

**IN AND BEFORE THE ZONING HEARING BOARD OF
LOWER PROVIDENCE TOWNSHIP
MONTGOMERY COUNTY, PENNSYLVANIA
IN RE: VALIDITY CHALLENGE APPLICATION OF M.B. INVESTMENTS
2650 AUDUBON ROAD, AUDUBON, PENNSYLVANIA 19403
APPLICATION NO. Z-10-17**

ORDER

AND NOW, this 27th day of January, 2011, upon consideration of legal briefs, documents, exhibits, and testimony submitted on behalf of the Applicant and Lower Providence Township as well as public comment, and following a full and complete hearing conducted on October 28, 2010, November 16, 2010, and December 6, 2010, and having pronounced a public decision on December 21, 2010, the Zoning Hearing Board of Lower Providence Township hereby orders and declares the following:

1. The Applicant, M.B. Investments, has standing to challenge the validity of Article XXII of the Lower Providence Township Zoning Ordinance entitled "BO Billboard Overlay District".

2. Article XXII of the Lower Providence Township Zoning Ordinance entitled "BO Billboard Overlay District", which was enacted pursuant to Ordinance No. 478 and further amended by Ordinance No. 490 and Ordinance 491 is determined to be unlawfully exclusionary and therefore invalid.

3. The Applicant, M.B. Investments, is entitled to the site specific relief requested and shall be granted approval for the erection of two billboards on the property located at 2650 Audubon Road, Audubon, Lower Providence Township with the dimensions and specifications of the proposed billboards meeting the following criteria:

- a. each billboard structure shall have two sides converging in a V-shape;

b. one side of the billboard structure shall have a traditional, static format while the other side of the structure shall have a digital, changeable copy format;

c. the advertising surface on each side of the billboard structure shall be 672 square feet (14x48 feet);

d. the bottom of the billboard structure shall be 35 feet above ground;

e. the maximum height of the billboard structure shall be 51.5 feet high;

f. the billboard structures shall be 544 feet apart;

g. the static side of each billboard structure shall be permitted to be illuminated by external lamps; and

h. there shall be a minimal 25 feet front yard setback for each billboard structure.

4. Pursuant to Section 916.1(c)(5) of the Pennsylvania Municipalities Planning Code, the Zoning Hearing Board directs Lower Providence Township to cure the unlawful and exclusionary defects in its billboard overlay district and recommends that the Township amend its Ordinance to permit the erection of billboards on property adjacent to a limited access highway which is zoned in a non-residential classification.

BY: 

William Donovan, Chairman

BY: 

Eric Frey, Vice Chairman

BY: 

Janice Kearney, Board Member

BY: 

Nancy McFarland

Dissenting

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OPINION

Pursuant to proper legal advertisement in the Times Herald on October 13, 2010 and October 20, 2010, public hearings were held on October 28, 2010; November 16, 2010; and December 6, 2010 at the Township Administration Building, 100 Parklane Drive, Eagleville, Pennsylvania.

Present for the hearings were the Board members, William Donovan, Chairman; Eric Frey, Vice Chairman; Nancy McFarland and Janice Kearney. Joseph P. Walsh, Esquire was present as the Solicitor for the Zoning Hearing Board. Thomas Heisner was present as Director of Planning and Zoning for Lower Providence Township.

Present at the hearings on behalf of the Applicant M.B. Investments, was its attorney, William F. Fox, Jr., Esquire. The Applicant presented testimony from Pasquale Mascaro and Ryan Inch at the October 28, 2010 hearing. At the November 16, 2010 hearing, Applicant presented testimony from Ryan Inch and Mary Beth Eshbach. At the December 6, 2010 hearing, Applicant presented testimony from Bernard Telatovich.

Present at the hearing on behalf of the Township was its attorney, Michael Sheridan, Esquire. At the October 28, 2010 hearing, the Township presented testimony from Tom Heisner, Director of Planning and Zoning. At the November 16, 2010 hearing, the Township presented testimony from Joseph Fiocco. At the December 6, 2010 hearing, the Township presented testimony from Joseph Hanna, Joseph Dunbar, Deirdre Gibson and Thomas Comitta. Upon conclusion of testimony at all three hearings, an opportunity was given for public comment. At

the October 28, 2010 hearing, Lower Providence Township resident, Larry Loughlin, had a question for Thomas Heisner. At the November 16, 2010 hearing, Lower Providence Township resident, Kathie Eskie, had a question for the witness Mary Beth Eshbach. Also at this hearing, Lawrence Loughlin had a question for Township witness, Joseph Fiocco. At the December 6, 2010 hearing, Lower Providence Township resident, Joseph Ferraro had a question for Township witness, Joseph Dunbar. Later in the hearing, Mr. Ferraro had a question for Deirdre Gibson.

The Notes of Testimony for each hearing were taken and transcribed by Tim Kurek, an official court reporter.

EXHIBITS AND DOCUMENTARY EVIDENCE PRESENTED

The following documents were marked for admission into evidence and considered by the Zoning Hearing Board:

ZHB EXHIBITS

- B-1 Proof of Publication
- B-2 Notification and Posting

Applicant's Exhibits

- A-1 Binder
- A-2 Large Map
- A-1 Binder (Tabs 1-6 & 8-12)
- A-2 Large Map
- A-3 Colored Map of Valley Forge NHP
- A-4 CV of Bernard Telatovich
- A-1 Tab 13 Route 422 Accident Map
- A-5 Blow-up of A-1, Tab 13

A-6 Tantara Report

Township's Exhibits

- T-1 Documents in Response to Subpoena
- T-2 Map dated 1955
- T-3 Map dated 10/22/2010 Map
- T-4 Decision of Application Z-03-06
- T-5 Ordinance 478
- T-6 Transcript dated 4/3/2003
- T-7 Ordinance 490
- T-8 Ordinance 491
- T-9 Transcript for Ordinance 490 dated 8/21/2003
- T-10 Transcript for Ordinance 491 dated 8/21/2003
- T-11 Billboard Overlay District Plan dated 6/25/2003
- T-12 Three Photographs
- T-13 Decision for Z-08-19 dated 12/05/2008
- T-14 Decision for Z-09-21 dated 12/04/2009
- T-15 Two Photographs
- T-16 Eight Photographs
- T-17 Aerial Map
- T-18 Notes of Testimony from Hearing Z-10-21
- T-19 CV of Joseph Fiocco
- T-20 Segmented Map of 422 from PennDOT
- T-21 Report of Joseph Fiocco dated 10/27/2010

