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

QUESTIONS

1. When and under what circumstances does a nonconforming billboard site no longer qualify for protection provided by Tenn. Code Ann. § 13-7-208?

2. If a billboard becomes disqualified, does the maximum number of billboards allowed by a municipal outdoor advertising ordinance increase?

3. What rights, if any, does the owner of a billboard site have that are required to be terminated when the owner of a billboard located on that site desires to move its billboard to another location?

4. If a municipal ordinance attempts to create rights for an owner of a billboard site who does not own the billboard located on that site, consequently removing rights from the owner of the billboard located on that site, which rights are undefined and contrary to the contract between the owner of the billboard site and the owner of the billboard located on that site, does that municipal ordinance violate Article I, Sections 8, 20, or 21 or Article XI, Section 8 of the Tennessee Constitution or the Fifth Amendment of the United States Constitution?

5. If the enactment of a municipal ordinance causes "an existing contracted billboard" to become nonconforming, is it proper for the municipality to issue a municipal outdoor advertising permit for a nonconforming billboard owned and operated by another billboard company to continue the nonconforming use "that is zoned out?"

6. Does Tenn. Code Ann. § 13-7-208 require a municipality to issue a municipal outdoor advertising permit to a new business making application to place a new billboard upon newly zoned premises?

OPINIONS

1. A nonconforming billboard site no longer qualifies for protection provided by Tenn. Code Ann. § 13-7-208 when the nonconforming billboard use is changed, when the nonconforming billboard use ceases for thirty continuous months, or when the zoning restriction that previously rendered the billboard use nonconforming is removed.

2. The express provisions of the applicable municipal outdoor advertising ordinance will determine the maximum number of billboards allowed by that ordinance.

3. Upon the removal of a billboard by its owner, the owner of that billboard site has the right to continue the leasing of that billboard site; to expand that billboard leasing operation; and to construct additional facilities "which involve an actual continuation and expansion of the activities" of the billboard 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 a new billboard may violate the limitation imposed by municipal ordinance upon the number of billboards permitted within the territorial limits of the municipality. Unless the owner of the billboard site and the owner of the billboard located on that site have entered into an agreement to the contrary, the removal of the billboard from that site does not terminate the rights of the owner of the billboard site that are protected by Tenn. Code Ann. § 13-7-208.

4. Evaluating the constitutionality of a municipal ordinance that attempts to create rights for an owner of a billboard site who does not own the billboard located on that site, consequently removing rights from the owner of the billboard located on that site, which rights are undefined and contrary to the contract between the owner of the billboard site and the owner of the billboard located on that site, without more specific information concerning the express provisions of that ordinance and the affected rights of the parties to the contract, is impossible.

5. As stated hereinabove, upon the removal of a billboard by its owner, the owner of that billboard site has the right to continue the leasing of that billboard site; to expand that billboard leasing operation; and to construct additional facilities "which involve an actual continuation and expansion of the activities" of the billboard 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 a new billboard may violate the limitation imposed by municipal ordinance upon the number of billboards permitted within the territorial limits of the municipality. Upon receiving from the owner of the billboard site a proper application for a new outdoor advertising permit, the municipality should issue that permit to the owner of the billboard site in accordance with Tenn. Code Ann. § 13-7-208 (c) and (d), subject to the various requirements of Tenn. Code Ann. § 13-7-208.

6. Tenn. Code Ann. § 13-7-208 does not require a municipality to issue a municipal outdoor advertising permit to a new business making application to place a new billboard upon newly zoned premises.

ANALYSIS

1. Tenn. Code Ann. § 13-7-208 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. 2005).

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. 2005). 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.

In the situation presented by the opinion request, 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 sites are concerned about the continuation of their legal nonconforming use after the municipal enactment of the billboard limitation and the anticipated termination of the leases of their billboard sites and removal of the billboard structures by the lessees.

The site owner's leasing of that billboard site and his use of the site to operate a billboard constitutes a "business establishment in operation", and it is that nonconforming use of the real property that is protected by Tenn. Code Ann. § 13-7-208 as long as the owner continues to engage in the same business operation that he was engaged in when the change in zoning occurred. [1] *See*

[1] In *Farris v. Town of Farragut*, 1996 WL 530020 (Tenn.Ct.App. 1996), 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).

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. 2004).

In the situation presented for review, the owner of the real property that has been leased for the construction and operation of an off-premises sign (or billboard) by others has the right "to continue" leasing that 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). Upon the termination of an existing lease and the removal of the billboard owned by the lessee, the owner of the billboard site has the right to continue leasing the billboard site to others; to expand the leasing operation, and to construct additional facilities "which involve an actual continuance and expansion of the activities" of the 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 the owner continues to be engaged in the same business that he or she was engaged in when the change in zoning occurred.

