



09/05/95 GALE VOSHELL v. BOARD ADJUSTMENT KENT

1995 | Cited 0 times | Superior Court of Delaware | September 5, 1995

Upon Decision of the Kent County Board of Adjustment

RIDGELY, President Judge

ORDER

This 5th day of September, 1995, upon consideration of the parties' briefs and the record in this case, it appears:

(1) Pursuant to 9 Del.C. § 4918, Gale Voshell ("Petitioner") seeks a review of the decision of the Kent County Board of Adjustment ("Board") granting an appeal to legalize a billboard constructed after the Kent County Department of Inspections and Enforcement ("Department") had erroneously issued a building permit. The Board found that the construction of the billboard was the fault of the County and not of the Applicants and, therefore, permitted the billboard to remain standing.

(2) On October 19, 1994, Richard and Lisa Lankford, owners of R & L Enterprises, Inc., t/a Aerial Displays ("Applicants") applied for a building permit to construct a 280 sq. ft. billboard on leased property located on the north side of Delaware Route 8 near Pearsons Corners. After reviewing the application, the Department issued the building permit on October 24, 1994. Petitioner, a neighboring property owner, subsequently observed construction of the billboard in progress and protested that the billboard would obstruct the view of his business from the road. He also questioned why such a large billboard was permitted when the signs for local businesses are required to be much smaller.

County officials then realized that the building permit should never have been issued because, on April 12, 1994, the Kent County Levy Court had adopted Ordinance No. 94-05 which amended Article 6, section 2.11 of the Kent County Zoning Ordinances to permit billboards to be located in a general industrial district only on divided highways. The Department issued a Stop Work Order after approximately 95 percent of the billboard had been completed. Thereafter, the Department applied for a variance "to permit and legalize an existing 280 [sq. ft.] billboard under construction located on a parcel which fronts on DE Rt 8 which is not a divided highway."

A hearing was held before the Board on January 19, 1995. During the hearing, counsel for the Board questioned whether the Department was the appropriate party before the Board in this proceeding. The application was tabled and subsequently readvertised as an appeal by the Applicants from the



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administrative decision of the Department to stop work on the billboard. A second hearing was held before the Board on February 16, 1995, with oral argument by counsel and testimony by the parties in favor of and opposed to this appeal. The record from the first hearing was incorporated by reference into the second.

(3) Upon the issuance of a writ of certiorari, the scope of this Court's review is limited to the correction of errors of law and to the determination whether there is substantial evidence to support the Board's findings of fact and Conclusions of law. See *Janaman v. New Castle County Board of Adjustment*, Del. Super., 364 A.2d 1241, 1242 (1976), *aff'd*, Del. Supr., 379 A.2d 1118 (1977). Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a Conclusion. *Oceanport Industries, Inc. v. Wilmington Stevedores, Inc.*, Del. Supr., 636 A.2d 892, 899 (1994); *Battista v. Chrysler Corp.*, Del. Super., 517 A.2d 295 (1986), *app. dismiss.*, Del. Supr., 515 A.2d 397 (1986). The Superior Court does not weigh the evidence, determine questions of credibility, or make its own factual findings. *Johnson v. Chrysler Corp.*, Del. Supr., 59 Del. 48, 213 A.2d 64, 66 (1965).

(4) Petitioner argues that the Board acted arbitrarily and capriciously when it failed to create an adequate record to justify its decision. Specifically, Petitioner points to the Board's decision which granted the appeal by vote of four to one and which simply quoted one Board member's reasoning, concurred in by the majority of the Board, that "... the County made a mistake, I think it should not be his [the applicant] fault for putting the sign up, it should be the County's problem, therefore he [the applicant] should have his sign." Additionally, the Petitioner contends that Board acted arbitrarily and capriciously in holding that the applicant had satisfied the requisite elements of equitable estoppel. The Applicants argue that the Board based its decision upon substantial evidence in the record, that its action was not arbitrary or capricious, and that it properly found the County was equitably estopped from requiring the billboard to be removed.

(5) The first alleged error which the Petitioner raises is the Board's failure to provide a sufficient record of its decision for the Court to review. See *New Castle County Council v. BC Development Assoc.*, Del. Supr., 567 A.2d 1271 (1989); *Tate v. Miles*, Del. Supr., 503 A.2d 187 (1986) (unless Council creates a record or states on the record its reasons ... a court is given no means by which it may review the Council's decision). The notice of decision filed by the Board contained no findings of facts or legal Conclusions other than the above-quoted reason given by one member. Nevertheless, only one legal theory, the doctrine of equitable estoppel, was advanced by the parties for granting and opposing the appeal. The reason given by the Board member for granting the appeal, a reason with which the majority of the Board concurred, reflects that doctrine. Moreover, a review of the record of the two hearings indicates that the parties laid out the legal elements of the doctrine, presented evidence pertaining to those elements and raised no other issues once it was clear that the administrative proceeding was no longer a request for a variance. There is no other possible explanation in the record for the Board's decision and the record in this case, therefore, provides "an adequate substitute for a more formal explanation." *BC Development Assoc.*, 567 A.2d at 1276.