T-1 through T-21

T-22 Aerial Plan dated 10/15/2010

T-23 Letter dated 12/01/2010 from PennDOT to Joseph Dunbar

T-24 River Crossing Complex Diagram

T-25 Large Plan, Valley Forge NHP

T-26 Valley Forge NHP Planimetric Data Map

T-27 CV of Thomas Comitta

STATEMENTS OF FACTUAL EVIDENCE PRESENTED

In addition to the testimony memorialized in the transcription of the three nights of hearing evidence, the Zoning Hearing Board of Lower Providence Township considered the following testimony presented by the Applicant and the Township, as well as the comments and questions from the public:

October 28, 2010 Transcript

Testimony of Pasquale Mascaro

1. Pasquale Mascaro is the managing partner of M.B. Investments, a real estate and investment company. (N.T., p. 20)

2. M.B. Investments owns property at 2650 Audubon Road in Lower Providence Township, Montgomery County, Pennsylvania, which is 2650 Audubon Road is approximately 11.9 acres, and abuts limited access highway U.S. Route 422 on the north and Audubon Road on the south. (N.T., pp. 21-22)

3. The 2650 Audubon Road property is zoned as light industrial. (N.T., p. 23)

4. Maximum building height for building structures in the L-1 district is 90 feet, and the building on the 2650 Audubon Road property is 52 feet. (N.T. pp. 23-24)

5. Mr. Mascaro proposes to erect two billboards on the subject property, one on the southeast corner and one on the southwest corner abutting U.S. Route 422. (N.T. pp. 24-27)

6. M.B. Investments has entered an agreement with Lamar Advertising in Exeter Township, Berks County, Pennsylvania for the installation, maintenance and repair of the proposed billboard structures should they become approved. (N.T. p. 27)

7. There currently exists an erected billboard approximately 700 feet from the 2650 Audubon Road property. (N.T. p. 28)

8. There is existing signage on the M.B. Investments building that faces U.S. Route 422. (N.T. p. 33)

9. The existing signage was installed as a result of a variance under the current ordinance, to install a sign on the building larger than normally permitted. (N.T. pp. 33-34)

10. The current signage on the building is illuminated, and with the company name and logo. (N.T. p. 34)

11. There exists an additional free-standing sign facing U.S. Route 422, black in color and illuminated that is on the property facing 422. (N.T. p. 36)

12. M.B. Investments seeks application for two billboards in addition to the current signage, each measuring 14 feet by 48 feet. (N.T. p. 38)

13. The current billboard district in Lower Providence Township exists at the corner of Egypt Road and Rittenhouse Road. (N.T. pp. 39-40)

Testimony of Thomas Heisner

14. Thomas Heisner is the Code Enforcement Manager of Lower Providence Township, and/or Township Zoning Officer. (N.T. p. 49)

15. Mr. Heisner's duties include reviewing zoning permit applications, zoning ordinances and zoning maps for the Township. (N.T. pp. 49-50)
16. U.S. Route 422 bypass is the only limited access highway in the Township of Lower Providence. (N.T. p. 53)
17. The maximum height for a building structure in the Light Industrial District is 90 feet. (N.T. p. 53)
18. Ordinance No. 478 of April 3, 2003 of the Lower Providence Township Zoning Ordinance is entitled "Billboard Overlay District". (N.T. p. 54)
19. The official zoning map of Lower Providence Township, Pennsylvania enumerates by title the various districts under the Township Zoning Ordinance. (N.T. pp. 55-56)
20. There is no indication in the Zoning Ordinance, or on the official Township zoning map that would indicate specific areas of the Billboard Overlay District. (N.T. pp. 58-59)
21. There has been a requirement pursuant to Township Zoning Ordinance since April 2003 that a billboard must be located adjacent to a limited access highway. (N.T. p. 69)
22. The Township has not designated any specific area along U.S. Route 422 as a Billboard Overlay District. (N.T. p. 69)
23. Egypt Road in Lower Providence Township is not deemed a limited access highway. (N.T. p. 74)
24. The Billboard Overlay District is described in Ordinance 491. (N.T. p. 83)
25. Due to staff oversight, the Billboard Overlay District was not designated on the Township Zoning Map. (N.T. pp. 83-84)
26. Ordinance 478 adopted the Billboard Overlay District subsequent to a Billboard Validity Challenge in 2003. (N.T. pp. 85-86)

27. Ordinance 478 designated the location of the Billboard Overlay District to be in two Mobile Home Park Districts, one located on Ridge Pike and the other at Trooper Road and 422. (N.T. p. 88)

28. Prior to 2003, there were already standing six billboards situated on Egypt Road in the Billboard District Overlay. (N.T. p. 101)

29. The M.B. Investments property on Audubon Road has been renovated in the church interior on the first floor, and a sign for the church installed adjacent thereto.

30. The M.B. Investments property is roughly a 95,000 square foot office building, with two stories. (N.T. p. 101)

31. A variance was issued by the ZHB to increase the square footage of the Solid Waste Services, Inc. wall sign from the maximum square footage of 100 square feet under the Zoning Ordinance, to 670 square feet as a variance. (N.T. p. 102)

32. A second sign variance for Victory Christian Fellowship was granted, from the maximum square footage for a free-standing sign under the Zoning Ordinance of 35 square feet to allow for a 40-foot long by 5.86-foot high, or approximately 234 square feet variance. (N.T. pp. 104-105)

33. The maximum size billboard permitted under the Billboard District is 360 square feet. (N.T. pp. 106-107)

34. The M.B. Investments proposal requested an additional 720 square feet in billboard size. (N.T. p. 107)

35. Pursuant to §143-139(A)(5), there are digital signs in existence in Lower Providence Township. (N.T. pp. 108-109)

36. As identified by Mr. Heisner, the eight digital signs currently located in Lower Providence Township are at 100 Parklane Drive, 3930 Germantown Pike, 3815 Ridge Pike, 3246

Ridge Pike, 3130 Ridge Pike, 2724 Ridge Pike, 925 South Trooper Road and 2674 Egypt Road. (N.T. p. 110). (Note however, the ZHB believes there are more than eight digital signs in the Township).

