STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Tanya A. Gee, Circuit Court Judge

Case No. 2015-CP-40-03357

Christ Central Ministries, ... Respondent

vs.

City of Columbia Board of Zoning Appeals ..... .Appellant

AMICUS CURIAE BRIEF OF THE LAMAR COMPANIES

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The Lamar Companies

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STATEMENT OF ISSUES ON APPEAL

Did the trial court err in interpreting Section 17-404(e) of the City of Columbia's zoning ordinances to allow a property owner with no existing rights in the non-conforming sign to apply for a permit to erect a new digital display sign after the existing nonconforming sign was removed by the sign owner?

STATEMENT OF THE CASE

Respondent Christ Central Ministries ("CCM") owns property located at 2024 Main Street in the City of Columbia, South Carolina. On September 9, 2009, CCM leased a portion of the property to the Lamar Companies ("Lamar") for the purpose of maintaining an outdoor advertising sign on the property ("the Lease"). This lease terminated a previous lease Lamar had on the same property with Sarn W. Jones, Jr. dated August 22, 2006. (R.75-76)

The lease allowed Lamar to "maintain advertisements on the sign, and to modify the sign to have as many advertising faces, including changeable copy faces or electronic faces, as are allowed by local and state law." Lamar's lease also included the following in paragraph 5:

5. All structures, equipment and materials placed upon the premises by the LESSEE or its predecessor shall remain the property of LESSEE and may be removed by LESSEE at any time prior to or within a reasonable time after expiration of the term hereof or any renewal. At the termination of this lease LESSEE agrees to restore the surface of the premises to its original condition. The LESSEE shall have the right to make any necessary applications with, and obtain permits from, governmental bodies for the construction and maintenance of LESSEE'S sign, at the sole discretion of LESSEE. All

such permits and any nonconforming rights pertaining to the premises shall be the property of LESSEE.

(R. 75)

On or about February 10, 2014, Lamar applied to the City of Columbia ("City") and was approved for a permit to replace its existing fixed display sign face with a digital display pursuant to Section 17-404(e)(4) of the City of Columbia zoning ordinances ("the Ordinance.") The City issued the permit issued on March 3, 2014 which was good for six (6) months. (R. 74)

CCM sent a letter to the City dated April 16, 2014, informing the City that it wanted to resubmit a 2012 application pursuant to the Ordinance and that it had designated Hal Stevenson to assist with the application. (R. 73) Lamar was not copied on the letter. On May 1, 2014, CCM filed a Letter of Agency designating Hal Stevenson its agent for submitting the application. (R. 72)

On June 16, 2014, pursuant to Lamar's request, the City extended Lamar's permit until December 31, 2014. (R. 71) On June 18, 2014, the City's zoning administrator sent a letter to CCM stating that following the expiration of the active building/zoning permit held by Lamar, a permit could be issued if CCM was in compliance with §17-404(e)(4) and any other applicable codes. (R. 70)

On July 8, 2014, CCM notified Lamar by letter that it was terminating the lease in thirty days as allowed under the terms of the lease. Lamar removed its non-conforming fixed display billboard on August 2, 2014. (R. 69)

On September 23, 2014, CCM, through its agent Hal Stevenson, submitted an application to the City for a "New Sign" (R. 68). The City did not process this application because of Lamar's existing permit. (R. 70) Subsequent to the expiration of Lamar's permit, CCM again requested that the City process its application for a new sign. By letter dated February 2, 2015, the City zoning administrator notified CCM's agent as follows, "It is my understanding that the non-conforming sign at the above referenced location was removed by the sign owner on or about August 2, 2014. As such, this office would not be able to issue a permit, per §17- 404(e)(4) to replace a sign that is no longer existing." (R. 66)

CCM timely appealed this decision to the City of Columbia Board of Zoning Appeals ("BZA".) In a hearing on April 14, 2015, by a vote of 5-0, with two members absent, the BZA unanimously affirmed the decision of the City zoning administrator. (R. 12-13) CCM appealed to the circuit court. By order dated November 12, 2015, Judge Tanya Gee reversed the decision of the BZA. (R. 5) The City timely appealed this order. Lamar has filed this Conditional Amicus Brief and motion for leave to file pursuant to Rule 213 SCACR.

ARGUMENT

I. **THE TRIAL COURT ERRED BY INTEPRETING THE ORDINANCE TO ALLOW A PERSON OTHER THAN THE EXISTING NON-CONFORMING SIGN'S OWNER TO ERECT A TOTALLY NEW DIGITAL DISPLAY SIGN AFTER THE EXISTING NON-CONFORMING SIGN WAS REMOVED BY THE OWNER OF THE SIGN.**

The trial court concluded that the City improperly imposed an artificial time limit for CCM to file for a permit to "replace" the sign with a digital display and also improperly misconstrued its own Ordinance as prohibiting the construction of a digital display once the existing sign is removed. The City contends it did not impose an artificial time, but merely interpreted the Ordinance as not permitting the replacement of a sign that no longer exists. Lamar contends that the key point that the trial court missed and that is not addressed in court's order is that CCM did not own, maintain or have any rights in the non-conforming sign it subsequently applied to replace.