In this situation the existing billboard operation, which is the business activity or use conducted by a billboard operator who leases land from the owner of the billboard site and operates this business activity pursuant to a municipal outdoor advertising permit, may also qualify as a pre-existing nonconforming use of the same site for which the billboard operator can invoke the protection provided by Tenn. Code Ann. § 13-7-208, provided that all requirements of that statute have been satisfied. *See Creative Displays, Inc. of Knoxville v. City of Pigeon Forge*, 576 S.W.2d 356, 357 (Tenn.Ct.App. 1978); and Tenn. Code Ann. § 13-7-208(h).

However, a nonconforming billboard site no longer qualifies for protection provided by Tenn. Code Ann. § 13-7-208 when the nonconforming billboard use is changed, when the nonconforming billboard use ceases for thirty continuous months, or when the zoning restriction that previously rendered the billboard use nonconforming is removed.

Tenn. Code Ann. § 13-7-208 (b) (1) provides:

> In the event that a zoning change occurs in any land area where such land area was not previously covered by any zoning restrictions of any governmental agency of this state or its political subdivisions, or where such land area is covered by zoning restrictions of a governmental agency of this state or its political subdivisions, and such zoning restrictions differ from zoning restrictions imposed after the zoning change, then any industrial, commercial or business establishment in operation, permitted to operate under zoning regulations or exceptions thereto prior to the zoning change shall be allowed to continue in operation and be permitted; *provided, that no*

> *change in the use of the land is undertaken by such industry or business.*

Tenn. Code Ann. § 13-7-201 (b)(1) (emphasis added). Under the express terms of this statute, "the business establishment in operation . . . prior to the zoning change shall be allowed to continue in operation . . . provided, that no change in the use of the land is undertaken . . . ." *Id. See also generally Lafferty v.City of Winchester*, 46 S.W.3d 752 (Tenn.Ct.App. 2000).

Furthermore, if the nonconforming billboard use ceases for thirty continuous months, the protection provided by section 13-7-208 can no longer be invoked. Tenn. Code Ann. § 13-7-208 (g).

Finally, 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.

2. When the language of a municipal ordinance is clear, the courts will enforce the ordinance as written. *421 Corporation v. Metropolitan Government of Nashville and Davidson County*, 36 S.W.3d 469, 475 (Tenn.Ct.App. 2000). When, however, the language of an ordinance is ambiguous, the courts will resort to the customary principles of statutory construction. *Id.* Accordingly, a reviewing court will construe a zoning ordinance as a whole and will give its words their natural and ordinary meaning. *Id.*

If the applicable municipal outdoor advertising ordinance specifies the maximum number of billboards allowed by that ordinance, the express provisions of the ordinance will determine the maximum number of billboards allowed by that ordinance.

3. 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. 1995).

Upon the removal of a billboard by its owner, the owner of that billboard site has the right to continue the leasing of that billboard site; to expand that billboard leasing operation; and to construct additional facilities "which involve an actual continuation and expansion of the activities" of the billboard 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 a new billboard may violate the limitation imposed by municipal ordinance upon the number of billboards permitted within the territorial limits of the municipality. Unless the owner of the billboard site and the owner of the billboard located on that site have entered into an agreement to the contrary, the removal of the billboard from that site does not terminate the rights of the owner of the billboard site that are protected by section 13-7-208.

4. Local governments lack inherent power to control the use of private property within their boundaries. This power belongs to the State of Tennessee, but the General Assembly may delegate this power to local governments. *Lafferty v. City of Winchester*, 46 S.W.2d at 757; *see* Tenn. Code Ann. §§ 13-7-101 and 13-7-201. Local governments must exercise their delegated power consistently with the statutes from which they derive their power. *See Henry v. White*, 194 Tenn. 192, 196, 250 S.W.2d 70, 71 (1952).

Local governments have "considerable discretion" to act within the scope of their delegated power, but they cannot effectively nullify state law on the same subject "by enacting ordinances that ignore applicable state laws, that grant rights that state law denies, and that deny rights that state law grants." *421 Corporation*, 36 S.W.3d at 475; *see also Family Golf of Nashville, Inc. v. Metropolitan Government of Nashville and Davidson County*, 964 S.W.2d 254, 257 (Tenn.Ct.App.1997). Ordinances that conflict with state law of state-wide application are universally held to be invalid. *See Southern Railway Co. v. City of Knoxville*, 223 Tenn. 90, 442 S.W.2d 619 (1968) and *City of Knoxville v. Currier*, 1998 WL 338195 (Tenn.Ct.App. 1998).