37. Digital billboards are totally prohibited in the Township. (N.T. p. 111)
38. Ordinance 491 was adopted into the Township's official ordinance book. (N.T. p. 117)
39. There was no official resolution to adopt the October 22, 2010 map as the official map of the Township. (N.T. p. 115)
40. Ordinance 491 was not placed into the text of the general Township code book. (N.T. p. 119)
41. The application at issue is for billboards to be digital on one side and two-sided in general. (N.T. pp. 121-122)
42. Eight zoning map amendments were made in 2009, during which the Township did not print out new maps for such amendments. (N.T. pp. 123-124)

Testimony of Ryan Inch

43. Mr. Inch is a registered professional civil engineer, and the Director of Engineering for Solid Waste Services a/k/a J.P. Mascaro & Sons. (N.T. p. 127)
44. M.B. Investments is a Mascaro-related entity. (N.T. p. 127)
45. The proposed billboard is to be set at least 25 feet away from the 422 ultimate right-of-way. (N.T. p. 132)
46. The sideyard setbacks from the eastern and western boundaries of the property were proposed at 75 feet for both. (N.T. p. 132)
47. On the north of the property, the lot width, as shown on the plot plan, is 806 feet. (N.T. p. 132)

48. The approximate distance between the two proposed billboards is 544 feet. (N.T. p. 132)

49. Billboard No. 2 would be approximated at 190 feet from the center line of 422. (N.T. p. 133)

50. Billboard No. 1 would be approximated at 194 feet from the center line of 422. (N.T. p. 133)

51. The proposed billboards are V-type billboards, double-sided, supported by a center pole. (N.T. p. 133)

52. One billboard would be a 30-foot board, and the other would be a 40-foot board, indicating the distance between the inside portions of the "Vs at the widest spread". (N.T. p. 133)

53. The size of the proposed advertising on the billboard is 48 feet wide by 14 feet high. (N.T. p. 134)

54. The proposed height of the billboards would be 51½ feet high. (N.T. p. 134)

55. The proposed billboards would be constructed of steel with a round-center column with catwalks around the bottom. (N.T. p. 135)

56. There exists another billboard near the M.B. Investments property, on the property of PECO, approximately 700-800 feet to the east of the M.B. Investments property. (N.T. p. 136)

57. The PECO billboard abuts U.S. Route 422, and is similar in construction. (N.T. p. 136)

58. The PECO billboard is approximately 50 feet high, with advertisement size approximately 14 by 48 feet, and illuminated at night. (N.T. p. 137)

59. Mr. Inch conducted a general visibility assessment with respect to the proposed billboard structures. (N.T. p. 140)

60. Based on field examination and review of the ARMS report as conducted, Mr. Inch concluded that there was very minimal visibility from surrounding properties of the proposed billboards. (N.T. pp. 147-148)

61. The billboards proposed are not proposed to emit any smoke, dust, odor, off-site noise, off-site vibration or water or chemical pollutants. (N.T. pp. 149-150)

62. The proposed billboards will not increase traffic congestion around the streets of the M.B. Investments property. (N.T. p. 150)

63. The proposed billboards will not impose an unreasonable risk of fire, so long as they are properly constructed in accordance with the Township Building Code. (N.T. p. 150)

64. The proposed billboards will not adversely impact public, private or community water supplies, nor ground water, nor the Township's public sewer system. (N.T. pp. 150-151)

65. The proposed billboards will have no purportedly adverse impact upon police, fire, ambulance or other emergency services activity. (N.T. p. 151)

66. Township roads will not be adversely affected by such proposed billboards. (N.T. p. 151)

67. Schools within the Township will not be adversely impacted by the proposed billboards. (N.T. p. 151)

68. The proposed billboards will not adversely impact any protected wetlands or woodlands, nor soil on the M.B. Investments site. (N.T. p. 151)

69. The proposed billboards will not be constructed on steep slopes, nor impact any flood plains or aquifers or any prime agricultural soil. (N.T. p. 152)

70. An aerial view of Egypt Road at Lower Providence between Rittenhouse Road and Shannondell Drive depicts the legal description contained in Ordinance 491. (N.T. p. 152)

71. Such depiction includes existing Lamar billboards, erected prior to the enactment of Ordinance 491. (N.T. p. 153)

72. Such depiction also includes one billboard erected on the other side of the street near Shannondell Drive. (N.T. p. 153)

73. The M.B. Investments property has no vehicle access to Route 422. (N.T. p. 156)

74. The M.B. Investments property has vehicle access on Audubon Road. (N.T. p. 156)

75. The M.B. Investments property fronts both 422 and Audubon Road. (N.T. p. 159)

November 16, 2010 Transcript

76. The proposed billboard on the eastern side of the M.B. Investments property has an angle of 32 degrees on the "V" of the sign. (N.T. p. 5)

77. The billboard proposed for the western side of the property is angled at 44 degrees on the "V". (N.T. p. 5)

Testimony of Mary Beth Eshbach

78. Ms. Eshbach is a real estate representative with Lamar Advertising. (N.T. p. 7)

79. Lamar Advertising has negotiated an agreement with M.B. Investments relating to the installation, maintenance and repair of the proposed billboards. (N.T. p. 9)

80. Lamar Advertising is requesting a signage of 14 by 48 feet because of the proximity of the road to the proposed location. (N.T. pp. 10-12)

81. The proposed height of the billboard would be slightly over 50 feet, due to the topography of the ground surrounding it and the proximity to the highway. (N.T. p. 13)

82. The proposed billboard will have a static face to read to westbound traffic, and the digital face will read to eastbound traffic with regard to the billboard on the western end of the property. (N.T. p. 15)