As recited in the Statement of Facts, CCM contractually agreed with Lamar, that "All structures, equipment and materials placed upon the premises by the LESSEE or its predecessor shall remain the property of LESSEE and may be removed by LESSEE at any time." (R. 75) CCM also agreed that Lamar could, "maintain advertisements on the sign, and to modify the sign to have as many advertising faces, including changeable copy faces or electronic faces, as are allowed by local and state law." (R. 75) Finally, CCM contractually acknowledges that "The LESSEE shall have the right to make any necessary applications with, and obtain permits from, governmental bodies for the

construction and maintenance of LESSEE'S sign, at the sole discretion of LESSEE. All such permits and any nonconforming rights pertaining to the premises shall be the property of LESSEE." (R. 75) Thus, it is clear that the sign belonged to and was maintained by Lamar, the sign permit was in Lamar's name and the non-conforming rights in the sign belonged to Lamar as the non-conforming sign owner.

Therefore, CCM had no right to apply for a permit to replace a non-conforming sign in did not own or have any rights in.

§17-404(e)(4) Code of Ordinances of the City of Columbia provides,

> Notwithstanding the provision of Division 7 of this article, the fixed display surface of a legal nonconforming outdoor advertising sign may be replaced in whole or in part by display surface area with changeable copy.... Generally this permissibility does not include the replacement of, or some other substantial alteration to, the sign support structure, except where existing metal sign support structures would be replaced with new metal sign support structures.

Viewed in its proper context, this section provides a specific, narrow exception to the general non-conforming structure regulations in Division 7 of the City of Columbia ordinances. Section 17-201 of Division 7, expressly provides, "It is the intent of this article to permit these nonconformities to continue until they are removed, but not to encourage their survival. ... It is the further intent of this article that nonconformities shall not be enlarged upon, expanded or extended, reconstructed to continue nonconformity after major damage, or used as grounds for adding other structures or uses prohibited elsewhere in the same district." (Emphasis added.)

Properly construed, then, the owner of a legal non-conforming sign can apply to the City for a permit exception to Division 7 to replace the fixed static display area of a nonconforming sign with changeable copy (digital display.) Also, only if the sign has existing metal support, can it then be replaced with new metal sign support structures. It should be noted that wooden support sign structures cannot be replaced with metal, and that only metal structures are sufficient to support a digital display. However, once the owner of a nonconforming sign removes its sign without applying for a permit or does not "replace" the sign within the time allowed by the permit, then all non-conforming rights are lost and there is no right to "replace" the sign.

II. REQUIRING AN APPLICANT TO HAVE EXISTING RIGHTS IN A SIGN IS CONSISTENT WITH STATE AND FEDERAL LAW.

Interpreting §17- 404(e)(4) to require the applicant to have existing rights in the sign is consistent with analogous state and federal law[1]. SC Code Reg. 63-350(C), which is promulgated pursuant to the South Carolina Highway Advertising Control Act, provides as follows, "Nonconforming signs must be maintained subject to the following restrictions : (1) No maintenance may occur which will lengthen the life of the device. (2) There must be existing property rights in the sign. (3) The right to continue a nonconforming sign is confined to the permitted sign owner or his transferee...." (Emphasis added.) This same regulation provides in subparagraph (6) "A

[1] This sign is not located within the jurisdiction of federal or state regulation; therefore the City of Columbia ordinance is applicable.

nonconforming sign when relocated or moved shall no longer be considered a nonconforming sign and thereafter shall be subject to all the provisions of law and of these regulations relating to outdoor advertising."

In this case, CCM had no property rights in Lamar's existing nonconforming permitted sign that was lawfully removed by Lamar.

Likewise, 23 C.F.R. §750.707 promulgated by the Federal Highway Administration under the Highway Beautification Act, provides, "In order to maintain and continue a nonconforming sign, the following conditions apply: (1) The sign must have been actually in existence at the time...; (2) There must be existing property rights in the sign affected by the State law or regulations..." Once again, CCM, the permit applicant had no existing property rights in Lamar's permitted non-conforming sign that was lawfully removed by Lamar.

This court should find that an applicant under §17- 404(e)(4) must have existing property rights in the non-conforming sign and that CCM did not, therefore the trial court erred in holding CCM's application should be granted and permit issued.

III. CASE LAW SUPPORTS THAT A NEW, NONCONFORMING SIGN CANNOT BE ERECTED AFTER THE OLD NONCONFORMING SIGN IS REMOVED BY THE OWNER.

