

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE  
April 24, 2014 Session

**WILLIAM H. THOMAS, JR. v. TENNESSEE DEPARTMENT OF  
TRANSPORTATION**

**Appeal from the Chancery Court for Davidson County  
No. 11534II Carol L. McCoy, Chancellor**

---

**No. M2013-01780-COA-R3-CV - Filed June 27, 2014**

---

This appeal arises from a petition for judicial review of the Tennessee Department of Transportation's decision to deny the petitioner's applications for billboard permits. Discerning no error, we affirm the chancery court's decision upholding the Department's denial.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed**

ANDY D. BENNETT, J., delivered the opinion of the court, in which RICHARD H. DINKINS, J., and LARRY BART STANLEY, SP. J., joined.

John Lee Farringer and Lauren Zehr Curry, Nashville, Tennessee, for the appellant, William H. Thomas, Jr.

Robert E. Cooper, Jr., Attorney General and Reporter; Joseph Whalen, Acting Solicitor General; and Larry Teague, Deputy Attorney General; for the appellee, State of Tennessee, Department of Transportation.

## OPINION

### FACTUAL AND PROCEDURAL BACKGROUND

On June 8, 2006, petitioner William H. Thomas, Jr. submitted two applications<sup>1</sup> to the Tennessee Department of Transportation (“TDOT” or “Department”) for two state outdoor advertising permits. The permits were for back-to-back billboards to be constructed off of Perkins Road at Log Mile 12.68 on Interstate 240 East in Shelby County. Mr. Thomas represented in the applications that the proposed site (also referred to as “Perkins Road location” or “the parcel”) was zoned CH (Highway Commercial).

On June 14, 2006, Robert Shelby, manager of the TDOT Region 4 Beautification Office in Jackson, and other employees in that office began to process Mr. Thomas’s applications. They conducted a field inspection on July 6, 2006, and asked the local zoning officials for Memphis and Shelby County, including Norman “Chip” Saliba, Jr., the manager of the Office of Planning and Development’s Land Use Controls Section, about the zoning of the proposed site.<sup>2</sup> Based on the information gathered through these inquiries and on his personal review of the complete inspection, Mr. Shelby determined that Mr. Thomas’s proposed billboard site was in the Nonconnah Creek Floodway and zoned FW (Floodway). Therefore, the proposed location failed to meet the zoning requirements in Tenn. Code Ann. § 54-21-103(4) and TDOT Rule 1680-2-3-.03(1)(a)(1), both of which require that outdoor advertising located within 660 feet of an interstate highway be located in areas zoned for industrial or commercial use. Mr. Shelby notified Mr. Thomas that his applications were denied by letter dated July 7, 2006.

Two weeks later, on July 21, 2006, Mr. Thomas obtained a local building permit for the proposed billboard site from the Office of Construction Code Enforcement. By letter to Mr. Shelby dated August 1, 2006, Mr. Thomas requested an administrative hearing to challenge TDOT’s denial of his applications. The letter also informed Mr. Shelby that he would be “receiving a letter from Chip Saliba, Jr. with the [OPD] stating that the area where the sign is to be located is zoned highway commercial.”

---

<sup>1</sup> The Tennessee Department of Transportation assigned these applications numbers 7068 and 7069.

<sup>2</sup> TDOT controls outdoor advertising along interstates and primary highways in Tennessee in accordance with federal laws, state statutes, and state rules. TDOT’s Beautification Office administers outdoor advertising and may consult with local agencies in doing so. Here, the local agency is the Memphis and Shelby County Department of Planning and Development within which there are operational offices, including the Office of Planning and Development (“OPD”) and the Office of Construction Code Enforcement. The OPD, a joint city-county agency, is comprised of two sections: the Land Use Controls Section and the Comprehensive Planning Section.