83. The eastern-ended billboard will have a digital read on the right side of the V and static on the left side of the V. (N.T. p. 16)

84. The proposed billboard will have changeable messages. (N.T. p. 17)

85. The proposed billboard will have a ten-second dwell time. (N.T. p. 18)

86. The proposed billboards will be illuminated, with two 400-watt Holophane fixtures. (N.T. pp. 18-19)

87. The proposed billboards will be illuminated at night. (N.T. p. 19)

88. Lamar Advertising does not manage or lease any billboards on Route 422 in Upper Providence Township. (N.T. p. 24)

89. The billboards on Egypt Road are 11'9 x 23'. (N.T. p. 24)

90. Mascaro is in the middle of the curve of the road on 422, approximately 1,000 feet west of the Betzwood Interchange. (N.T. p. 32)

91. The proposed billboards would not be visible to vehicles traveling west on 422 until passing under the bridge. (N.T. p. 33)

92. Lamar Advertising has a limit of six messages that can be put on any proposed billboard. (N.T. p. 37)

93. The proposed billboards would be a distance of 194 feet from the western end of the property, and 190 feet from the center line of the highway at the eastern end of the property. (N.T. p. 42)

Testimony of Joseph Fiocco

94. Joseph Fiocco is a traffic safety and highway safety expert employed by McMahon Associates. (N.T. p. 65)

95. Mr. Fiocco was engaged to conduct a safety study on U.S. Route 422 in the vicinity of the proposed billboards. (N.T. p. 65)

96. When scaling the site, Mr. Fiocco noted that it was on the outside of a significant curve on U.S. Route 422, and was approximately 1,500 feet in radius. (N.T. p. 68)

97. The property sits high in elevation on the outside of the curve. (N.T. p. 69)

98. There is one circular ramp at the 422 Betzwood Interchange. (N.T. p. 70)

99. The curve starts within the interchange of Trooper Road or Betzwood Interchange, and the length of the curve would be approximately half a mile. (N.T. p. 71)

100. For eastbound traffic toward King of Prussia, the direction of the curve is the right. (N.T. p. 72)

101. For westbound traffic, the direction of the curve is to the left. (N.T. p. 72)

102. Mr. Fiocco obtained crash data for the last five years with regard to the section of state highway that runs across the property frontage, from 2005 through 2009. (N.T. p. 74)

103. There were 70 reportable crashes on that stretch during the five-year period. (N.T. p. 75)

104. Eastbound, there were 38 crashes and westbound, there were 32 crashes. (N.T. p. 75)

105. Mr. Fiocco obtained crash data for all of U.S. Route 422 that is in the same classification as the other crash study. (N.T. p. 76)

106. The second crash data study regarded a portion of 422 that is approximately 23 miles long and was also over a five-year period. (N.T. p. 76)

107. Mr. Fiocco obtained a NHTSA (National Highway Traffic and Safety Administration) report that was conducted in April 2006. (N.T. pp. 78-79)

108. The aforementioned study indicated that any eye glance away from the forward roadway greater than two seconds greatly increases near-crash risk. (N.T. p. 79)

109. A NHTSA publication documented that 5,474 people were killed nationally in crashes involving distracted operators in 2009. (N.T. p. 80)

110. The report also indicates that 959,000 or 17 percent of all crashes involved a distracted driver in 2009. (N.T. p. 80)

111. The NHTSA publication offered no specifics with respect to the subject site nor did it delineate driver distraction due to billboards.

112. Mr. Fiocco also reviewed a Transportation Research Board report entitled "Traffic Safety Evaluation of Video Advertising Signs", published in 2005. (N.T. p. 82)

113. In review of all the aforementioned, it is Mr. Fiocco's opinion that installing billboards at the subject location will increase the risk to motorists who travel on U.S. Route 422 of having an accident. (N.T. p. 84)

114. It is further Mr. Fiocco's opinion that the proposed location, based on geometrical figures at this portion of U.S. Route 422, is not suitable for the installation of billboards because of the added risk for crashes for motorists on 422. (N.T. p. 85)

115. Curved sections of roadway have higher crash rates than straight stretches of roadway. (N.T. p. 86)

116. Intersections and interchanges along these roads have more crashes. (N.T. p. 86)

117. The crash rates are roughly twice was the statewide average of crash rates are for similar roadways at this particular location where the billboards are proposed. (N.T. p. 86-87)

118. Highway crash rates statewide are .47 crashes per million vehicle miles traveled. (N.T. p. 87)

119. With regard to the proposed segment of highway, the figure is .984 crashes per million vehicle miles traveled. (N.T. p. 87)

120. At eastbound 422, it is 1.11 crashes per million vehicle miles traveled, and on the westbound side, it is .879. (N.T. p. 87)

121. There are plans in the design phase to convert the partial interchange at Betzwood to a full interchange, in order to make all movements between Route 363 and Route 422. (N.T. p. 90)

122. The scheduled start date of such construction is in 2012. (N.T. p. 91)

123. The new ramp would be approximately a property frontage of range away, relative to M.B. Investments property on the eastbound side. (N.T. p. 92)

124. On the westbound lane, the ramp, relative to M.B. Investments' property would be across the entire property frontage. (N.T. p. 92)

125. PennDOT requires that no billboard be erected within 500 feet of the end of the acceleration or deceleration ramp relative to interchange ramps. (N.T. p. 92)

126. The proposed billboards would not be permitted under PennDOT regulations if the ramps were already constructed. (N.T. p. 92)

127. Nothing in the report indicated that any of the accidents in the summary segment were caused by billboard distraction in particular. (N.T. p. 99)

128. PennDOT does not classify nor break down its report relating to specifics in a billboard distraction incident. (N.T. pp. 102-103)

129. In order to have the distraction documented by the report, the driver would have to tell the officer that he was distracted by the billboard when he called in the incident. (N.T. p. 103)

130. There would be a proposed digital aspect of the Lamar billboard that a ten-second change rate would be applied. (N.T. p. 106)

