

STATE OF NEW JERSEY
DEPARTMENT OF TRANSPORTATION

OUTFRONT MEDIA, LLC	:	FINAL DECISION
	:	
v.	:	OAL DKT NO. TRP 06927-2020 N
	:	
NEW JERSEY DEPARTMENT OF	:	AGENCY DOCKET NO. 76803
TRANSPORTATION	:	
	:	

Outfront Media, LLC ("Outfront") contests the denial of outdoor advertising application #76803, which sought a permit to erect an off-premise multi-message billboard visible to north-bound traffic approaching Exit 4 on Route 287 in South Plainfield. The New Jersey Department of Transportation's ("NJDOT") Office of Outdoor Advertising ("OOA") denied Outfront's application because the billboard would have been visible "within 500 feet of the beginning or ending of pavement widening, within 500 feet of the point of gore, or any point between those features where the pavement is widened" in violation of N.J.A.C. 16:41C-8.1(d)(2). Outfront conceded that its billboard would be visible on the widened portion of the roadway and prior to the point of gore but argued that application of N.J.A.C. 16:41C-8.1(d)(2) to its proposed location was unconstitutional.

The NJDOT transmitted the matter to the Office of Administrative Law for a formal hearing, which the parties stipulated would be governed by the Appellate Division's remand instructions in In re Denial of the Outdoor Adver. Application No.

75708, Docket No. A-5468-16T1, 2019 N.J. Super. Unpub. LEXIS 1397 (App. Div. 2019) ("Hartz"). The administrative law judge ("ALJ") heard testimony on April 24, 2023 and April 26, 2023 and closed the record on July 19, 2023. On September 15, 2023, the ALJ issued an Initial Decision affirming the OOA's denial. Outfront filed exceptions on October 10, 2023, to which the OOA replied on October 18, 2023. On October 26, 2023, the 45-day statutory period for issuing a final decision was extended until December 14, 2023 pursuant to N.J.S.A. 52:14B-10(c) and N.J.A.C. 1:1-18.8.

I have reviewed and considered the Initial Decision, Outfront's letter of exceptions and the attachments thereto, and the OOA's reply. Based upon a de novo review of the record presented, I hereby accept and adopt the findings and conclusions set forth in the Initial Decision.

As the ALJ noted, the Hartz court ruled that the NJDOT's application of N.J.A.C. 16:41C-8.1(d)(2) is subject to intermediate scrutiny. As such, application of the regulation must serve a significant government interest, be narrowly tailored to that interest, and preserve ample alternative means for communication. Hartz, at *21. To meet the narrow tailoring requirement, the NJDOT must demonstrate that its significant government interest in traffic safety "would be achieved less effectively" without the regulation. Id. at *22 (citing E & J Equities, LLC v. Franklin Twp. Bd. of Adjustment, 226 N.J. 549,

582 (2016)). However, the NJDOT's proof "need not necessarily be rigorous or unchallenged to survive a constitutional challenge." Id. at *24. A long history, substantial consensus, and simple common sense can be sufficient to show that a law is necessary to advance the governmental interest. Id. at *24 (citing Burson v. Freeman, 504 U.S. 191, 211 (1992)).

The OOA met its constitutional burden of demonstrating that application of N.J.A.C. 16:41C-8.1(d)(2) to Outfront's proposed billboard promotes a significant government interest in traffic safety. As the ALJ noted:

[T]he NJDOT witnesses offered credible and reliable testimony concerning the traffic safety risks involved in the placement of a multi-media billboard, and particularly in this location which was within the pavement widening. The proposed billboard would add an additional distraction on a high-speed roadway where drivers are already navigating the pavement widening by switching lanes, adjusting their speeds, reading signs, and looking out for other drivers, and this reasonably creates an increased safety-risk to the driver. A multi-media billboard that changes images about every eight seconds is a distraction that can potentially be a dangerous one especially since it is placed within a pavement widening where motorists are switching lanes, reading signs, accelerating and decelerating, on a high-speed roadway. Through the regulation, NJDOT seeks to limit dangerous distractions on the road. . . . The 500-foot restriction has been in effect for about fifty years, it has been supported by the federal DOT since at least 1971, and there has been a substantial consensus regarding this requirement as it has been adopted by forty-six states. . . . I am satisfied that the NJDOT has sufficiently demonstrated at least "a modicum" of support for the invocation of this government interest in maintaining traffic safety here, and that traffic safety would be achieved less effectively without the regulation.

