

STATE OF TENNESSEE

OFFICE OF THE
ATTORNEY GENERAL
POST OFFICE BOX 20207
NASHVILLE, TENNESSEE 37202

January 10, 2006

Opinion No. 06-007

Tenn Code Ann. § 13-7-208 Protection of Nonconforming Billboard Sites

QUESTIONS

1. What rights do the owners of real property, a portion of whose land was leased for the construction and operation of an off-premises sign, which sign was constructed and in operation prior to a change in zoning which would now prohibit such activity, have under Tenn. Code Ann. § 13-7-208(d) upon the termination of the lease and the removal of the sign structure by the lessee?

2. What rights do the owners of real property, a portion of whose land was leased for the construction and operation of an off-premises sign, which sign was constructed, in operation and in compliance with all municipal zoning regulations prior to a change in zoning which now limits the maximum number of signs which may be permitted in the municipality, have under Tenn. Code Ann. § 13-7-208(d) upon the termination of the lease and the removal of the sign structure by the lessee if the rebuilding of the sign would cause the maximum number of signs to be exceeded?

3. Assuming the municipality later passes an ordinance, the effect of which would be to remove a requirement which created a nonconformity, such as a spacing requirement for the distance between signs, which was expanded from 750 feet to 1,500 feet and then later reduced to 750 feet, does the removal of the requirement which caused the nonconformity terminate the owners' rights under Tenn. Code Ann. § 13-7-208?

4. Is the entity that will rebuild a sign structure under Tenn. Code Ann. § 13-7-208(d), whether it be the landowner or the sign company, entitled to disregard the municipality's regulations regarding the height, bulk and physical location of a structure under Tenn. Code Ann. § 13-7-208(i), or is this section applicable only to the increase in the area of the sign face under Tenn. Code Ann. § 13-7-208(h)?

OPINIONS

1. In the situation presented for review, the owners of the real property that has been leased for the construction and operation of an off-premises sign (or billboard) by others have the right "to continue" their leasing of their billboard site subject to the provisions of Tenn. Code Ann. § 13-7-208(b)(1); to "expand operations and construct additional facilities which involve an actual continuance and expansion of the activities of the . . . business which were permitted and being conducted prior to the change in zoning" subject to the provisions of Tenn. Code Ann. § 13-7-208(c); and to "destroy present facilities and reconstruct new facilities necessary to the conduct of

such . . . business subsequent to the zoning change” subject to the provisions of Tenn. Code Ann. § 13-7-208(d). Their “business establishment in operation” is their leasing of their billboard site. Upon the termination of an existing lease and the removal of the billboard owned by the lessee, the owners of the billboard site have the right to continue their leasing of their billboard site; to expand their leasing operation; and to construct additional facilities “which involve an actual continuance and expansion of the activities” of their leasing operation “which were permitted and being conducted prior to the change in zoning,” subject to the various requirements imposed by Tenn. Code Ann. § 13-7-208, as long as they continue to be engaged in the same business that they were engaged in when the change in zoning occurred.

2. In the situation under review, the owners of the billboard site have the right to continue their leasing of their billboard site; to expand their leasing operation; and to construct additional facilities “which involve an actual continuance and expansion of the activities” of their leasing operation “which were permitted and being conducted prior to the change in zoning,” subject to the various requirements imposed by Tenn. Code Ann. § 13-7-208, even though the construction of the new billboard would violate the limitation imposed by municipal ordinance upon the number of billboards permitted within the territorial limits of the municipality.

3. In the event that a municipality enacts an ordinance that removes a zoning restriction that previously rendered a legal conforming land use nonconforming under that zoning restriction, the section 13-7-208 protection of the land use, which was once nonconforming but that has been transformed into a conforming use by operation of the new ordinance that removes the zoning restriction, can no longer be invoked.

4. Tenn. Code Ann. 13-7-208(i) expressly provides that the requirement imposed by that subsection “shall not apply to off-site signs.”

ANALYSIS

1. The State of Tennessee has enacted Tenn. Code Ann. § 13-7-208, which expresses the public policy of this state that “industrial, commercial, or other business establishments in operation and permitted to operate under zoning regulations or exceptions thereto in effect immediately preceding a change in zoning” may “continue in operation and be permitted” under certain conditions set forth in that statute. Tenn. Code Ann. § 13-7-208(b)(1). *B. F. Nashville, Inc. v. City of Franklin*, 2005 WL 127082 at *16 (Tenn. Ct. App.).

The Court of Appeals of Tennessee has held that Tenn. Code Ann. § 13-7-208 is a “grandfather clause,” which is defined as “an exception to a restriction that allows those already doing something to continue doing it, even if they would be stopped by the new restriction.” *Lamar Tennessee, LLC v. City of Hendersonville*, 2005 WL 65536, at *4 (Tenn. Ct. App.). The Court of Appeals has also opined that such an exception in a statute “must be construed strictly against the party who seeks to come within the exception.” *Id.*, quoting *Teague v. Campbell County*, 920 S.W.2d 219, 221 (Tenn. Ct. App. 1995).