131. The state's minimum for change rates is five seconds. (N.T. p. 106)

132. PENNDOT has not installed a "curve warning" sign on the particular curve at issue. (N.T. p. 109)

133. The speed limit on the particular stretch of roadway at issue is 55 miles per hour, as is the entire stretch of Route 422. (N.T. p. 111)

134. The crash data along the curve has not caused PennDOT to reduce the speed limit. (N.T. p. 112)

135. Mr. Fiocco did not conduct a speed study of the area at issue. (N.T. p. 112)

136. Approximately 60,000 cars come past the 422 curve at issue in a given day. (N.T. p. 113)

137. Close to 22 million cars pass the curve in a year and/or 110 million in five years. (N.T. p. 113)

138. Out of 110 million cars that have traveled the curve in five years, there have been 70 reportable accidents. (N.T. p. 114)

139. A driver distraction looking at a billboard would be lumped in with other driver distractions in a given NHTSA report. (N.T. p. 119)

140. There is no statistically significant correlation between billboards and crash rates. (N.T. p. 120)

141. For the long straightaway portion of 422 for the same five-year period, there were eight accidents as opposed to 70 accidents on the curved portion. (N.T. p. 134)

142. The straight stretch is close to a half-mile long, whereas the curved section is close to six-tenths of a mile. (N.T. p. 134)

143. Limited access highways are statistically safer than full access highways based on crash data provided. (N.T. p. 135)

144. The individual segment at the subject section of 422 is over twice the normal crash data on a limited access highway. (N.T. p. 135)

145. It is Mr. Fiocco's opinion that most of the crashes were reported due to "driving too fast for conditions". (N.T. p. 136)

146. Such conditions could include rain, fog, snow, sun glare, etc., along with curvature of the roadway. (N.T. p. 137-138)

147. The crash report, and its backup information, indicates what crashes pertained to dangerous road conditions or driving too fast for unsafe conditions. (N.T. p. 142)

148. Mr. Fiocco visited the 422 eastbound and westbound sites twice during normal work hours in order to view the property. (N.T. pp. 142-143)

149. Should the proposed billboards be erected, vehicles passing would be looking at four billboards in the specific location as opposed to one in existence now along with a sign on the building. (N.T. p. 145)

150. The term "video sign" is interchangeable with the term "digital sign". (N.T. p. 148)

151. PennDOT does not consider the curvature of the road when determining whether to allow billboards near an interchange. (N.T. p. 149)

152. The existing signage on the property would stay in the same place where it is now, regardless of the proposed billboards. (N.T. pp. 157-158)

153. The proposed billboards would be within approximately 500 feet from the on-and/or off-ramp proposed in the future for the Trooper Interchange. (N.T. p. 159)

December 6, 2010 Hearing

Testimony of Joseph P. Hanna

154. Joseph P. Hanna is employed by Chambers Associates, Inc, the Engineer for Lower Providence Township. (N.T. p. 7)

155. The distance between the Overlay District and the closest point thereto on the M.B. Investments property is 5,131 lineal feet. (N.T. p. 8)

156. A mile equals 5,280 lineal feet. (N.T. p. 9)

Testimony of Joseph Dunbar

157. Joseph Dunbar is the Township Manager of Lower Providence Township. At the time of the enactment of the Billboard Overlay District, Mr. Dunbar was a Lower Providence Township Supervisor. (N.T. p. 10)

158. The interchange project at 422 and 363 is approximately 1,000 feet from the M.B. Investments property. (N.T. p. 11)

159. PennDOT confirmed by letter that in 2011 it is expected to acquire the right-of-way, and put the project out to bid to release in the latter part of 2011 for Spring 2012 construction. (N.T. p. 13)

160. The intention of Lower Providence Township in passing Ordinance 478 was to provide for a Billboard District next to the mobile home park adjacent to Route 422. (N.T. pp. 18-19)

161. This was accomplished with subsection 254(J). (N.T. p. 19)

162. Ordinance 490, specifically §252(E), allowed for the Board of Supervisors to designate the Billboard District within the Township. (N.T. p. 19)

163. Ordinance 491 was adopted to apply the Billboard Overlay District along the Egypt Road corridor where most of the pre-existing billboards existed. (N.T. pp. 19-20)

164. Section 254(J), which limited billboards to limited access highways remained in existence despite these new ordinances. (N.T. pp. 20-21)

165. In 2003, the intention of the Board was to locate the Billboard District along Egypt Road and not along Route 422. (N.T. p. 23)

Testimony of Joseph Ferraro

166. Ordinances 490 and 491 corrected Ordinance 478. (N.T. p. 28)

167. Nothing in Ordinance 478 prohibits the Township from applying the Mobile Home Park District to ground along Egypt Road. (N.T. pp. 29-30)

168. Section 143-254(J) of Ordinance of 478 indicates that any lot upon which a billboard is located must be adjacent to a limited access highway. (N.T. p. 30)

169. At the time the Billboard Overlay District was passed, the Board believed it highly unlikely that any billboards would be erected in the area. (N.T. pp. 36-37)

Testimony of Deirdre Gibson

170. The proposed billboards are inconsistent with the existing topography of Valley Forge National Historic Park. (N.T. p. 44)

171. The proposed billboards would be visible on the north side of the river from the crest, just south of Pawlings Road in Valley Forge National Historic Park. (N.T. pp. 51-52)

172. On the south side of the Schuylkill River, the billboards would be visible from the entrance to the Visitor's Center, from the second floor of the Visitor's Center itself, from Route 23 and the Joseph Plumb Martin Trail, and from the Stony Battery Fort site. (N.T. p. 52)

173. The billboards would be somewhat visible from the National Royal Arch and Outer Line Drive. (N.T. p. 53)

174. The billboards would be visible from Redoubt 2, a small fort within the VFHNP. (N.T. p. 53)

175. The illuminated billboards would become the dominant visual element and disrupt the fundamental scenic character of this stretch of 422 and of the Valley Forge Historic National Park. (N.T. p. 54)

176. The stretch of highway from the subject trailer park to the Perkiomen Trail is approximately two-and-a-half miles. (N.T. p. 55)