On October 25, 2006, Mr. Thomas met with Mr. Saliba and other OPD representatives to discuss the zoning of the parcel at issue. Mr. Thomas provided a drawing that was prepared after consultation with a local engineering firm to show that the parcel could be used for an advertising sign because a small area within it was zoned Highway Commercial (CH) with a Floodplain (FP) overlay. Five days later, Mr. Saliba wrote Mr. Thomas to reconfirm the OPD's conclusion "that the parcel is completely within the Floodway (FW) Zoning District." In support of that conclusion, Mr. Saliba attached a portion of zoning atlas panel 2240, noting that it "is the current zoning map for the area prepared by [the OPD]" and that "the subject property is shown entirely covered by a darker gray shading which represents Floodway (FW) Zoning." With his letter, Mr. Saliba also included a map panel prepared by the Federal Emergency Management Agency ("FEMA"), and explained it as follows:

It is Panel #225 and was effective December 2, 1994. This map panel was adopted by the Memphis City Council and Shelby County Commission in November 1999 as part of a comprehensive rezoning application known as Case # Z 99-134 CC adopting all the 12/02/94 FEMA Map Panels.

[This] map panel was placed on our local zoning map after its adoption in November 1999. In doing so, this caused the previous floodplain/floodway zoning to change on your parcel and expand north toward the Interstate 240 right-of-way. This resulted in your parcel being completely covered by the Floodway (FW) District as it is currently shown on the zoning map . . . .

Mr. Saliba advised Mr. Thomas that, if he could obtain "a letter from FEMA that they have approved a mapping revision/amendment to [the] parcel to remove it from the floodway," then he could file a rezoning application to remove part or all of the parcel from the Floodway Zoning District. Mr. Saliba also sent Ted Illsley a copy of the letter.<sup>3</sup>

Though he lacked the required state outdoor advertising permits, Mr. Thomas proceeded to construct the billboard at the Perkins Road location in December 2006. On December 13, 2006, Mr. Illsley requested that Mr. Thomas submit "an 'as built' drawing providing the precise coordinates of the [billboard's] support pole," noting that "the Zoning ordinance and federal statute" required the billboard's location to be outside of the regulated floodway. Accordingly, Mr. Thomas engaged civil engineer Teck Tang to prepare a plat to show that the billboard, as built, was not within the floodway.

---

<sup>3</sup> Mr. Illsley is a plans examiner in the local Office of Construction Code Enforcement from which Mr. Thomas received the local building permit.

On March 6, 2007, the TDOT Beautification Office discovered the billboard at the Perkins Road location and issued Notice of Violation No. 79-588 to Mr. Thomas for constructing it without first obtaining the necessary permits, in violation of Tenn. Code Ann. § 54-21-104. In response, Mr. Thomas asserted that the Perkins Road location was zoned CH (FP) (Highway Commercial within a Floodplain), and he enclosed a March 14, 2007 letter from Mr. Illsley stating the same. Richard Copeland, Director of the OPD, reviewed the zoning of the Perkins Road parcel. By letter dated August 13, 2007, Mr. Copeland concluded that it was wholly located in floodway zoning, as stated in the OPD's original October 30, 2006 letter that Mr. Saliba sent to Mr. Thomas. The OPD again invited Mr. Thomas to "pursue a zoning map change to remove [the] property from floodway zoning by filing a rezoning application."

On September 7, 2007, TDOT granted Mr. Thomas's request for an administrative hearing, but the initial hearing was delayed indefinitely by an October 24, 2007 stay that the Shelby County chancery court issued.<sup>4</sup>

Eventually, in the administrative proceeding, TDOT and Mr. Thomas submitted motions for summary judgment with the Administrative Law Judge. TDOT presented Mr. Copeland's affidavit which stated in part:

The City of Memphis and Shelby County are governed by a joint zoning ordinance which is administered by OPD. All zoning districts and any changes to the zoning districts duly passed by relevant governing bodies and in legal effect in Memphis and Shelby County are delineated and kept of record in the official Memphis and Shelby County Zoning District Map, commonly referred to as the Zoning Atlas, which is maintained by employees in the Office of Land Use Control and incorporated by reference into the joint zoning ordinance.

