

SUPREME COURT ESTABLISHES EXTENT OF RIGHT TO A NON-CONFORMING USE

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In a case of first impression, the Nebraska Supreme Court has held that the right to maintain a so-called “nonconforming use” on property is not a personal right, but rather a right that is “an incident of ownership of the land,” that runs with the land.

State statute provides that the use of a building or land that is lawful at the time a zoning regulation is adopted or amended by a municipality may legally be continued as a “nonconforming use” even though the use does not comply with the zoning regulation passed or amended, subject to some restrictions. One restriction is that if such nonconforming use is discontinued for a period of twelve months or more, the right to the nonconforming use is forfeited, and future use must comply with the new zoning regulation. Municipalities may also set conditions for nonconforming properties to come into compliance with new zoning regulations, and may enact “sunset” provisions after which nonconforming uses will no longer be valid. Many landowners rely on such rights to nonconforming uses to continue activities that would not be allowed under current zoning regulations.

On September 4, 2009, the Supreme Court issued its opinion in *Lamar Company, LLC v. City of Fremont*. In *Lamar*, owners of land which the Lamar Company leased for purposes of advertising billboards terminated those leases with Lamar, and entered into new leases with a competing billboard company. Lamar’s billboards did not comply with Fremont zoning codes passed in 2000, but were maintained as nonconforming uses. After the Lamar leases were terminated, Lamar removed its billboards, and the competing company entered the property as the new tenant, erecting new billboards pursuant to a recently passed Fremont ordinance that allowed replacement of nonconforming billboards within certain specifications. Lamar then brought suit on a number of bases and against a number of parties, including the City of Fremont, the landowners, and the competing billboard company. Lamar argued the ordinance was unconstitutional, was a regulatory taking without compensation, and was a governmental impairment of contract, among other things. At the base of these arguments was Lamar’s contention that the right to maintain a nonconforming use in the form of its billboards belonged to it individually, and thus the competing billboard company could not step in as new tenant of the property following Lamar’s tenancy, and take advantage of the same nonconforming use right and maintain billboards on the property.

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The Court held that “the right to maintain a legal nonconforming use ‘runs with the land,’ meaning it is an incident of ownership of the land, and is not a personal right. Therefore, a change in the ownership or tenancy of a nonconforming business or structure which takes advantage of the nonconforming rights does not affect the current landowner’s right to continue the nonconforming use.” The Court reasoned that if the right to use a nonconforming use was not one of the “bundle of rights” attributed to land ownership, then a seller could never truly sell all of his/her rights in the land and, no longer possessing the land after selling it, could not exercise the right. In essence, the right to exercise the nonconforming use would go uncompensated, and ultimately extinguished, in any sale of nonconforming land.

Zoning administrators and other municipal officials likely will or already have faced questions regarding how to treat a nonconforming use following a change in ownership or tenancy of property, and need to be aware of the new state of the law. The Supreme Court has now clarified that a change in ownership or tenancy of property does not by itself end a nonconforming use; rather, the right to the nonconforming use “runs with the land” and continues to be available to the new owner or tenant, so long as other requirements for continuing the use are met.

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