177. The Valley Forge Park is managed by staff, which has no position in favor or in opposition to the proposed billboards. (N.T. p. 56)

178. Valley Forge National Historic Park stretches three miles. (N.T. p. 59)

179. Lamar Advertising would dim the lighting in the evening hours after dusk for the proposed billboards. (N.T. p. 64)

180. All of the noted points of concern south of the Schuylkill River with regard to Valley Forge National Historic Park are more than one mile away from the M.B. Investments building and/or the proposed billboards. (N.T. p. 64)

181. People traveling the Schuylkill River Trail across from the M.B. Investments building on the other side of Route 422, in the meadow area, would not be able to see the billboards due to the area being completely wooded. (N.T. p. 65-66)

182. Upper Merion Township provides for a large apartment building visible from Valley Forge National Historic Park, as well as the Valley Forge Convention Center, visible from the trails in the meadow area. (N.T. pp. 66-67)

183. Valley Forge Park is 3,500 acres. (N.T. p. 69)

184. Valley Forge Park has approximately 26 miles of trails. (N.T. p. 69)

185. From the vast majority of trail locations, the M.B. Investments building is not visible, nor would be the proposed billboards. (N.T. pp. 69-70)

186. From the site of the proposed billboards, parts of the Mascaro sign on the M.B. Investments building could be legibly read. (N.T. p. 71)

187. The Victory Church sign on the site is situated too low for legible reading, from the proposed site. (N.T. p. 70)

Testimony of Thomas Comitta

188. Thomas Comitta is the president of Thomas Comitta Associations, Inc., Town Planners and Landscape Architects located in West Chester, Pennsylvania. (N.T. p. 78)

189. Mr. Comitta is qualified as an expert in land planning. (N.T. p. 78)

190. Ordinance 143-139.A permits digital signage in three districts, the Ridge Pike Business District, the General Commercial District, and the Highway Commercial District. (N.T. pp. 80-81)

191. Other than the three districts delineated above, the Township does not provide for permission of any digital signs in any other district. (N.T. p. 81)

192. Where digital signs are permitted, the Township restricts these signs to display time and temperature only in an amber color, that they contain a brief message changing only once every 45 seconds, and amber in color. (N.T. pp. 81-82)

193. The retail establishments on Ridge Pike are automobile dependent with regard to digital signage. (N.T. p. 96)

194. The restrictions in 143-139.A(5) are in place with regard to amber color and message frequency change to protect health, safety and welfare. (N.T. pp. 96-97)

195. The amber color is softer to look at and 45 seconds is a reasonable length of time for signage change. (N.T. p. 97)

196. There are ten areas and three district types comprised of three different places, where digital signs are permitted in Lower Providence Township. (N.T. p. 101)

197. The definition of billboard in Lower Providence Township is a sign calling attention to a service or a place that is offered elsewhere than upon the premises. (N.T. p. 106)

Testimony of Bernard Telatovitch, P.E.

198. Bernard Telatovitch is a Registered Professional Engineer, whose career deals in significant part with highway design and traffic safety issues. (N.T. p. 115)

199. U.S. Route 422 near the M.B. Investments property contains segments 320 eastbound and 321 on the westbound lane as designated by PennDOT. (N.T. p. 119-120)

200. These segments are approximately 3,200 feet long. (N.T. p. 120)

201. The posted speed limit in the vicinity of the M.B. Investments property on U.S. Route 422 is 55 miles per hour. (N.T. p. 121)

202. There are no speed limit warning signs in the curved section of 422 at issue in this case. (N.T. p. 123)

203. The proposed billboard locations are elevated when compared to the travel lanes of Route 422. (N.T. p. 126)

204. There is nothing in specific detail in the PennDOT accident history provided that indicates that any of the accidents were caused by billboard distraction per se. (N.T. p. 153)

205. The Tantala report is a study of twenty different locations where billboards were installed in Berks County and compared various factors of digital billboard proposals with existing static billboards. (N.T. pp. 212-213)

206. Aside from the opposition presented by Lower Providence Township, no other party formally entered his or her appearance as a protestant to the application.

207. Although a number of individuals from the public came forward to ask questions of the witnesses, only one individual from the public stated an opposition to the Application.

208. Kathie Eskie, a resident on the opposite end of the Township, provided public comment in opposition to the Applicant at the conclusion of the hearing on December 6, 2010. She was of the opinion that billboards were unsightly and digital billboards were distracting. (N.T. pp.219-221).

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

Based upon its review of the testimony presented, the exhibits, and submissions of the parties, and based upon assessments of credibility and application of fact to law, the Zoning Heard Board of Lower Providence Township makes the following determinations:

1. The Applicant being a resident of Lower Providence Township with a property situated adjacent to a limited access highway is an aggrieved party with a substantial interest in the exclusionary effects of the laws, codes, and ordinances of the Township.
2. Ordinance 478 of Lower Providence Township mandates a billboard to be located adjacent to a limited access highway.
3. Ordinance 491 of Lower Providence Township mandates a billboard to be located within a described area on Egypt Road.
4. At the time of the filing of this Application, the Township Map failed to designate an area where billboards were permitted to be located.
5. At the time of the filing of the Application, a prospective applicant would have no way of knowing that the Township of Lower Providence had in fact designated a section of the Township as a Billboard Overlay District.
6. At the time of the filing of the Application, the Township Map was not updated to reflect the amendments of Ordinance 491.

7. At the time of the filing of the Application, neither Ordinance 490 nor Ordinance 491 was incorporated in the published Township Code which would have been readily accessible to a prospective applicant either on the internet or in hard copy.

8. At the time of the filing of this Application, the Township Ordinance had conflicting provisions regarding the area to be designated as the Billboard Overlay District and where billboards were permitted to be erected.

9. The conflicting provisions of the Township Ordinance, when read in conjunction with one another, served to effectively prohibit the erection of a billboard within Lower Providence Township.

10. The Township Ordinance would require a billboard to be located both on Egypt Road and adjacent to a limited access highway, which Egypt Road is not; these provisions are inconsistent and mutually exclusive.

