STATE OF MICHIGAN

IN THE COURT OF APPEALS

BUFFALO REALTY, LLC,
a Michigan Limited Liability Company, and
GRAND RAPIDS OUTDOORS, LLC,
Michigan Limited Liability Company,
Petitioner-Appellants,

COA Docket No. 315139

Lower Ct Case No. 12-08105-AA

v

CITY OF GRAND RAPIDS,
A Michigan Municipal Corporation, and
CITY OF GRAND RAPIDS BOARD OF
ZONING APPEALS,
Respondent-Appellees.

Steven F. Stapleton P51571
Miller, Canfield, Paddock & Stone, PLC
Attorneys for Appellants
99 Monroe Ave., NW, Ste. 1200
Grand Rapids, MI 49503
(616)454-8656

Kristen Rewa P73043
Assistant City Attorney
Attorney for Appellees
300 Monroe Ave., NW, Ste. 620
Grand Rapids, MI 49503
(616)456-3103

Eric D. Williams P33359
Attorney for Amicus MML
524 N. State Street
Big Rapids, MI 49307
(231) 796-8945

AMICUS CURIAE BRIEF OF THE MICHIGAN MUNICIPAL LEAGUE JOINED BY THE MICHIGAN TOWNSHIP ASSOCIATION

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STATEMENT OF INTEREST OF AMICUS CURIAE

The amicus curiae Michigan Municipal League is a non-profit Michigan corporation whose purpose is the improvement of municipal government and administration through cooperative effort. Its membership is comprised of 524 Michigan local governments, of which 478 are also members of the Michigan Municipal League Legal Defense Fund. The Michigan Municipal League operates the Legal Defense Fund through a board of directors. The purpose of the Legal Defense Fund is to represent the member local governments in litigation of statewide significance.

The Michigan Townships Association promotes the interests of 1,242 townships by fostering strong, vibrant communities, advocating legislation to meet 21st century challenges, developing knowledgeable township officials and enthusiastic supporters of township government, and encouraging ethical practices of elected officials. Collectively, the Michigan Municipal League and Michigan Township Association represent all of the cities, villages and townships in Michigan.

The Legal Defense Fund Board authorized the filing of an amicus curiae brief in support of the City of Grand Rapids and its Board of Zoning Appeals. The Michigan Township Association agreed to join in the amicus curiae brief. The primary interest of the amici is to make certain that cities, villages, townships and counties can administer local zoning ordinances to achieve the gradual eradication of nonconforming uses, and

nonconforming billboard uses in particular. Appellants seek a ruling that would allow landowners a second chance to rebuild nonconforming use billboards, contrary to local zoning ordinances, after the nonconforming billboards are demolished and removed.

The Michigan Municipal League and the Michigan Township Association support the City of Grand Rapids and its Board of Zoning Appeals on the issue of ending a nonconforming use embodied in a billboard that is demolished and removed from the site.

STATEMENT OF QUESTIONS INVOLVED

I. DID THE BOARD OF ZONING APPEALS CORRECTLY FIND THAT THE NONCONFORMING BILLBOARD USE AT 410 PEARL STREET ENDED WHEN THE LESSEE DEMOLISHED AND REMOVED ITS BILLBOARD?

APPELLANTS SAY	"NO"
APPELLEES SAY	"YES"
BZA SAID	"YES"
CIRCUIT COURT SAID	"YES"
AMICI SAY	"YES"

STATEMENT OF FACTS

The amici accept the Counterstatement of Facts by the City of Grand Rapids.

The amici point out an incorrect and unsupported assertion in the Appellants' Statement of Facts, at page 2 of their brief on appeal, where they state that the "Planning Director deemed CBS's action as having extinguished the site owner's rights to its nonconforming use and thereby defeated the intended transfer of the site owner's vested rights to the nonconforming sign." Neither "the site owner's rights to its nonconforming use," nor "the site owner's vested rights to the nonconforming sign," were proved or otherwise established by Appellants and found to exist by the Board of Zoning Appeals. Pursuant to a lease, the site owner conveyed or transferred to the lessee the right to use the site for the erection, operation, and removal of a billboard, which the lessee exercised, to the site owner's dismay and perceived disadvantage.

