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Kevin Westray, Legal Assistant

BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

TERRELL DEVELOPMENT, LLC,
Petitioner,

v.

DEPARTMENT OF TRANSPORTATION,
Respondent.

Docket No.: OSAH-DOT-OA-1338996-11-Howells

TERRELL DEVELOPMENT, LLC,
Petitioner,

v.

DEPARTMENT OF TRANSPORTATION,
Respondent.

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INITIAL DECISION

Petitioner Terrell Development, LLC ("Terrell" or "Petitioner") appeals the denial of two outdoor advertising sign permit applications. The two appeals were consolidated and the hearing in the consolidated matters was held on August 15, 2013.[1] G. Franklin Lemond, Jr., Esq. represented Petitioner. Kenneth A. Thompson, Jr., Esq. represented the Georgia Department of Transportation ("DOT" or "Respondent"). For the reasons set forth below, the Department's denial of the two permit applications is **AFFIRMED**.

[1] The record was held open until September 5, 2013, to allow the parties to submit proposed Findings of Fact and Conclusions of Law. On September 5, 2013, in addition to its proposed Findings of Fact and Conclusions of Law, Petitioner filed Petitioner's Notice of Filing Additional Evidence, an affidavit from Mr. Timothy Young, a copy of the Locust Grove Ordinance rezoning parts of the city, and some unpublished decisions. The record was held open until September 5, 2013, solely to allow the parties to submit proposed Findings of Fact and Conclusions of Law. It was not left open to submit additional evidence. Furthermore, Petitioner did not file a motion for leave to submit newly discovered evidence pursuant to OSAH Rule 616-1-2-.25. Nor did Petitioner show that the evidence could not have been discovered in the exercise of reasonable diligence prior to the hearing. Petitioner provides no reason why it could not have had a conversation with Mr. Young at or prior to the hearing. In fact, Petitioner listed Mr. Young as a witness. Moreover, Mr. Young testified at the hearing as a witness for DOT. Thus, Petitioner could have cross-examined Mr.

FINDINGS OF FACT

1.

Terrell submitted two applications for outdoor advertising signs to be located on railroad right-of-way property of Norfolk Southern Railroad Company in the City of Locust Grove, in Henry County. The property is adjacent to State Route 42 and its width varies between 120 to 150 feet at the locations of the proposed signs. Both applications were signed and dated October 16, 2012, and were received in the Department's Outdoor Advertising Office at 11:20 a.m. on October 18, 2012. The applications are for two locations which DOT designated Working Numbers 740330 and 740335. (DOT Exs. 1, 3; Petitioner's Exhibit (hereinafter P Ex.) 4, 5; Tr. 104.)

2.

For both applications, Petitioner submitted a Local Government Certification for Outdoor Advertising. Both certifications are dated September 20, 2012, and signed by Locust Grove City Manager Tim Young. At the time Petitioner approached Mr. Young for the certificate, the zoning map showed no zoning for the railroad right-of-way where the proposed signs would be erected. Thus, for the purposes of the certificates, Mr. Young inferred the zoning by looking at the zoning for adjacent areas and using center lines. Specifically, Mr. Young looked at the zoning of property across State Route 42 from the locations of the proposed signs, and inferred that the zoning would be the same for the railroad right-of-way property. For Working Number 740330, Mr. Young inferred that the zoning of the railroad right-of-way to the center line of the tracks would be C-1 (commercial) because there is property located diagonally across State Route 42 from the proposed sign location where a veterinary clinic is located and is within a C-1 zone. However, he admits that there is also a mixture of zoning across State Route 42 from the proposed sign bearing Working Number 740330.

Young on these very issues. Accordingly, Mr. Young's affidavit has not been considered in rendering this decision.

Thus, "to err on the side of caution," Mr. Young determined that the zoning would be C-1.[2] For Working Number 740335, Mr. Young inferred that the zoning of the railroad right-of-way to the center line of the tracks would be O&I (office and institutional) because there is property located across State Route 42 from the proposed sign location that is zoned O&I. ((DOT Exs. 1, 4; Pet. Exs. 4, 5; Tr. 102, 104-10.)

3.

In October 2012, the City of Locust Grove adopted a new zoning map. As of October 1, 2012, the railroad right-of-way property is zoned TCU, which stands for transportation, communications, and utilities. It is a unique zoning that is used for rights-of-way, utilities, such as power, cell towers, wireless communication facilities, and transit stations (Tr. 107, 110-12.)