As is stated in Mr. Saliba's October 30, 2006 letter and my August 13, 2007 letter, the Thomas Location is entirely in the Floodway (FW) zoning district. There is no part of that property, the Thomas Location, which is zoned for commercial or industrial use. In fact, the Thomas Location is in the Nonconnah Creek Floodway.

---

<sup>4</sup> The chancery court issued the stay in *State of Tennessee v. William H. Thomas, Jr.*, No. CH-07-0454-I, a case that this Court dismissed in November 2010. See *State ex rel. Comm'r of Dept. of Transp. v. Thomas*, 336 S.W.3d 588 (Tenn. Ct. App. 2010).

I am also familiar with the letter dated March 15, 2007<sup>5</sup> written to Mr. Thomas by Ted Illsley<sup>6</sup> stating that the Thomas Location is zoned CH(FP) . . . . The information provided by Mr. Illsley in his letter of March 15, 2007 was incorrect then and it remains incorrect today. I attempted to correct Mr. Illsley's error through my letter of August 13, 2007.

No application has been filed by Mr. Thomas to rezone the Thomas Location.

Following oral arguments on October 23, 2009, and by initial order entered June 7, 2010, the ALJ granted summary judgment to TDOT. The ALJ ruled that Mr. Thomas's billboard had been constructed in a location that was not zoned industrial or commercial by the OPD, the agency vested with authority to make such determinations, and ordered the billboard removed. Specifically, the ALJ found that "[a]lthough various professionals may have different and well-informed opinions regarding how particular property should be zoned, only [the OPD] can 'under authority of law' determine how property in Memphis and Shelby County is zoned" and that the OPD "has zoned the Perkins Road area in question as 'FW-Floodway,' not commercial and not industrial." The ALJ concluded as a matter of law that "the Perkins Road location is not eligible for a billboard permit" because "no evidence was presented *that an agency with the legal authority to zone property in Memphis/Shelby County has zoned [it] as commercial or industrial.*" Accordingly, the ALJ ordered the billboard removed because it "is both unpermitted and unpermitt-able."

Mr. Thomas appealed the initial order to the Commissioner. The Commissioner issued an April 5, 2011 final order adopting and affirming the initial order. The Commissioner also found that affirming the initial order was necessary "to maintain effective control of outdoor advertising as mandated by 23 U.S.C. § 131 and the Billboard Regulation and Control Act of 1972, as amended, Tenn. Code Ann. § 54-21-101 et seq."

Thereafter, Mr. Thomas filed a petition for judicial review of the Commissioner's final order in the chancery court. After hearing oral arguments, the chancery court entered an April 24, 2013 memorandum and order upholding the Commissioner's final order and instructing TDOT "to take appropriate action in regard to the removal of the billboards at the Perkins Road location." The chancery court considered Mr. Thomas's primary argument that the zoning designation of his Perkins Road billboard location presented a genuine issue of material fact that would bar summary judgment:

---

<sup>5</sup> Mr. Illsley's letter was actually dated March 14, 2007.

<sup>6</sup> Mr. Copeland also explained, "Ted Illsley is an employee of the Office of Construction Code Enforcement. He does not report directly to me but does work under my ultimate supervision."

The Court considers Mr. Thomas' assertion that Teck Tang, a civil engineer who he employed in the past, opined that the land upon which Mr. Thomas' billboards rest is not zoned as a Floodway. Mr. Thomas cites the transcript of a 2007 show cause hearing in a different case in support of this assertion. At that show cause hearing, Mr. Tang opined that the billboard structure at the Perkins Road location was not in a floodway.

Mr. Thomas contends that Mr. Tang's opinion should be given more credence tha[n] the opinion of the OPD's Chief Administrator, Rick Copeland, who is not an engineer . . . [or that] Mr. Tang's opinion shows there is a disputed issue of fact which bars a grant of summary judgment.