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(6) The doctrine of equitable estoppel may be raised as a defense against the enforcement of a zoning regulation where: (1) a party, acting in good faith, (2) on affirmative acts of a municipal corporation, (3) makes expensive and permanent improvements in reliance thereon, and (4) the equities strongly favor the party seeking to invoke the doctrine. See *Miller v. Board of Adjustment of the Town of Dewey Beach*, Del. Supr., 521 A.2d 642, 645-46 (1986). The issuance of a building permit by an authorized municipal agent constitutes such an affirmative act. *Id.* at 646. In general, however, courts are extremely cautious in invoking the doctrine unless there are exceptional circumstances which make it highly inequitable or oppressive to enforce the regulations. *Id.*

Delaware courts have recognized this doctrine, but have only approved its use as a defense against enforcement of county or municipal zoning regulation in a few exceptional cases. See *DMDY, L.P. v. Board of Adjustment of Sussex County*, Del. Super., C.A. No. 92A-10-005, Lee, J. (March 16, 1994); *Dragon Run Farms, Inc. v. Board of Adjustment of New Castle County*, Del. Super., C.A. No. 88A-JA-2-1-AP, Stiftel, P.J. (August 11, 1988); see also *City of Rehoboth Beach v. Shirl Ann Assoc.*, Del. Ch., C.A. No. 1552, Chandler, V.C. (August 31, 1993); *Wilmington Materials, Inc. v. Town of Middletown*, Del. Ch., C.A. No. 10392, Jacobs, V.C. (December 16, 1988). The facts of this case, however, are not so exceptional as to invoke its use.

The ordinance in question limited the location of billboards to the land zoned general industrial district along divided highways only. The Applicants have argued that they were acting in good faith when they sought a building permit to erect the billboard. According to the Applicants, the Kent County Department of Planning itself was unsure how to interpret the phrase "divided highway." The record reflects, however, that County personnel understood the intent of the amendment was to permit billboards only on highways physically divided by a median: U.S. Routes 13, 113 and a section of Delaware Route. 10. Without gainsaying the Applicants' good faith, it remains the responsibility of the property owner or, as in this case, the leaseholder, to know the zoning regulations and how they affect the property in question. See *Beiser v. Board of Adjustment of the Town of Dewey Beach*, Del. Super., C.A. No. 90A-JN6, Lee, J. (October 25, 1991) mem. op. at 10; see also *Cheng v. D'Onofrio*, Del. Ch., C.A. No. 12617, Allen, C. (September 20, 1994). The Applicants are not inexperienced business people; one of them has been in the family sign business for 20 years. A property owner cannot invoke the estoppel doctrine if he had the means of discovering the truth regarding the facts. *Beiser*, *supra*, at 11.

The billboard is now 95 percent complete. Applicants have expended approximately \$8,300 for materials and leasing the property on which the billboard stands. Although there is some dispute in the record as to the cost of removing the billboard, with maximum and minimum estimates of \$2000 and \$600, the billboard is removable and some of the materials can be reused by the Applicants. The record also reflects continuing opposition to permitting the billboard to remain because of poor visibility at an intersection and an increased chance of accidents.

Considering the totality of the circumstances, the Court finds that they are not sufficiently



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exceptional to justify the Board's invocation of the equitable estoppel doctrine to permit the billboard to remain. First, a billboard is not a permanent improvement to the property in that it can be easily removed at minimal cost. Cf. DMDY, L.P., supra, at 11 (improvements consisting of foundation and subflooring were expensive and permanent). Second, the amount of money expended by the Applicant was substantially less than in other cases. Cf. Dragon Run Farms, supra, at 15 (appellants spent \$750,000 in purchasing land for use as a borrow pit operation). Third, traffic safety risks are presented by the placement of the billboard. The equities do not strongly favor the Applicants under these circumstances.

The Court, therefore, holds that the Board erred as a matter of law in applying the doctrine of equitable estoppel in this case to prevent enforcement of the county's zoning ordinance prohibiting billboards along non-divided highways.

NOW, THEREFORE, IT IS ORDERED that the decision of the Kent County Board of Adjustment is REVERSED and the matter is REMANDED for proceedings consistent with this Order.

Henry duPont Ridgely

President Judge