4.

Mark Webb is an outdoor advertising regional coordinator for DOT. He conducted the field investigations for the two permit applications on October 29, 2012. After his field investigations, he recommended denial of the applications. He based his recommendation primarily on the fact that the property was railroad right-of-way property. Specifically, the property contained railroad tracks and based on DOT's rule, railroad tracks are not considered commercial activity. He did note that the majority of the surrounding area is residential, with a smattering of commercial areas. (Tr. 66-73; DOT Exs. 2, 5.)

5.

William Kenrick Wright, Jr. is the landscape architect manager for DOT. As part of his position, he has a supervisory role in the outdoor advertising unit. Mr. Wright is responsible for making the final

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Notwithstanding, even if this Tribunal considered Mr. Young's affidavit, it would not change the decision.

[2] It is somewhat unclear what Mr. Young meant by this statement. However, it appears that he chose the C-1 zoning designation to err in favor of commercial zoning for the purpose of Terrell's outdoor advertising permit application.

decision to approve or deny an outdoor advertising permit. He made the decision to deny permits for Working Numbers 740330 and 740335. (Tr. 125-26, 128.)

6.

Mr. Wright issued the denial letters on November 27, 2012. In the letters, the reasons for the denial of the permit applications are stated as follows:

> (1) The proposed sign location is on railroad property which does not qualify as a commercial or industrial activity for outdoor advertising purposes. {O.C.G.A. § 32-6-71(7)}.
>
> (2) The proposed sign location appears not to be zoned nor located within a commercial or industrial area on the same side of the road as the sign. The Department, in its assessment of the appropriateness of railroad properties for outdoor advertising purposes, considers zoning and primary uses of the property on the same side of the road as the sign. The property adjacent to the proposed sign's location, use and zoning is residential. {O.C.G.A. § 32-6-72} {GDOT Regulation § 32-6-71672-6-.01(t)} (sic)

(DOT Exs. 3, 6.)

7.

There are no buildings or appurtenances located on the railroad right-of-way property where the proposed signs would be erected.[3] Nor is there sufficient space to put any buildings on the property at the proposed sign locations, other than perhaps a platform for the train itself. Mr. Young does not know of any plans to build anything on the railroad right-of-way property at this time. He is not aware of the tax rate Norfolk Southern pays, although he thinks it may be tax exempt. (DOT Exs. 1-5, 7; Pet. Exs. 3, 4, 5; Tr. 113-16)

8.

There is no sewerage running directly to the railroad right-of-way property. Mr. Young believes there is electricity that runs along State Route 42. It is unclear whether there is any water running

to the railroad right-of-way property, in the vicinity of the proposed signs. (Tr. 115, 117-18.)

CONCLUSIONS OF LAW

1.

As the applicant, Petitioner bears the burden of proof to show that the application for the permit should be granted. The standard of proof is preponderance of the evidence. Ga. Comp. R. & Regs. r. 616-1-2-.07 & .21.

2.

This proceeding is a de novo review of the DOT's action in denying the permit applications. The evidence is not limited to information presented to or considered by the DOT, but the decision is based solely on the evidence admitted at the hearing. Ga. Comp. R. & Regs. r. 616-1-2-.21; *Longleaf Energy Assocs., LLC v. Friends of the Chattahoochee, Inc.*, 298 Ga. App. 753, 768 (2009) (concluding that the ALJ must consider the facts and law anew, and render an independent decision).

3.

In general, an outdoor advertising sign that is located within 660 feet of the nearest edge of the right of way and is visible from the interstate or primary highways is allowed if the proposed sign is located within an area zoned commercial or industrial, and the primary use of the property is consistent with its commercial or industrial zoning. O.C.G.A. § 32-6-72(4); Ga. Comp. R. & Regs. 672-6-.01(t). Additionally, an outdoor advertising sign located in unzoned commercial or industrial area is allowed if it is located within 660 feet of the nearest edge of the right of way and is visible from the interstate or primary highways. O.C.G.A. § 32-6-72(4). Thus, as long as the proposed sign meets the other statutory and regulatory requirements, an outdoor advertising sign can be erected on

[3] The City of Locust Grove did build a viewing platform downtown, where people can view the trains. The viewing platform is located approximately ½ to ¾ of a mile from the southernmost proposed sign location. The platform was built for the purposes of tourism development. (Tr. 116-17.)

property that is zoned commercial or industrial or is considered unzoned commercial or industrial property.