Mr. Thomas' focus on a dispute over the zoning of the Perkins Road property is misplaced. The Commissioner enforces the Tennessee billboard statute, which provides that billboards may only be located "in areas that are zoned industrial or commercial *under authority of law*." Tenn. Code Ann. § 54-21-103(4) (emphasis added). The only agency with legal authority to make a zoning determination in this instance is the OPD . . . [which] deemed the Perkins Road site a Floodway (FW), which precludes the grant of an outdoor advertising permit. Any dispute regarding this zoning decision falls squarely within the province of the OPD. Thus, a review of the record reveals no material facts in dispute and the Commissioner's decision to uphold the ALJ's grant of summary judgment was appropriate.

Mr. Thomas then filed a motion to alter or amend under Tenn. R. Civ. P. 59.04 and 52.02 which the trial court denied following a hearing and by order entered July 12 , 2013. Mr. Thomas appeals.

#### STANDARD OF REVIEW

Currently before this Court is Mr. Thomas's petition for judicial review of the TDOT Commissioner's final order. The narrow standard contained in Tenn. Code Ann. § 4-5-322(h) governs judicial review of administrative agency decisions. *Willamette Indus., Inc. v. Tenn. Assessment Appeals Comm'n*, 11 S.W.3d 142, 147 (Tenn. Ct. App. 1999) (citing *Wayne Cnty. v. Tenn. Solid Waste Disposal Control Bd.*, 756 S.W.2d 274, 279 (Tenn. Ct. App. 1988)). This Court may reverse or modify the agency's decision only if it is:

- (1) In violation of constitutional or statutory provisions;
- (2) In excess of the statutory authority of the agency;

(3) Made upon unlawful procedure;

(4) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or

(5)(A) Unsupported by evidence that is both substantial and material in the light of the entire record.

(B) In determining the substantiality of evidence, the court shall take into account whatever in the record fairly detracts from its weight, but the court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact.

Tenn. Code Ann. § 4-5-322(h).

Under the Uniform Administrative Procedures Act (“UAPA”), this court must apply the substantial and material evidence standard to the agency’s factual findings. *City of Memphis v. Civil Serv. Comm’n*, 239 S.W.3d 202, 207 (Tenn. Ct. App. 2007). Substantial and material evidence is “such relevant evidence as a reasonable mind might accept to support a rational conclusion and such as to furnish a reasonably sound basis for the action under consideration.” *Wayne Cnty.*, 756 S.W.2d at 279-80 (quoting *S. Ry. v. State Bd. of Equalization*, 682 S.W.2d 196, 199 (Tenn. 1984)). Substantial evidence “requires something less than a preponderance of the evidence . . . but more than a scintilla or glimmer.” *Id.* at 280 (citations omitted). We may overturn the administrative agency’s factual findings “only if a reasonable person would necessarily reach a different conclusion based on the evidence.” *Davis v. Shelby Cnty. Sheriff’s Dep’t*, 278 S.W.3d 256, 265 (Tenn. 2009) (citing *Martin v. Sizemore*, 78 S.W.3d 249, 276 (Tenn. Ct. App. 2001)). This narrow standard of review for an administrative body’s factual determinations “suggests that, unlike other civil appeals, the courts should be less confident that their judgment is preferable to that of the agency.” *Wayne Cnty.*, 756 S.W.2d at 279.

Issues of statutory construction present questions of law and are therefore reviewed de novo with no presumption of correctness. *Carter v. Bell*, 279 S.W.3d 560, 564 (Tenn. 2009).

#### ANALYSIS

As Mr. Thomas succinctly states in his brief, the dispositive issue is “whether (a) Mr. Thomas’ billboard was constructed on land zoned Highway Commercial within a Floodplain

(CH-FP), in which case installation of an off-premises advertising sign would be permitted; or (b) the billboard was constructed on land zoned Floodway (FW) Zoning District, in which case the sign would not be permitted.”

Congress enacted the Federal Highway Beautification Act of 1965 to control the erection and maintenance of billboards along interstate and primary highways, to “protect the public investment in such highways, to promote the safety and recreational value of public travel, and to preserve natural beauty.” 23 U.S.C. § 131(a). The Federal Highway Beautification Act requires states to provide for “effective control of the erection and maintenance” of billboards. 23 U.S.C. § 131(b). In compliance with the federal act, Tennessee enacted the Billboard Regulation and Control Act of 1972, codified at Tenn. Code Ann. §§ 54-21-101 through -123, which confers full authority upon the TDOT Commissioner to enforce the provisions of both the federal and state acts. *See* Tenn. Code Ann. §§ 54-21-112 and -116.