Zoning ordinances are often challenged on constitutional grounds. The express provisions of the municipal ordinance under review have not been provided to this office, but that ordinance is described as an attempt "to create rights to a real property owner that does not own the billboard, consequently removing rights from the billboard owner which is contrary to the agreement between the landowner and the billboard owner and the rights are undefined." Evaluating the validity of that ordinance without more specific information is impossible, but this office provides the following summary of applicable law for consideration when the specific provisions of that ordinance are known.

The Tennessee Constitution guarantees citizens substantive due process. Article I, Section 8 of the Tennessee Constitution provides that "no man shall be taken or imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the judgment of his peers, or the law of the land." The Tennessee Supreme Court has opined that "unless a fundamental right is implicated, a statute comports with substantive due process if it bears 'a reasonable relation to a proper legislative purpose' and 'is

neither arbitrary nor discriminatory.'" *Riggs v. Burson*, 941 S.W.2d 44, 51 (Tenn. 1997).

Generally, a substantive due process claim is based on the exercise of governmental power without reasonable justification. *Consolidated Waste Systems, LLC v. Metropolitan Government of Nashville and Davidson County*, 2005 WL 1541860 at *5 (Tenn.Ct.App. 2005). Where governmental action does not deprive a citizen of a particular constitutional guarantee, that action will be upheld against a substantive due process challenge if it is rationally related to a legitimate governmental interest. *Id.* Under this standard, a legislative regulation of land use will be upheld "if it has a rational relationship with a legitimate governmental interest or public welfare concern." *Id.* If "any reasonable justification" for the law may be conceived, it must be upheld. *Riggs*, 941 S.W.2d at 48.

The Tennessee Constitution also guarantees citizens the equal protection of the laws. *State v. Robinson*, 29 S.W.3d 476, 480 (Tenn. 2000). Article I, Section 8 and Article XI, Section 8 of the Tennessee Constitution provide "essentially the same protection" as the Fourteenth Amendment to the United States Constitution. *State v. Tester*, 879 S.W.2d 823, 827 (Tenn. 1994). The equal protection provisions of the federal and state constitutions "demand that persons similarly situated be treated alike." *Gallaher v. Elam*, 104 S.W.3d 455, 461 (Tenn. 2003).

In analyzing equal protection challenges, the Tennessee Supreme Court has "adopted an analytical framework similar to that used by the United States Supreme Court." *Id.* at 460. The Court applies one of three standards, "depending upon the nature of the right asserted or the class of persons affected." *Id.* Those standards include: (1) strict scrutiny (when the classification at issue "operates to the peculiar disadvantage of a suspect class or interferes with the exercise of a fundamental right"); (2) heightened scrutiny (when the classification at issue involves "a quasi-suspect class"); or (3) reduced scrutiny (when the challenged classification is evaluated in light of its relationship to "a legitimate state interest"). *Id.* at 460, 461. The last standard is often described as the "rational basis test." *Id.*

The rational basis analysis used in an equal protection challenge does not differ substantially from the rational basis test used when considering a substantive due process claim. *Consolidated Waste Systems, LLC*, 2005 WL 1541860 at *7. Equal protection requires only that the legislative classification be rationally related to the objective it seeks to achieve. *Id.* And the ordinance will be upheld "if any state of facts can reasonably be conceived to justify the classification or if the unreasonableness is fairly debatable . . . ." *Id.*

Article I, Section 20 of the Tennessee Constitution states "that no retrospective law, or law impairing the obligations of contracts, shall be made." However, this constitutional prohibition against retrospective laws "does not inhibit retrospective laws made in furtherance of the police power of the state . . . ." *Dark Tobacco Growers' Co-op Ass'n v. Dunn*,150 Tenn. 614, 266 S.W.308, 312 (1924). The enactment of a municipal zoning ordinance pursuant to the police power delegated by the state to the municipality is not a violation of Article I, Section 20.

In some jurisdictions the enactment of a zoning ordinance has been challenged as an

unlawful taking of property. Article I, Section 8 of the Tennessee Constitution provides that "no man shall be . . . deprived of his life, liberty, or property, but by the judgment of his peers or the law of the land." Article I, Section 21 provides that "no man's particular services shall be demanded, or property taken, or applied to public use, without the consent of his representatives, or without just compensation being made therefor." These constitutional provisions apply to governmental taking of property, but the Tennessee Supreme Court has never held that the enactment of a zoning ordinance constitutes a taking of property under these provisions. *See Consolidated Waste Systems, LLC*, 2005 WL 1541860 at *11, 12. Instead, the Supreme Court has "traditionally examined" land use regulation through ordinances using the rational basis test, as described earlier in this opinion, "or other tests of validity under state law." *Id.*