4.

Georgia Code section 32-6-71(29) defines "zoned commercial or industrial areas" as areas:

> which are zoned for industrial or commercial activities pursuant to state or local zoning laws or ordinances *as part of a comprehensive zoning plan.* Strip zoning shall not be considered as a bona fide comprehensive zoning plan. Comprehensive zoning plans for the purposes of outdoor advertising only shall be approved by the board when an application for a permit has been made.

O.C.G.A. § 32-6-71(29) (emphasis added).

5.

The Department's Rules define a Comprehensive Zoning Plan as:

> a zoning plan or ordinance approved by either a city or a county in accordance with the Georgia Zoning Procedures Law O.C.G.A. § 36-66-1 et seq. A Comprehensive Zoning Plan shall be reviewed and accepted by the Board for outdoor advertising purposes if it, (1) effectively zones the entire city or county, and (2) does not utilize strip zoning or spot zoning. *For Outdoor Advertising purposes only, if the zoning of jurisdiction is not approved by the State Transportation Board the Department may treat the jurisdiction as unzoned until such time that said zoning is approved as being acceptable for Outdoor Advertising purposes.*

Ga. Comp. R. & Regs. r. 672-6-.01(e) (emphasis added).

6.

When a proposed sign is to be erected on land that is zoned commercial or industrial, a permit may be issued, only if, *inter alia*, the primary use of the property is consistent with its commercial or industrial zoning. Ga. Comp. R. & Regs. 672-6-.01(t). Factors that DOT considers in making this determination include, but are not limited to, the following:

> (1) the expressed reasons for the zoning designation/change,
> (2) the zoning of the surrounding area,
> (3) the actual land uses nearby,
> (4) the existence of development and construction plans, certified by a licensed

professional engineer, for commercial or industrial development scheduled to begin within two years,

(5) the assessment of real estate taxes at commercial/industrial rates,
(6) the presence of utilities such as water, electricity, and sewerage,
(7) the existence of access roads or dedicated access to the newly zoned area, and
(8) the existence of commercial or industrial activities which, if unzoned, would qualify an area as an unzoned commercial or industrial area under 672-6-.01(y).

Ga. Comp. R. & Regs. 672-6-.01(t). According to the DOT rule, "[n]o one of the above factors is determinative." *Id.*

7.

Georgia Code section 32-6-71(25) defines "unzoned commercial or industrial areas" as follows:

> Areas which are not zoned by state law or local ordinance and on which there is located one or more permanent structures devoted to an industrial or commercial activity or on which an industrial or commercial activity is actually conducted, whether or not a permanent structure is located thereon, and the area along the highway extending outward 600 feet from and beyond the edge of the activity in each direction and a corresponding zone directly across a primary highway which is not also a limited-access highway, when the same is not a public park, public playground, public recreational area, public forest, parkland, scenic area, cemetery, primarily residential, or locally zoned.

O.C.G.A. § 32-6-71(25).

8.

Section 32-6-71(7) defines "industrial or commercial activity" as "those activities commonly or generally recognized as commercial or industrial." O.C.G.A. § 32-6-71(7). However, section 32-6-71(7) further provides that certain activities are exempted from the definition of industrial or commercial activity. In pertinent part, section 32-6-71(7)(G) states that "railroad tracks and minor sidings" shall not be considered commercial or industrial activity. O.C.G.A. § 32-6-71(7)(G).

9.

Thus, for an outdoor advertising sign to be permitted: (1) the property where the sign is to be erected

must be zoned commercial or industrial, under a comprehensive zoning plan, approved by the Board, and the primary use of the property must be consistent with its commercial or industrial zoning, or (2) the property must meet the definition of an unzoned commercial or industrial area. O.C.G.A. §§ 32-6-71(7), (25), (29), 32-6-72(4), (5); Ga. Comp. R. & Regs. 672-6-.01(e), (t), (y).

10.