The key facts are uncontroverted. Appellant Buffalo Realty owns the land at 410 Pearl Street in the City of Grand Rapids. Buffalo Realty leased the right to erect, operate, and remove a billboard on the land at 410 Pearl Street; EXHIBIT 1. The City of Grand Rapids amended its zoning ordinance in 2008, making it illegal to place a billboard on the site at 410 Pearl Street. The lessee demolished and removed its billboard from 410 Pearl Street on December 8, 2011. Buffalo Realty's new lessee, Appellant Grand Rapids Outdoor, applied for a permit to erect another billboard on the site at 410 Pearl Street, and was turned down by the City of Grand Rapids, because

billboards are prohibited in that zoning district and the nonconforming use billboard was removed on December 8, 2011. Buffalo Realty and its new lessee, Grand Rapids Outdoor, ask the Court of Appeals to order the City of Grand Rapids to issue a permit for a new billboard to be constructed at 410 Pearl Street, contrary to the zoning ordinance, claiming Buffalo Realty owns a "vested right" to continue the nonconforming use established and terminated by the prior lessee.

INTRODUCTION

The relief sought by the Appellants from the Court of Appeals could produce the perpetual regeneration of nonconforming billboards at sites like 410 Pearl Street, despite being prohibited by the local zoning ordinance. Cities, townships, counties and villages constantly confront nonconforming structures and uses in Michigan communities. The gradual eradication of the nonconforming structures and uses is an essential element of the effective administration of zoning ordinances. Off premises billboards are highly regulated by municipalities through zoning ordinances. The gradual removal of nonconforming billboard structures and uses is an important municipal objective in communities across the state.

Appellants want the Court of Appeals to rule the landowner has a vested right to rebuild a nonconforming billboard that was lawfully demolished and removed from the site at 410 Pearl Street by the owner of the billboard, even though the zoning ordinance now prohibits billboards in that zoning district. If Appellants somehow prevail, the

new lessee will construct a new nonconforming billboard at 410 Pearl Street, and when the lessee demolishes and removes it ten or twenty years from now, the landowner will retain a "vested right" to the nonconforming use, enter a new lease, and another new nonconforming billboard will be constructed. The result will be that nonconforming billboard structures and uses will regenerate like mushrooms, because site owners never will lose the nonconforming billboard use of the land when the billboard structures are demolished and removed by the lessees.

This is not a case between an outdoor advertising company and a landowner, where the Court of Appeals is asked to determine which entity owns the right to continue a nonconforming use of the real property. This is not a case in which the wide variation in leases and land uses by lessees can be encompassed in a broad ruling declaring that lessors own "vested rights" to continue and transfer nonconforming uses established by lessees who construct, own, and remove improvements which embody and constitute the nonconforming uses.

This is an appeal from the decision of the Grand Rapids Board of Zoning Appeals which found that the nonconforming billboard structure was demolished and removed by its owner, and the nonconforming billboard use of the land ended. That finding or ruling can be affirmed without necessarily reaching and deciding who "owns" the theoretical right to continue the nonconforming billboard use that ended

December 8, 2011, and without making a sweeping ruling on "vested rights" purportedly held by landowners in nonconforming uses.

ARGUMENT

I. THE LANDOWNER HAS NO RIGHT TO REBUILD THE NONCONFORMING USE BILLBOARD THAT WAS OWNED, OPERATED, DEMOLISHED AND TERMINATED BY A LESSEE.

Standard of Review

The general standard of review applied to a decision of a zoning board of appeals is stated in MCL 125.3606(1), to ensure the decision (a) complies with the constitution and laws of the state, (b) is based upon proper procedure, (c) is supported by substantial evidence, and (d) represents the reasonable exercise of discretion granted by law.

Buffalo Realty failed to prove to the Board of Zoning Appeals that Buffalo Realty owned or held any vested property right in the nonconforming billboard structure and use at 410 Pearl Street.