11. At the time of the filing of this Application, Lower Providence Township effectively prohibited the erection of billboards within its boundaries.

12. The Lower Providence Township Ordinance is de facto exclusionary with respect to the erection of billboards within the municipality.

13. The Lower Providence Township Ordinance was unconstitutional at the time of the filing of this Application as it effectively precluded any applicant from erecting a billboard within the limits of the municipality.

14. The Township's efforts to cure the deficiencies in its map and conflicting code provisions subsequent to the filing of the Application did not obviate the preclusive effect of its Ordinance.

15. The Township failed to put forth competent and credible evidence that the billboards requested by the Applicant would have an adverse effect on the health, safety, and welfare of the community.

16. The testimony of Joseph Fiocco was credible and uncontroverted in its statement that limited access highways are statistically safer than full access roadways.

17. The testimony of Joseph Fiocco was not credible in its conclusion that the proposed billboards would increase the risk and number of accidents along the Route 422 corridor in Lower Providence Township.

18. The PENNDOT proposed changes for the Betzwood Interchange should not interfere with the current proposal of the Applicant because of the possibility that the project be changed, withdrawn, or defunded.

19. The testimony of Deirdre Gibson was not credible in her position that the proposed billboards, especially the digital billboards, would have an adverse effect on the aesthetics of Valley Forge National Park.

20. The Lower Providence Township Ordinance does permit digital signage but not specifically digital billboards.

21. The Lower Providence Township Ordinance does not specifically exclude the erection of digital, changeable copy billboards.

22. Digital, changeable copy billboards have emerged as the industry standard.

23. The two digital faces of the proposed billboards fulfill the Commonwealth mandates for change rate and dwell time.

24. There was no competent and credible evidence presented that digital, changeable copy billboards pose a greater risk of driver distraction or have a greater impact on the health, safety, and welfare of the community than a traditional billboard.

25. The public objections raised by Kathie Eskie are found to lack credibility and were presented without foundation.

26. The Township of Lower Providence has failed to designate sufficient areas for its fair share of off-premises advertisement.

27. As the prevailing party in this validity challenge, the Applicant is entitled to the site specific relief it requested.

28. The dimensions, locations, construction, and use of the proposed billboards are found to be reasonable and not adverse to the health, safety, and welfare of the community.

29. Based upon the testimony, exhibits, and submissions of the parties, the Zoning Hearing Board finds that the erection of billboards adjacent to Route 422, the Township's only limited access highway, is a safer, aesthetical, and more reasonable location for the Billboard Overlay District.

30. It is the recommendation of the Zoning Hearing Board that Lower Providence Township designates the non-residential lands adjacent to Route 422 as the Billboard Overlay District and deletes the conflicting provisions of Ordinance 478 and Ordinance 490 with the adoption of a revised Township Map in accordance with these recommendations.

31. The Applicant's challenge to the validity of the Township's Billboard Ordinances is substantive and not procedural.

32. Both Ordinance 478 and Ordinance 490 contain Severability and Repealer clauses; however, Ordinance 491 contains neither of those clauses.

33. Ordinance 490 operates as an enabling provision providing the Board of Supervisors with the authority to designate an area of Lower Providence Township as the Billboard Overlay District.

34. Before Ordinance 490 became effective (i.e., five days from its enactment), the Board of Supervisors pursuant to Ordinance 491 designated the area along Egypt Road and Rittenhouse Road as the Billboard Overlay District. Ordinance 490 and Ordinance 491 were enacted by the Board at the same meeting.

35. Section 2 of Ordinance 491 mandates that it does not alter or modify Ordinance 478 in any way other than designating the area along Egypt Road and Rittenhouse Road as the Billboard Overlay District.

36. Because §143-254J of Ordinance 478 mandates that the Billboard Overlay District be adjacent to a limited access highway, and the BO District specifically described in Ordinance 491 is not adjacent to a limited access highway, Ordinance 478 and Ordinance 491 conflict.

37. Pursuant to the Repealer clause in Ordinance 478, Ordinance 491 would be automatically repealed for this conflict and inconsistency.

38. The Repealer clause in Ordinance 478 serves to effectively repeal the Billboard Overlay District in Ordinance 491.

39. At the time of the filing of this Application, Lower Providence Township did not have an enforceable and designated Billboard Overlay District.

40. §143-254J of Ordinance 478 cannot be repealed by Ordinance 491; rather, the specific language and intent of these statutory provisions mandates that Ordinance 478 repeal Ordinance 491 for the inconsistency.

41. By enacting the provisions of these Ordinances as such, the Board of Supervisors have left the Township with no cure for this conflict and for these inconsistencies and hence no cure for the unlawful exclusion of billboards in this municipality.

42. Ordinance 478 and Ordinance 491 cannot be saved from unconstitutionality by severance of these offending provisions.

MEMORANDUM OF LAW

The Zoning Hearing Board of Lower Providence Township submits this Memorandum of Law in support of the factual and legal determinations set forth above:

I. THE APPLICANT HAS STANDING TO PURSUE THIS VALIDITY CHALLENGE

The Applicant, M.B. Investments, has standing to pursue this validity challenge. As a “landowner affected” and a “person aggrieved” by the Zoning Ordinance effected by Lower Providence Township related to billboard use, M.B. Investments has standing to file the substantive validity challenge pursuant to §10916.1(A) and §10913.3 of the Pennsylvania Municipalities Planning Code.

Not only is M.B. Investments a property owner within the Township, the Applicant owns property adjacent to a limited access highway. Section 143-254(J) of Ordinance 478 mandates a billboard to be located adjacent to a limited access highway. Although Ordinance 490 and 491 purports to amend Ordinance 478, Section 143-254(J) was not deleted. Hence, the property which is the subject of this Application falls within the area of the Township affected by the Billboard Overlay District. Accordingly, M.B. Investments clearly has standing. The Applicant has standing as a Township resident and property owner seeking to remedy unconstitutional provisions, and also as an immediately affected landowner.