In its exceptions, Outfront argues that the ALJ improperly relied on inadmissible testimony proffered by the OOA's rebuttal witness Chris Barretts ("Barretts"), who was qualified as an expert in traffic engineering and safety. Outfront contends that Barretts's testimony about the safety risks of billboards constitutes "net opinion" and that the ALJ should have excluded references to other states' regulations, the amount of truck traffic on I-287, and speed differentials at the proposed site. Outfront also argues that the ALJ improperly conducted a rational basis review rather than intermediate scrutiny.

I disagree. As the OOA correctly points out in its reply to Outfront's exceptions, the OAL is not bound by the New Jersey Rules of Evidence. See N.J.A.C. 1:1-15.1(c). Under N.J.A.C. 1:1-15.9(b), testimony of an expert witness is admissible if it

will assist the judge to understand the evidence or determine a fact in issue and the judge finds the opinions or inferences are:

1. Based on facts and data perceived by or made known to the witness at or before the hearing; and
2. Within the scope of the special knowledge, skill, experience or training possessed by the witness.

Barretts's testimony was based on his three decades of experience in traffic engineering at the NJDOT and familiarity with the proposed site. His testimony about other states' regulations was also admissible because hearsay evidence is commonly accepted in administrative hearings so long as there is

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"some legally competent evidence . . . to support each ultimate finding of fact to an extent sufficient to provide assurances of reliability and to avoid the fact or appearance of arbitrariness." N.J.A.C. 1:1-15.5(b); Weston v. State, 60 N.J. 36, 50-51 (1972). Barretts's testimony about other states was meant to demonstrate the wide recognition of billboards as potentially dangerous, a point that was corroborated by other testimony and case law considered by the ALJ, including Burns v. Barrett, 561 A.2d 1378 (Conn. 1989).

Outfront presented evidence that the proposed site is straight and level, has a lower historic crash rate than the average comparable stretch of interstate highway, and that the widened portion of the roadway leads only to the exit ramp, without a shared entrance that would increase weaving activity or merging. However, the likelihood that billboards pose a greater safety risk at locations with such characteristics does not deprive the NJDOT of a constitutionally permissible basis for applying N.J.A.C. 16:41C-8.1(d)(2) to the pavement widening at issue here.

Under Hartz, the OOA was not required to demonstrate that Outfront's billboard would be exceptionally or uniquely dangerous to be constitutional. Rather, the OOA only needed to provide "a modicum of support" that application of N.J.A.C. 16:41C-8.1(d)(2) to this location furthers its significant interest in traffic safety. The OOA did so with the credible testimony of two experts

who explained, among other things, the complex driving tasks involved in negotiating a pavement widening and importance of minimizing the potential distractions posed by billboards at such locations.


For the foregoing reasons, the ALJ in the Initial Decision properly concluded that the OOA had met its burden of demonstrating that N.J.A.C. 16:41C-8.1(d)(2) advances a significant government interest in traffic safety as applied to Outfront's application.

It is, therefore, on this 8th day of December, 2023, ORDERED that outdoor advertising application #76803 is denied pursuant to N.J.A.C. 16:41C-8.1(d)(2).

This FINAL AGENCY DECISION may be appealed in accordance with Rule 2:4-1(b) by filing a Notice of Appeal with the New Jersey Superior Court, Appellate Division, within 45 days from the date of service or notice of this decision.

STATE OF NEW JERSEY
DEPARTMENT OF TRANSPORTATION

DATED: December 08, 2023


Diane Gutierrez-Scaccetti
Commissioner of Transportation