The Fifth Amendment to the United States Constitution guarantees that no person shall "be deprived of life, liberty, or property, without due process of law" and also provides, "nor shall private property be taken for public use, without just compensation." The second provision is called the Takings Clause, or sometimes the Just Compensation Clause, and it is predicated on the proposition that the government should pay for private property it has taken for its own use. *Id.* The purpose of the Takings Clause is to prevent the government from forcing an individual or group of individuals alone to bear burdens "which, in all fairness and justice, should be borne by the public as a whole." *Palazzolo v. Rhode Island*, 533 U.S. 606, 618, 121 S.Ct. 2448, 2457-58 (2001); *Dolan v. City of Tigard*, 512 U.S. 374, 384, 114 S.Ct. 2309, 2316 (1994); *Armstrong v. United States*, 364 U.S. 40, 49, 80 S.Ct. 1563, 1569 (1960).

A taking of property for public use violates the Takings Clause only if just compensation is not paid. *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 125 S.Ct. 2074, 2080 (2005).

The Takings Clause of the United States Constitution was generally understood to apply only to physical takings until the United States Supreme Court held in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415, 43 S.Ct. 158, 160 (1922) that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." The Court has repeatedly stated there is no set formula for determining when a regulation goes too far. *Lingle*, 125 S.Ct. at 2081; *Palazzolo*, 533 U.S. at 617, 121 S.Ct. at 2457; *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015, 112 S.Ct. 2886, 2893 (1992).

The principles that have emerged in takings jurisprudence are attempts to apply the "fairness and justice" purposes underlying the Takings Clause, as explained in *Armstrong*, 364 U.S. at 49, 80 S.Ct. at 1569. *See also Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 321, 122 S.Ct. 1465, 1478 (2002) (referring to the *Armstrong* principles). The United States Supreme Court has described its Takings or Just Compensation Clause holdings as follows:

> The text of the Fifth Amendment itself provides a basis for drawing a distinction between physical takings and regulatory takings. Its plain language requires the payment of compensation whenever the government acquires private property for a public purpose, whether

> the acquisition is the result of a condemnation proceeding or a physical appropriation. But the Constitution contains no comparable reference to regulations that prohibit a property owner from making certain uses of her private property. Our jurisprudence involving condemnations and physical takings is as old as the Republic and, for the most part, involves the straightforward application of *per se* rules. Our regulatory takings jurisprudence, in contrast, is of more recent vintage and is characterized by 'essentially ad hoc, factual inquiries,' designed to allow 'careful examination and weighing of all the relevant circumstances.'

Brown v. Legal Foundation of Washington, 538 U.S. 216, 233, 123 S.Ct. 1406, 1417-18 (2003).

5. As stated hereinabove, upon the removal of a billboard by its owner, the owner of that billboard site has the right to continue the leasing of that billboard site; to expand that billboard leasing operation; and to construct additional facilities "which involve an actual continuation and expansion of the activities" of the billboard 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 a new billboard may violate the limitation imposed by municipal ordinance upon the number of billboards permitted within the territorial limits of the municipality. Upon receiving from the owner of the billboard site a proper application for a new outdoor advertising permit, the municipality should issue that permit to the owner of the billboard site in accordance with Tenn. Code Ann. § 13-7-208 (c) and (d), subject to the various requirements of Tenn. Code Ann. § 13-7-208.

Section 13-7-208(c) provides:

> 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 shall be allowed to expand operations and construct additional facilities which involve an actual continuance and expansion of the activities of the industry or business which were permitted and being conducted prior to the 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. *No building permit or like permission* for construction or landscaping *shall be denied* to an industry or business seeking to expand and continue activities conducted by that industry or business which were permitted prior to the 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.

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

Section 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.

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

The foregoing statutory provisions compel a municipality to issue the requested outdoor advertising permit to the "business establishment in operation," which in the scenario presented for review is the leasing of the billboard site by the owner of that site. *See Farris v. Town of Farragut*, 1996 WL 530020 (Tenn.Ct.App. 1996), in which 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.

6. As previously mentioned, a party seeking the protection of Tenn. Code Ann. § 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.*, 39 S.W.3d at 135. In the last scenario presented for review, the party seeking this protection is not a "business establishment in operation" that desires to continue a pre-existing nonconforming use, and it therefore does not qualify for protection provided by Tenn. Code Ann. § 13-7-208 (b), (c) and (d). *See Custom Land Development, Inc. v. Town of Coopertown*, 168 S.W.3d 764, 775 (Tenn. Ct. App. 2004); and *Toles v. City of Dyersburg*, 39 S.W.3d 138, 140 (Tenn. Ct. App. 2000). Section 13-7-208 does not require a municipality to

issue a municipal outdoor advertising permit to a new business proposing to begin a nonconforming billboard use commencing after the zoning change that rendered that use nonconforming.

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