In this case, at the time Terrell obtained the Local Government Certification from Mr. Young (i.e., September 20, 2012), the railroad right-of-way property was not zoned as part of a comprehensive zoning plan. Mr. Young had to infer the zoning by reference to other areas. Terrell argued that it has a vested right in the zoning created by Mr. Young. For this proposition, Terrell cites *Fulton County v. Action Outdoor Adver., JV, LLC*, 289 Ga. 347 (2011) and *Recycle & Recover v. Ga. Bd. Of Natural Res.*, 266 Ga. 253 (1996). Both cases stand for the premise that an applicant has a vested right in having his permit application considered under the law in existence *at the time the application is submitted. Fulton County*, 289 Ga. At 349; *Recycle & Recover*, 266 Ga. at 254-55. These cases are inapposite under the facts of this case. At the time, Terrell submitted its applications (i.e., October 18, 2012), the railroad property had been zoned under a new zoning map and plan as TCU. At the time Terrell submitted its applications, the railroad property no longer had the C1 and O&I designations given by Mr. Young, and thus it could not have a vested right in those designations.

11.

The current zoning of the railroad right-of-way property is not commercial or industrial. Rather, its zoning is unique, and its purpose is for the location of transportation, communication, and utilities. Furthermore, there is no evidence that Locust Grove's October 2012 zoning plan was presented to or

approved by the State Transportation Board.[4] Therefore, it was appropriate for DOT to treat the property as unzoned. O.C.G.A. § 32-6-71(29); Ga. Comp. R. & Regs. r. 672-6-.01(e).

12.

If the railroad property is treated as unzoned, Terrell is not entitled to a permit. When property is unzoned, to meet the definition of an "unzoned commercial or industrial area," there must either be one or more permanent structures devoted to industrial or commercial activity, or commercial or industrial activity must actually be conducted on the property. O.C.G.A. § 32-6-71(25). Here, neither of these factors is present for the railroad right of way property. There are no permanent structures devoted to commercial or industrial activity located on the property. Nor is any commercial or industrial activity being conducted on the property. In fact, the only activity being conducted on the property is the running of the trains over railroad tracks. As noted above, railroad tracks are, by statute, specifically excluded from being considered commercial or industrial activity. Therefore, the railroad right-of-way property cannot be considered an unzoned commercial or industrial area.

13.

Based on the evidence presented, the undersigned concludes that Terrell has failed to prove by a

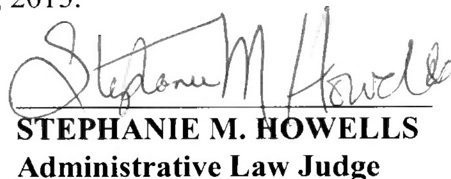
[4] Even if this Tribunal ignored Mr. Young's testimony about the TCU zoning, the zoning designations given by Mr. Young (i.e., C1 and O&I) were not pursuant to a comprehensive zoning plan that had been approved by the Board. Furthermore, even if the property would be considered as zoned commercial or industrial, the primary use of the property is not consistent with commercial or industrial zoning. The primary use of the property is a railroad right-of-way. By statute, railroad tracks are not considered commercial or industrial activity. O.C.G.A. § 32-6-71(7). At the location of the proposed signs, there is not sufficient space to build a commercial or industrial building. Additionally, Petitioner presented no evidence of the expressed reasons for the zoning designation/change, the existence of certified development and construction plans for the property, or the type of real estate taxes paid by the owners of the property. Ga. Comp. R. & Regs. 672-6-.01(t). While there was some evidence about the proximity of electricity in the vicinity of the property, there was insufficient evidence about the presence of water and sewage. Finally, the actual land uses nearby and the zoning of the surrounding area is predominantly residential, with a small amount of commercial use and zoning mixed in. For these reasons, it cannot be said that the primary use of the railroad property is consistent with a commercial or industrial zoning. *Id.* Consequently, Terrell would not be entitled to outdoor advertising permits, even if the property was considered as zoned commercial or industrial. *Id.*

preponderance of the evidence that its applications for outdoor advertising permits should have been granted. The railroad right of way property is not zoned commercial or industrial, under a Board-approved comprehensive zoning plan; and even if it would be considered zoned as such, the primary use of the property is not consistent with commercial or industrial zoning. O.C.G.A. §§ 32-6-71(7), (29), 32-6-72(4); Ga. Comp. R. & Regs. 672-6-.01(e), (t). Nor does the property meet the definition of an unzoned commercial or industrial area. O.C.G.A. §§ 32-6-71(7), (25), 32-6-72(5); Ga. Comp. R. & Regs. 672-6-.01(y)

DECISION

For the foregoing reasons, DOT's decision to deny Terrell's outdoor advertising permit applications is **AFFIRMED.**

SO ORDERED this 10th day of September, 2013.



STEPHANIE M. HOWELLS
Administrative Law Judge

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