. Accordingly, the circuit court properly granted summary disposition on this prior restraint claim.[1]

[1] We note that plaintiff also asserts the practical difficulty it suffered was not self-created. Plaintiff cites the decision in *Wolverine Commerce, LLC v Pittsfield Charter Twp*, 483 Mich

IV. COMMERCIAL SPEECH

Plaintiff next argues that billboard advertising is a form of speech protected under the First Amendment and any attempt by defendant to regulate or restrict billboard advertising must directly advance a substantial government interest and be narrowly tailored to reach no further than necessary to achieve that interest. Plaintiff asserts on appeal that when defendant began enforcing 300 square foot limitations to billboards in 2011, defendant received two requests for variances that exceeded the 300 square foot limitation, and it granted one and denied plaintiff's. Plaintiff again asserts that the denial of their variance was the result of the ZBA's unbridled discretion and consistent willingness to grant variances to erect billboards exceeding the strict regulations. Such conduct, plaintiff argues, renders the stated purpose of the Sign Ordinance nugatory and unconstitutional.

"The First Amendment, as applied to the States through the Fourteenth Amendment, protects commercial speech from unwarranted governmental regulation." *Central Hudson Gas & Elec Corp v Pub Serv Comm of New York*, 447 US 557, 561; 100 S Ct 2343; 65 L Ed 2d 341 (1980). To be valid, an ordinance that restricts commercial speech that concerns lawful activity and is not misleading must: (1) seek to implement a substantial governmental interest; (2) directly advance that interest; and (3) reach no further than necessary to accomplish the given objective. *Id.* at 563-566. The burden of justifying a restriction on commercial speech is on the party seeking to uphold it. *Edenfield v Fane*, 507 US 761, 770–771; 113 S Ct 1792; 123 L Ed 2d 543 (1993).

A review of the record suggests that the current and previous variances granted or denied were directly related to the stated purpose of the Sign Ordinance. The purpose of the Sign Ordinance is "to protect the health, safety and welfare of the citizens of the City of Roseville, including but not limited to defining and regulating signs in order to promote aesthetics, to avoid danger from sign collapse and to regulate sign materials, avoid traffic hazards from sign locations and size, avoid visual blight and provide for the reasonable and orderly use of signs." Roseville Ordinance, § 264-2. The specific purpose of the Sign Ordinance is noted in the minutes of every ZBA hearing that plaintiff attached to its motion for summary disposition. This specific purpose was also stated in the ZBA's review of plaintiff's application for variances. Given that plaintiff provides no relevant legal authority or factual support for its claim,[2] the circuit court did not err in granting defendant's motion for summary disposition on this claim.

1023, 1024; 765 NW2d 343 (2009), for the proposition that "[t]he self-imposed hardship rule applies to preclude relief in taking claims asserted by a property owner who has subdivided or physically altered the land so as to render it unfit for the uses for which it is zoned, not to cases in which the legal status of the property has been altered." Even in accepting plaintiff's assertion that leasing the property with full knowledge of the billboard restrictions did not constitute a self-created practical difficulty, the ZBA did not base its decision solely on finding the practical difficulty was self-created. In fact, the ZBA expressly found that no practical difficulty existed, and merely stated that if it did exist, it was self-created.

[2] The circuit court made a similar finding, stating: "Plaintiff has not supported its arguments in this vein with any legal authority, and the Court will not entertain this argument without same."

Affirmed. No costs are awarded to either party. MCR 7.219.

/s/ Stephen L. Borrello
/s/ William C. Whitbeck
/s/ Kirsten Frank Kelly