Billboard Lease Agreement

The Billboard Lease Agreement, attached for quick reference as EXHIBIT 1, plainly provides that Buffalo Realty leased to Viacom Outdoor Inc the right to erect and maintain an 11' x 23' Back to Back Poster advertising sign at 410 Pearl Street, including

support structures, illumination facilities and ancillary equipment. The lease was made on March 8, 2002, signed in April of 2002, with a term of ten years and four and one half months, commencing October 15, 2001, and ending March 1, 2012.

Paragraph 3 of the lease provides 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(s), at the sole discretion of Lessee." Also in paragraph 3 it says that "all such permits shall always remain the property of Lessee."

In paragraph 4 of the lease it says that "all sign(s), structure(s) and improvements placed on the premises by or for the Lessee shall remain the property of the Lessee, and that Lessee shall have the right to remove the same at any time during the term of Lease, or after the expiration of the Lease."

In paragraph 10 of the lease it says that "Lessor shall not assign its interest under this Lease or any part thereof except to a party who purchases the underlying fee title to the premises; and Lessee shall not assign its interest under this Lease or any part thereof except to a party who purchases title to the subject sign structure(s)."

Nonconforming billboard structure and use

In 2008 the City of Grand Rapids amended its zoning ordinance, banning billboards in the zoning district in which Buffalo realty's land is located at 410 Pearl Street. As a result, the billboard became a nonconforming structure and use at 410 Pearl Street, protected by MCL 125.3208(1):

> If the use of a dwelling, building, or structure or of the land is lawful at the time of enactment of a zoning ordinance or an amendment to a zoning ordinance, then that use may be continued although the use does not conform to the zoning ordinance or amendment. This subsection is intended to codify the law as it existed before July 1, 2006 in section 16(1) of the former county zoning act, 1943 PA 183, section 16(1) of the former township zoning act, 1943 PA 184, and section 3a(1) of the former city and village zoning act, 1921 PA 207, as they applied to counties, townships, and cities and villages, respectively, and shall be construed as a continuation of those laws and not as a new enactment.

The Grand Rapids zoning ordinance recognizes nonconforming uses and structures, and states "[i]t is the intent of this Chapter to permit nonconforming lots, buildings, structures, and uses to continue until they are removed, but not to encourage their continued use or survival. Art 3, Sec 5.3.01.

The Grand Rapids zoning ordinance defines a "nonconforming sign" and provides that "[e]very permanently affixed sign which was legally erected, constructed, installed, placed or located, and which lawfully existed on the effective date of this Chapter, but which does not conform to the type, height, size, area, or location requirements of this Article shall be deemed nonconforming." Art 17, Sec 5.17.03.

The nonconforming billboard structure at 410 Pearl Street was owned, operated, demolished, and removed from the site by the successor lessee of the Billboard Lease Agreement on December 8, 2011.

Appellant Buffalo Realty claims it is the owner and holder of "vested rights to the nonconforming use" at 410 Pearl Street by which a billboard was allowed to remain on site until it was removed by its owner on December 8, 2011. See Appellants' Brief on Appeal, page v. Appellant Buffalo Realty offers nothing in support of this claim, other than its ownership of the land at 410 Pearl Street, and the general proposition that "[t]he law has well established that such a vested property right rests with the site owner/lessor." Appellant's Brief on Appeal, page 6. Buffalo Realty cites no statute, ordinance, or reported case that describes or acknowledges this "well established law" in Michigan by which a landowner acquires or holds "vested property rights" in a nonconforming billboard and the nonconforming use of the land by the billboard owner.