Lamar did not find South Carolina precedent directly on point, but other jurisdictions have considered the issue. In *Billboards Divinity, LLC v. Commissioner of*

Transp., 133 Conn. App. 405, 35 A.3d 395 (2012)(*cert denied* 40 A.3d 783 (Conn. 2012) the

Connecticut Appellate court describes the relevant facts as follows:

> The plaintiff, hoping to secure more lucrative terms, sought to renegotiate the terms of the lease with NextMedia. Those negotiations proved to be unsuccessful, however, and, on November 16, 2006, the plaintiff sent written notice to NextMedia that it intended to terminate the lease. NextMedia, which, under the lease, retained the right to remove the billboards from the subject property, removed the billboards.
>
> ...
>
> The plaintiff filed an application with the department ... to erect two new billboards on the subject property, equal in size to the billboards that had been removed by NextMedia. The department denied the plaintiff's application by letter...
>
> The plaintiff filed the underlying action for a writ of mandamus directing the defendants to approve its permit application. ...The plaintiff ... argues that the billboards it sought to construct were intended to replace the billboards removed by NextMedia. It is undisputed that the prior billboards legally existed before the enactment of the federal-state agreement and, therefore, would have been permitted to continue as nonconforming signs. The plaintiff believes it has the legal right to replace those signs in order to continue with a nonconforming use of its property.

The Connecticut Appellate Court reasoned,

> Here, NextMedia lawfully removed the existing, nonconforming billboards from the subject property, apparently without protest by the plaintiff, and the permit for those billboards was terminated. There is no indication that the plaintiff sought to have either the billboards or the permit transferred to its control. Thus, rather than seeking to make repairs to or to maintain an existing, nonconforming billboard, the plaintiff's application sought a permit to erect two wholly new signs.

The court further noted,

> The plaintiff has not provided citations to any cases from Connecticut or other jurisdictions in which a property owner was allowed to replace a nonconforming billboard that was lawfully removed from the property, and our research has not revealed any such cases.

In this case, CCM notified Lamar that it was terminating its lease. Lamar lawfully removed its permitted non-conforming sign from the property as allowed under its lease. CCM applied for and was properly denied an application to erect a new digital display to replace Lamar's sign. This court should follow the reasoning of *Billboard Divinity* and hold that once a nonconforming sign is removed by the sign owner, it cannot be replaced with a new sign by the property owner with no rights in the sign being removed.

Another case which supports this view and was cited by the court in *Billboard Divinity* is *Zanghi v. State*, 611 N.Y.S.2d 263, 204 A.D.2d 313 (1994). In *Zanghi*, the property owner's tenant, who apparently owned and maintained the billboard, removed the sign and the signpost without the property owner's permission. The property owner subsequently re-erected the billboard. The New York DOT demanded that the sign be removed since it no longer had protected status as a nonconforming use. The property owner responded by bringing an action for permanent injunctive relief.

The court denied the request for injunctive relief finding that the property owner "has not sufficiently demonstrated a clear legal right to the ultimate relief sought." The court stated, "The billboard herein was "changed" when the tenant took it down. Although the plaintiff almost immediately re-erected the signposts, such re-erection also constituted a "change in existing use".

This court should conclude that CCM, who had no rights in Lamar's sign or Lamar's permit, cannot simply re-erect a totally new sign with a digital display after Lamar removed its permitted non-conforming sign.

CONCLUSION

CCM had no rights in Lamar's nonconforming sign or permit. It was error for the trial court to interpret the 17-404(e)(4) of the City of Columbia's ordinance to allow a property owner with no rights in Lamar's nonconforming sign to erect a totally new digital display sign after Lamar had lawfully removed its permitted sign. This interpretation is contrary to the limited nature of the exception to the general nonconforming use regulations in the City of Columbia's ordinances. It is also contrary to the interpretation by the City of Columbia's Zoning Administrator of its own ordinance as affirmed by the City of Columbia Board of Zoning Appeals. This interpretation is contrary to analogous state and federal regulations concerning nonconforming use. Finally this interpretation is contrary to similar cases decided in other jurisdictions. For all these reasons, the order of the trial court should be reversed and the decision of the City of Columbia Zoning Administrator to deny the permit as affirmed by the City of Columbia Board of Zoning Appeals should be affirmed.

Respectfully Submitted,

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September 29, 2016

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PROOF OF SERVICE

I certify that I have served the Amicus Curiae Brief of The Lamar Companies by depositing a copy of it in the United States Mail, postage prepaid, on September 30, 2016, on the Appellant addressed to it's attorney of record, Natalie Armstrong Ham, Post Office Box 667, Columbia, South Carolina 29202 and on the Respondent addressed to it's attorney of record Jay Bender, Post Office Box 8057, Columbia, South Carolina 29202.

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