II. THE BILLBOARD OVERLAY DISTRICT AS ESTABLISHED BY ORDINANCE NO 478 AND AMENDED BY ORDINANCE 490 AND 491 IS UNLAWFULLY EXCLUSIONARY AND THEREFORE INVALID

The Billboard Overlay District established by Lower Providence Township Ordinance No. 478, and further amended by Ordinance No. 490, is determined to be unlawfully exclusionary. Because such ordinance is unlawfully exclusionary, it is therefore invalid.

The Supreme Court of Pennsylvania held that a complete prohibition of revolving signs in each zoning district within a municipality is patently unreasonable, and therefore invalid. Specifically, it indicated that a municipality has no power to place a blanket prohibition on all revolving signs without any regard to location, size of signs or other considerations. Amerada Hess Corp. v. Zoning Board of Adjustment, 313 A.2d 787, 789 (Pa. Commw. 1973).

In that case, the Court held that the ordinance did not attempt to regulate, but to exact a complete prohibition without regard for the district setup under the zoning ordinance. As in our case, a complete prohibition of digital billboards throughout the Township of Lower Providence would be considered a complete prohibition of billboards, and therefore patently unreasonable and invalid as it relates to the Billboard Overlay District. The official Township Zoning Map does not indicate specific boundaries within the Billboard Overlay District, and neither does the written text of the zoning ordinance, as amended, describe any specific area within the Township to be the Billboard Overlay District. Accordingly, both the map and the substance of the ordinance itself are not specific enough to enable any applicant to propose or erect a billboard. As such, the ordinance must be found prohibitive and exclusionary.

Further, while the official Township Zoning Map does not specifically reference Ordinance No. 491, it does reference other ordinances which apparently amended the Township Map. No reference to Ordinance No. 491 is contained within the Township's Chapter 143 of the Zoning Ordinance either. Section 143-254(J) of the Township's Zoning Ordinance indicates that

billboards must be placed “adjacent to a limited highway”. Because Egypt Road is not a limited access highway within Lower Providence Township, and the only limited access highway within Lower Providence Township is U.S. Route 422, the fact that there are billboards in existence on Egypt Road does not remedy the exclusionary aspect of the Township Ordinance.

While the Township may not have had exclusionary intent regarding the enactments of Ordinances Nos. 490 and 491, the law makes relevant only whether the zoning ordinance had an “exclusionary impact” as it relates to billboard use within the Township. Overstreet v. Zoning Hearing Board of Schuylkill Township, 618 A.2d 1108, 1112-13 (Pa. Commw. 1992). Because Ordinance 491 does not alter or modify Chapter 143 of the Township Zoning Ordinance or Chapter 143 of the Code of Lower Providence Township, it therefore does not alter the requirement that any billboard must be located adjacent to a limited access highway. Regardless of intent, Ordinance 491 necessitates a limited access highway as part of the Township Zoning Ordinance as it relates to billboard placement and location. Neither is there a repealer clause with regard to the ordinance as it stands.

III. THE APPLICANT, M.B. INVESTMENTS, IS ENTITLED TO SITE-SPECIFIC RELIEF WITH REGARD TO PROPOSED BILLBOARDS

The Applicant, M.B. Investments, is entitled to site-specific relief with regard to its proposed billboard placement. Despite the Township’s arguments under §10916.1(c)(5) of the Municipal Planning Code, and §143-169 of the Township Zoning Ordinance, that the placement of these billboards would be a violation of general public health, safety and welfare issues, this has not been determined to be the case.

Mr. Fiocco was not determined to be credible by the Zoning Hearing Board with respect to the testimony that there would be an increase in motor vehicle accidents at the location of the proposed billboard site. Accordingly, there was no credible testimony that the proposed

billboards would violate safety issues. There was no reliable testimony or report produced at the hearing that the proposed M.B. billboards would cause any significant risk of accident increase along segments 320 and 321 of U.S. Route 422. PennDOT accident histories produced did not indicate accident increase due to billboard distraction per se. There is no state law or PennDOT regulation in effect today that would prevent M.B. Investments from erecting its proposed billboards where they plan to erect them. To the contrary, M.B. Investments established at the hearing that the proposed billboards are consistent with an existing billboard located on a property approximately 800 feet from the proposed site. This property also lies adjacent to U.S. Route 422, and is approximately the same size and shape and illumination that M.B. Investments proposes.

When determining whether a billboard should be erected at a specific site, the party seeking such employ must show that the submitted plans are reasonable, and that they are not generally injurious to the public health, safety and welfare. Casey v. Zoning Hearing Board of Warwick Township, 328 A.2d 464, 468-69 (Pa. 1974); Adams Outdoor Advertising, Ltd. V. Hanover Township Zoning Hearing Board, 683 A.2d 240, 245 (Pa. Commw. 1993). Specifically, the Adams Court held in citing the Casey case that an Applicant should be permitted to develop their property as proposed, regardless of how the land is currently zoned, if it is determined that the Township produced no evidence that would show that the proposed signage would be injurious to the public health, safety and welfare of its citizens. Id. at 633 A.2d 245-246.

IV. THE LOWER PROVIDENCE TOWNSHIP ZONING HEARING BOARD PROPOSED CURE TO THE EXCLUSIONARY ORDINANCE

Section 916.1(c)(5) of the Pennsylvania Municipalities Code requires the zoning hearing board in a validity challenge to include in its decision “recommended amendments to the

challenged ordinance which will cure the defects found” in those cases where the validity challenge is found to have merit. The ZHB has complied with this mandate in its Order.

Based upon the testimony, exhibits, and submissions of the parties, the Zoning Hearing Board finds that the erection of billboards adjacent to Route 422, the Township’s only limited access highway, is a safer, aesthetical, and more reasonable location for the Billboard Overlay District. Route 422 is a much more suitable location for these billboards. In addition, an amendment to the Township Ordinance establishing the Billboard Overlay District in this area will meet the fair share requirements of Pennsylvania law.

In addition to establishing a BO district adjacent to the non-residential lands adjacent to Route 422, the ZHB recommends that the Township revise its Ordinance so that Ordinance 478 and Ordinance 491 no longer conflict in language. The Township must then update its Map accordingly.