Appellants cite *Adams Outdoor Advertising v City of East Lansing*, 463 Mich 17; 614 NW2d 634 (2000) in support of their position, but the case involved a constitutional taking claim for rooftop billboards that were outlawed by a police power ordinance. Appellants quoted a paragraph on page 638 from Justice Taylor's opinion stating "that a lessor can transfer no greater rights than he possesses," and "the lessors never had an

absolute right to display signs on the rooftops of their buildings." As applied to the present case, Justice Taylor's comments mean "that Buffalo Realty can transfer no greater rights [to subsequent lessee Grand Rapids Outdoors LLC] than [Buffalo Realty] possesses." And "[Buffalo Realty and Grand Rapids Outdoors] never had an absolute right to display signs on [Buffalo Realty's site]," because "[a]t most, the leases included a right to display signs on the [site] subject to reasonable police power regulations that did not effect a taking of the lessor's interest." *Adams, id,* pp 638-639.

Buffalo Realty never owned and held an absolute right to erect and display a billboard on the site at 410 Pearl Street. At most, the right to erect and display a billboard at 410 Pearl Street was subject to the City zoning ordinance, which was amended in 2008 to prohibit billboards in the zoning district where 410 Pearl Street is located. Once the nonconforming billboard at 410 Pearl Street was demolished and removed, the nonconforming billboard use ended, and Buffalo Realty had no right to resume that nonconforming billboard use. There is nothing in the *Adams* opinion to suggest that owners of the buildings on which rooftop signs were erected by rooftop lessees could claim the right to place rooftop signs on their buildings after the ordinance was enacted to prohibit them, and after the rooftop lessees removed their signs.

Appellants cite *The Lamar Company LLC v City of Fremont*, 278 Neb 485, 492-492; 771 NW2d 894 (2009), because of the following quotations.

> While this court has not previously addressed the issue, upon review of the jurisprudence of other jurisdictions and the treatises addressing nonconforming use rights, we are persuaded that the right to maintain a legal nonconforming use "runs with the land," meaning it is an incident of ownership of the land and it 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.
>
> Lamar contends that while the nonconforming use rights may "run with the land," the rights vest in the individual or entity currently using those rights and that, therefore, once such use is terminated, the legal nonconforming rights remain with the individual or entity which had used the nonconforming right and such rights cannot be transferred without the authority of this individual or entity. We believe Lamar's proposed proposition of law is not sound. Indeed, such a holding could lead to the very problem identified in the Rathkopf treatise, wherein a landowner is divested of the ability to transfer the nonconforming use rights associated with his or her real property and, further, the proposed purported owner of the nonconforming use rights, having been separated from the real property on which the nonconforming rights had been used, would be unable to utilize such rights.
>
> We reject Lamar's suggestion and conclude that the better proposition of law is, as stated above, that the right to maintain and use a nonconforming use "runs with the land" and is an incident of ownership of the land.

The problem with transferring the holding in *Lamar* to the present case is that Lamar's leasehold interests were terminated and *Lamar* removed its nonconforming signs from the properties and later filed suit to prevent its competitor from erecting replacement signs as permitted by an amendment to the local zoning ordinance on the same properties. The City issued replacement permits for the signs, and did not take the position that Lamar's removal of its nonconforming signs prevented the landowners and subsequent lessees from erecting replacement signs as allowed by the amended zoning ordinance. The Nebraska Supreme Court never considered whether Lamar's

removal of its nonconforming signs could be a basis for the City of Fremont to refuse to allow replacement signs to be placed by landowners or lessee on the sites as permitted by the local ordinance. Unlike the facts in *Lamar*, Buffalo Realty leased the rights to construct, operate, and remove a billboard from the site at 410 Pearl Street, which billboard became a nonconforming structure and use during the lease, and Buffalo Realty no longer held any right to construct a billboard on that site.

Even if Buffalo Realty retained the abstract right to continue the nonconforming use of the billboard owned by the lessee, Buffalo Realty did not hold or acquire the right to use the nonconforming billboard structure. Once the nonconforming billboard structure was removed, there was no right to replace it on 410 Pearl Street. Buffalo Realty should have bought the billboard to claim the right to its continued use, nonconforming or otherwise. In effect, the City of Grand Rapids was asked to allow Buffalo Realty and its new lessee to construct a new nonconforming billboard at 410 Pearl Street to replace the nonconforming billboard that Buffalo Realty could not, or did not, acquire from the prior lessee.