A party seeking the protection of section 13-7-208 has the burden of proving that its use is a pre-existing nonconforming use which qualifies for protection. *Outdoor West of Tennessee, Inc. v. City of Johnson City*, 39 S.W.3d 131, 135 (Tenn. Ct. App. 2000). To invoke the protection of this statute the one seeking such protection must establish (1) that there has been a change in zoning (either adoption of zoning where none existed previously or an alteration in zoning restrictions), and (2) that the use which the party seeks to continue was permitted prior to the zoning change. *Rives v. City of Clarksville*, 618 S.W.2d 502, 505 (Tenn. Ct. App. 1981). Additionally, a party seeking the protection of section 13-7-208(d) must establish that destroying present business facilities and reconstructing new facilities is “necessary to the conduct of such industry or business subsequent to the zoning change.” Tenn. Code Ann. § 13-7-208(d); *see also Outdoor West*, 39 S.W.3d at 136, and *Lamar Tennessee, LLC*, 2005 WL 65536, at *6-7.

In the situation presented for review, a municipality has enacted an ordinance that limits the number of billboards permitted within its territorial jurisdiction, and owners of real property located in that municipality who lease their real property for the construction and operation of an off-premises sign (or billboard) by others contend that this municipal ordinance imposes a zoning restriction upon their use of their real property. The opinion of this office is based on the assumption that the owners can establish that there has been a change in zoning, and that the use which the owners seek to continue was permitted prior to the zoning change. The owners of the billboard site are concerned about the continuation of their legal nonconforming use after the municipal enactment of the billboard limitation and the anticipated termination of the lease of their billboard site and removal of the billboard structure by the lessee.

The “business establishment in operation” by the owners of the billboard site is their leasing of their billboard site, and it is that nonconforming use of their real property that is protected by Tenn. Code Ann. § 13-7-208 as long as they continue to engage in the same business operation that they were engaged in when the change in zoning occurred.¹ *See Lafferty v. City of Winchester*, 46 S.W.3d 752, 758 (Tenn. Ct. App. 2000), and *Rutherford v. Murray*, 2004 WL 1870066 (Tenn. Ct. App.).

In the situation presented for review, the owners of the real property that has been leased for the construction and operation of an off-premises sign (or billboard) by others have the right “to continue” their leasing of their billboard site subject to the provisions of Tenn. Code Ann. § 13-7-208(b)(1); to “expand operations and construct additional facilities which involve an actual continuance and expansion of the activities of the . . . business which were permitted and being conducted prior to the change in zoning” subject to the provisions of Tenn. Code Ann. § 13-7-208(c); and to “destroy present facilities and reconstruct new facilities necessary to the conduct of

¹ In *Farris v. Town of Farragut*, 1996 WL 530020 (Tenn. Ct. App.), the Court of Appeals of Tennessee affirmed the decision of the trial court to direct the Board of Zoning Appeals of the Town of Farragut to issue a building permit allowing Farris, the owner of a billboard site, to reconstruct a billboard after the lessee of her site removed its billboard. At all relevant times before and after the Town of Farragut enacted an ordinance that prohibited billboards within its territorial limits, the owner of the billboard site was the permittee of the state billboard permits and actively engaged in the billboard operation protected by Tenn. Code Ann. § 13-7-208(d).

such . . . business subsequent to the zoning change” subject to the provisions of Tenn. Code Ann. § 13-7-208(d). Upon the termination of an existing lease and the removal of the billboard owned by the lessee, the owners of the billboard site have the right to continue their leasing of their billboard site; to expand their leasing operation, and to construct additional facilities “which involve an actual continuance and expansion of the activities” of their leasing operation “which were permitted and being conducted prior to the change in zoning,” subject to the various requirements imposed by Tenn. Code Ann. § 13-7-208, as long as they continue to be engaged in the same business that they were engaged in when the change in zoning occurred.

2. The power of local governments to enact ordinances that regulate or restrict the use of private property is derived from the state and is delegated to them by the General Assembly through the enactment of a state statute. *B. F. Nashville, Inc.*, 2005 WL 127082, at *15. While local governments have broad discretion to enact land use regulations and restrictions within this delegated power, those regulations and restrictions “cannot contravene or conflict with applicable state laws.” *Id.* When a state statute and a municipal ordinance “are in irreconcilable conflict, . . . the ordinance must give way to the imperatives of the statute.” *Id.*

In the situation under review, a municipality seeks to limit the number of billboards erected within its territorial limits by exercise of its delegated power to do so. However, that limitation cannot contravene the provisions of Tenn. Code Ann. § 13-7-208 “so long as the requirements of that statute are satisfied” by the business that seeks to invoke the protection of that statute. *Outdoor West*, 39 S.W.3d at 137; *see also Lamar Advertising of Knox County, Tennessee, Inc. v. City of Knoxville*, 1995 WL 124292, at *3-4 (Tenn. Ct. App.).

