

STATE OF TENNESSEE

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Opinion No. 05-117

Tenn. Code Ann. § 13-7-208(d) Protection of Nonconforming Billboards

QUESTIONS

1. When a municipality has established a cap on a maximum number of outdoor advertising structures within its municipal limits and a landowner leases land to a billboard operator and the operator obtains a municipal permit to erect a billboard, erects the billboard and operates it over a number of years, does the billboard operator have the exclusive right to protection under Tenn. Code Ann. § 13-7-208(d) as the “business owner” as defined in that statute?

2. In the situation described above, what rights under Tenn. Code Ann. § 13-7-208(d) does the non-operator landowner have, if any?

OPINIONS

1. In the situation presented for review the billboard operation is “the business establishment in operation” that “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” under Tenn. Code Ann. § 13-7-208(d). If the billboard operator satisfies the requirements of this statute, the billboard operator has the right to destroy its present facilities and reconstruct its new facilities subject to the provisions of this statute.¹

2. In the situation presented for review the landowner who leases land to the billboard operator is not engaged in the non-conforming use to be protected, does not own the “facilities” of

¹ Tenn. Code Ann. § 13-7-208(f) states that subsection (d) does not apply to any municipality defined as a premier type tourist resort according to Tenn. Code Ann. § 67-6-103(a)(3)(B). Also, chapter 1680-2-3 of the Tennessee Department of Transportation Rules and Regulations regarding Control of Outdoor Advertising imposes additional criteria upon the destruction and/or reconstruction of certain outdoor advertising devices that are considered grandfathered non-conforming devices under Tenn. Code Ann. §§ 54-21-101, *et seq.*

“the business establishment in operation,” and has no right to destroy existing billboard facilities and reconstruct new billboard facilities pursuant to Tenn. Code Ann. § 13-7-208(d).

ANALYSIS

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” shall be allowed to “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.).

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.

Section 13-7-208(d) allows “business establishments” that satisfy the requirements of that statute to “destroy present facilities and reconstruct new facilities necessary to the conduct of such industry or business subsequent to the zoning change.” Section 13-7-208(h) expressly provides that section 13-7-208(d) shall apply to an “off-site sign” and defines such a sign as:

any sign that advertises or gives direction to any business, product, service, attraction, or any other purpose or interest, other than the

industrial, commercial or other business establishment located on the site where the sign is located;²

Even prior to the enactment of section 13-7-208(h) in 2004, the Court of Appeals of Tennessee held that a billboard operation is a business establishment entitled to the protections provided by Tenn. Code Ann. § 13-7-208 if the requirements of that statute are satisfied. *Outdoor West of Tennessee, Inc. v. City of Johnson City*, 39 S.W.3d 131, 137 (Tenn. Ct. App. 2000).

A party seeking the protection of section 13-7-208 “has the burden of proving that its sign is a pre-existing non-conforming use which qualifies for protection.” *Id.*, 39 S.W.3d at 135. 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 also 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 v. City of Hendersonville*, 2005 WL 65536, at *6-7 (Tenn. Ct. App.).

In the situation presented for review the nonconforming use to be protected is a billboard operation, a business activity or use conducted by a billboard operator who leases land from a landowner and operates this business activity pursuant to a municipal permit granted for such an activity. In that situation the billboard operation is “the business establishment in operation” that would be allowed to destroy present facilities and reconstruct new facilities under the authority of section 13-7-208(d), 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). In that situation it is the billboard operator who is engaged in the nonconforming use to be protected.

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*, 2005 WL 65536, at *4. 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).

In the situation presented for review the landowner who leases land to the billboard operator is not engaged in the nonconforming use to be protected and does not own the “facilities” of “the

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

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business establishment in operation” that section 13-7-208(d) allows the business establishment to destroy and reconstruct.

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