The most pertinent Michigan case is *Outdoor Systems Advertising Inc v Korth*, 238 Mich App 664; 607 NW2d 729 (1999), in which the Court of Appeals held that billboards are trade fixtures and the personal property of the lessee as a matter of law. The discussion about trade fixtures is instructive. Some excerpts are quoted here, *Outdoor Systems Advertising Inc*, supra, pp 667-669.

> A trade fixture is merely a fixture which has been annexed to leased realty by a lessee for the purpose of enabling him to engage in a business. The trade fixture doctrine permits the lessee, upon the termination of the lease, to remove such a fixture from the lessor's real property. (Cites omitted.)
>
> A trade fixture is considered to be the personal property of the lessee. *Wentworth v Process Installations, Inc,* 122 Mich App 452, 465; 333 NW2d 78 (1983).
>
> The Supreme Court long ago addressed the policy behind allowing a tenant to remove trade fixtures installed in furtherance of the tenant's business:
>
> The right of the tenant to remove the erections made by him in furtherance of the purpose for which the premises were leased is one founded upon public policy and has its foundation in the interest which society has that every person shall be encouraged to make the most beneficial use of his property the circumstances will admit of....
>
> The reason property of this kind is personal, rather than real, is based upon the rule the law implies [that the parties made] an agreement that it shall remain personal property from the fact the lessor contributes nothing thereto and should not be enriched at the expense of his tenant when it was placed upon the real estate of the landlord with his consent. There is no unity of title between the owner of the land and the owner of the structures, and the buildings were not erected as permanent improvements to the real estate, but to aid the lessee or licensee in the use of his interest in the premises. (Cite omitted.)

The policy considerations expressed long ago by the Michigan Supreme Court can be used as guideposts for resolving Appellants' challenges to the rulings of the Board of Zoning Appeals. There is no unity of title between the owner of the land and the owner of the billboard structure. The billboard structure was not erected as permanent improvements to the real estate, but to aid the lessee in the use of the lessee's interest in the premises. The lessor contributed nothing to the construction of the billboard structure, and the lessor should not be enriched at the expense of his lessee, when the

billboard structure was placed upon the real estate of the lessor with his consent. Without the construction and use of the billboard structure by the lessee, the lessor site owner would have no nonconforming billboard or billboard use to claim and argue about! The lessee constructed, owned, and operated the billboard, and established the nonconforming structure and use on the site owned by Buffalo Realty. The lessee removed no more from Buffalo Realty's real property than what it added pursuant to the lease. The City of Grand Rapids and its Board of Zoning Appeals informed Buffalo Realty and its new lessee that billboards are not permitted at 410 Pearl Street, so they cannot obtain a permit to build one.

A claim virtually identical to that made by Buffalo Realty was advanced and rejected in *Billboards Divinity LLC v Commissioner of Transportation*, 133 Conn App 405, 418-419; 35 A3d 395 (2012).

> The plaintiff nevertheless 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.
>
> 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 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. By contrast, other jurisdictions have found that once nonconforming signs are removed completely, or they have been repaired substantially or altered in some way, any right to the continuation of the nonconformity terminates. (Cites omitted.)

The Board of Zoning Appeals correctly found that the nonconforming billboard structure and use at 410 Pearl Street ended on December 8, 2011, when the billboard was demolished and removed from the site.

CONCLUSION

The Board of Zoning Appeals correctly found that the nonconforming billboard was demolished and removed from the site at 410 Pearl Street on December 8, 2011, and the nonconforming billboard use ended, so Buffalo Realty and its new lessee cannot construct a new billboard there.

The finding and decision of the Board of Zoning Appeals complied with the constitution and laws of the state, was based upon proper procedure, was supported by substantial evidence, and represents the reasonable exercise of discretion granted by law.

The decision of the Board of Zoning Appeals should be affirmed.

Dated: _____

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Eric D. Williams P33359
Attorney for Amicus Curiae MML
524 N. State Street
Big Rapids, MI 49307
(231)796-8945