Under the Tennessee billboard statute, a person cannot erect a billboard within 660 feet of an interstate or primary highway without obtaining a permit from TDOT, Tenn. Code Ann. § 54-21-104(a); Tenn. Comp. R. & Regs. 1680-02-03-.03(1)(a)(6)(i), and billboards may be built or maintained only “in areas that are zoned industrial or commercial under authority of law.” Tenn. Code Ann. § 54-21-103(4); *see also* Tenn. Comp. R. & Regs. 1680-02-03-.03(1)(a)(1). “Zoned Commercial or Zoned Industrial, means those areas in a comprehensively zoned political subdivision set aside for commercial or industrial use *pursuant to the state or local zoning regulations . . .*” Tenn. Comp. R. & Regs. 1680-02-03-.02(29) (emphasis added). The state has granted counties and municipalities broad authority to control the use of private land within their boundaries. *See* Tenn. Code Ann. §§ 13-7-101(a)(1), -201(a)(1); *see also* 421 Corp. v. Metro. Gov’t of Nashville & Davidson Cnty., 36 S.W.3d 469 (Tenn. Ct. App. 2000).

The record establishes that the City of Memphis and Shelby County are governed by a joint zoning ordinance which is administered by the OPD. We agree with the trial court that the lawful authority to determine the zoning of Mr. Thomas’s billboard site rests with the OPD.<sup>7</sup> The OPD’s Director and Land Use Controls manager, relying on the official records of the Shelby County Assessor of Property, Shelby County Zoning Atlas panel 2240, and the FEMA map panel adopted by the local legislative bodies, determined that Mr. Thomas’s billboard was not located in an area “zoned industrial or commercial,” as the state statute and regulations require.

Thus, acting in compliance with Tenn. Comp. R. & Regs. 1680-02-03-.03(1)(a)(1),

---

<sup>7</sup> *See also* 23 U.S.C. § 131(d); 23 C.F.R. § 750.708(b).



Mr. Shelby, in his capacity as TDOT Regional Manager, properly rejected Mr. Thomas's applications for billboard permits. We therefore conclude that TDOT acted within its statutory authority in denying Mr. Thomas's applications for permits and that substantial and material evidence supports the ALJ's decision to uphold TDOT's denial of the applications.

Having addressed the dispositive issue, we will briefly discuss one other issue raised by Mr. Thomas. Mr. Thomas contends that he detrimentally relied on the local building permit that the Office of Construction Code Enforcement issued and on the information contained in Mr. Illsley's letters, yet acknowledges that obtaining a permit *from TDOT* was a prerequisite to constructing the billboard at the Perkins Road location. After learning that the location was zoned Floodway (FW) (and therefore neither industrial nor commercial), Mr. Thomas chose not to exercise the option of filing a rezoning application. Instead, he went ahead and constructed the billboard and has yet to remove it, despite receiving a notice of violation from TDOT.

Mr. Thomas constructed the billboard at his own risk and cannot claim reliance on Mr. Illsley's statements or the Office of Construction Code Enforcement's actions because, by that time, Mr. Thomas already knew that the OPD had determined the zoning of the parcel and that TDOT had denied the permit applications. A billboard that is erected prior to obtaining the required permit from TDOT "shall be considered illegal and subject to removal at the expense of the owner as provided in Tennessee Code Annotated § 54-21-105." Tenn. Comp. R. & Regs. 1680-02-03-.03(1)(a)(6)(i). Therefore, TDOT should take necessary and appropriate action to have the billboard at the Perkins Road location removed.

#### CONCLUSION

For the foregoing reasons, we uphold the chancery court's judgment. Costs of appeal are assessed against the appellant, William H. Thomas, Jr., and execution may issue if necessary.

---

ANDY D. BENNETT, JUDGE