The owners of the billboard site have the right to continue their leasing of their billboard site; to expand their leasing operation; and to construct additional facilities “which involve an actual continuance and expansion of the activities” of their leasing operation “which were permitted and being conducted prior to the change in zoning,” subject to the various requirements imposed by Tenn. Code Ann. § 13-7-208, even though the construction of the new billboard would violate the limitation imposed by municipal ordinance upon the number of billboards permitted within the territorial limits of the municipality.

3. Section 13-7-208 is a “grandfather clause,” which is defined as “an exception to a restriction that allows those already doing something to continue doing it, even if they would be stopped by the new restriction.” *Lamar Tennessee, LLC*, 2005 WL 65536, at *4. And that exception allows an industrial, commercial or business establishment “in operation and permitted to operate under zoning regulations or exceptions thereto immediately preceding a change in zoning” to continue and to expand in operation in spite of the change in zoning that renders the “business establishment in operation” nonconforming. Tenn. Code Ann. §§ 13-7-208(b)(1) and (c).

In the event that a municipality enacts an ordinance that removes a zoning restriction that previously rendered a legal conforming land use nonconforming under that zoning restriction, the section 13-7-208 protection of the land use, which was once nonconforming but that has been transformed into a conforming use by operation of the new ordinance that removes the zoning

restriction, can no longer be invoked. By removing the zoning restriction that created the nonconformity, the municipal ordinance in effect restores the legality of the “nonconforming use” and makes the invocation of the section 13-7-208 protection unnecessary.

4. Tenn. Code Ann. § 13-7-208(d) provides:

Industrial, commercial, or other business establishments in operation and permitted to operate under zoning regulations or exceptions thereto immediately preceding a change in zoning shall be allowed to destroy present facilities and reconstruct new facilities necessary to the conduct of such industry or business subsequent to the zoning change; provided, that no destruction and rebuilding shall occur which shall act to change the use classification of the land as classified under any zoning regulations or exceptions thereto in effect immediately prior to or subsequent to a change in the zoning of the land area on which such industry or business is located. No building permit or like permission for demolition, construction or landscaping shall be denied to an industry or business seeking to destroy and reconstruct facilities necessary to the continued conduct of the activities of that industry or business, where such conduct was permitted prior to a change in zoning; provided, that there is a reasonable amount of space for such expansion on the property owned by such industry or business situated within the area which is affected by the change in zoning, so as to avoid nuisances to adjoining landowners.

However, the broad protection provided by subsection (d) is limited by subsection (i), which provides:

Notwithstanding the provisions of subsection (d), any structure rebuilt on the site must conform to the provisions of the existing zoning regulations as to setbacks, height, bulk, or requirements as to the physical location of a structure upon the site, *provided that this subsection (i) shall not apply to off-site signs.*²

Tenn. Code Ann. § 13-7-208(i) (emphasis added).

The fourth issue presented involves the interpretation of a state statute. The primary rule of statutory interpretation is “to ascertain and give effect to the intention and purpose of the legislature.” *Lens Crafters, Inc. v. Sundquist*, 33 S.W.3d 772, 777 (Tenn. 2000). To determine legislative intent, one must look to “the natural and ordinary meaning of the language used in the

² Tenn. Code Ann. § 13-7-208(j) states that subsection (i) does not apply to any home rule municipality but provides that a home rule municipality “may opt into the provisions” of subsection (i) as well as other subsections.

statute itself” and examine any provision “within the context of the entire statute and in light of its over-arching purpose and the goal it serves.” *State v. Flemming*, 19 S.W.3d 195, 197 (Tenn. 2000). The statute should be read “without any forced or subtle construction which would extend or limit its meaning.” *National Gas Distributors, Inc. v. State*, 804 S.W.2d 66, 67 (Tenn. 1991). The interpreter of a statute must “give effect to every word, phrase, clause and sentence of the act in order to carry out the legislative intent.” *Tidwell v. Collins*, 522 S.W.2d 674, 676-677 (Tenn. 1975).

Tenn. Code Ann. § 13-7-208(i) expressly provides that the requirement imposed by that subsection “shall not apply to off-site signs.” We must presume that the General Assembly selected these words deliberately to convey their intent that the requirement imposed by subsection (i) “shall not apply to off-site signs.”

PAUL G. SUMMERS
Attorney General

MICHAEL E. MOORE
Solicitor General

LARRY M. TEAGUE
Deputy Attorney General

Requested by:

The Honorable Jere L. Hargrove
State Representative
34 Legislative Plaza
Nashville, Tennessee 37243-0142