

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2002-CA-002163-MR

JEFFERSON COUNTY BOARD OF  
ZONING ADJUSTMENT; RICHARD TONINI;  
J. DOUGLAS HAWKINGS; PATRICIA HOMMRICH;  
LULA HOWARD; SHERMAN KLINE; AND HEIDI  
SAUNDERS

APPELLANTS

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE THOMAS J. KNOFF, JUDGE  
ACTION NO. 02-CI-002492

THORNTON OIL CORPORATION

APPELLEE

OPINION

AFFIRMING

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BEFORE: BAKER AND SCHRODER, JUDGES, AND HUDDLESTON, SENIOR  
JUDGE.<sup>1</sup>

SCHRODER, JUDGE. The Jefferson County Board of Zoning  
Adjustment (BOZA) appealed the circuit court's decision which  
reversed the Board's denial of a permit to alter a nonconforming

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<sup>1</sup> Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

freestanding business sign. We agree with the circuit court that the modifications were clearly not the replacement of a structural element. Also, the legal nonconforming use is a property right that is constitutionally protected, thus, provisions of the ordinance which permit alterations to legal nonconforming structures should have been liberally construed. Therefore, we affirm.

Thornton Oil Corporation (Thornton) purchased the property in question on February 1, 1983. At the time of purchase, the property was developed with a Chevron service station, which included a freestanding Chevron sign. Thornton sought and received a permit, and did demolish the Chevron service station. On May 5, 1983, Thornton applied for a permit to build a Thornton "Food Stop" on the site. The freestanding Chevron sign was replaced with a Thornton sign of the same size. In 1986, Thornton again obtained a permit and modified the sign to add lower price pods.

In 2001, Thornton applied to the Jefferson County Planning & Development Services (Planning) for a permit to modify the sign. The record contains the application which has a picture of the original sign with a diagram of the proposed sign. The sign construction can best be described as looking like a ladder stuck into the ground. The two sides are thicker than the rungs going from side to side. On the top rung of the

ladder sign is a cabinet (two-faced sign with lights between) with the words "thornton's FOOD MART." Attached to the next rung down is a sign with the words "OPEN 24 hrs." The next rung down supports a cabinet for price signage, which prices need to be changed manually by employees. The bottom rung has another cabinet sign for changeable advertising.

Thornton sought the permit to replace the faces on the top cabinet to simply read "THORNTONS," and to lower this cabinet some. The second sign, "OPEN 24 hrs." was to be eliminated. Third down, the pricing pod or advertising cabinet (which measured 5' x 8'8") was to be taken down and replaced with a smaller cabinet (4'9" x 6'4") with mechanics inside which would allow scrolling numbers (gas prices) to be controlled from inside the store. The effect would be to reduce the square footage of the total pricing sign coverage. The bottom cabinet or general advertising pod was to be given two new faces.

Planning had reviewed the dimensions of the sign to be replaced and decided it was "taller and greater in area than the regulations currently allow." Planning treated the sign as a legal nonconforming use<sup>2</sup> which could continue indefinitely as long as there was no "enlargement or extension of a nonconforming use beyond the scope and area of its operation at the time the regulation . . . was adopted." KRS 100.253(2).

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<sup>2</sup> See KRS 100.253.

Planning looked to Section 8.3 Non-conformance, E. Signs, of the Development Code for repairs, modifications, and replacement of signs. The second paragraph read:

At such time as any structural element of a non-conforming sign is replaced, the sign must be brought into compliance with the requirements of Article 11. Replacement of structural elements in this context means the disassembly and subsequent re-assembly or the substantial alteration of the pole, base or frame.

Planning concluded that replacing the faces in the cabinets was allowed, but it had a problem with replacing the manual pricing cabinet with the smaller mechanical one, and disapproved the permit.

Thornton filed an appeal before the BOZA. A public hearing was conducted on February 18, 2002, at which time a question arose as to whether the sign was a legal or illegal nonconforming structure. The matter was continued to March 4, 2002, at which time neither side could show when the sign became nonconforming. The BOZA denied the appeal concluding that Thornton did not have nonconforming rights to the existing sign and that the replacement of the pricing pod was a change to a structural element. An appeal was taken to the circuit court which reversed the BOZA for a number of reasons. First, the court concluded the sign was a legal nonconforming use because Planning could not show when it became nonconforming (Code

Enforcement did not maintain records that far back) and had assumed, in denying the permit, that the sign was legally nonconforming. The court then raised the proposed alterations and concluded there were to be no alterations to the sign's poles (sides) or base (where it stuck in the ground). The court's review of the pricing pod or cabinet work concluded that the cabinet's replacement was not a structural change or frame change, and even if considered a frame change, "there is no material evidence in the record that this is a substantial alteration as required by the language of Section 8.3(E)." (emphasis original.) The court set aside the BOZA's denial and remanded the matter back in order to issue Thornton the permit.

On appeal to this Court, the BOZA contends the circuit court erred in not giving greater deference to the BOA's decision; and in its decision that Thornton possessed legal nonconforming rights. We disagree with appellant on both arguments and therefore affirm the circuit court.

KRS 100.253(1) recognizes that when zoning ordinances are enacted there may be uses or even structures that now do not conform to the provisions of the newly adopted zoning ordinance, or development code. Preexisting structures or uses are deemed nonconforming uses which are legally entitled to continue - hence the name "legal nonconforming use." Nonconforming structures built after adoption of the zoning ordinance, or

development code, are not entitled to continue because they were illegally constructed - hence the name "illegal nonconforming use." See Grannis v. Schroder, Ky. App., 978 S.W.2d 328, 331 (1997). When Thornton applied to Planning for a permit to alter the sign, it was discovered that the sign (which was previously erected with a permit) was now nonconforming. Planning could not say when the sign became nonconforming and treated it as a legal nonconforming use. In denying the permit to alter the sign, Planning concluded the sign was legally nonconforming but that the one modification would not comply with Section 8.3 of the Development Code described above. Thornton appealed to the BOZA on this one issue, which under KRS 100.257, is proper for the review of a decision of "an administrative official in the enforcement of the zoning regulation." What started out as an interpretation of Section 8 of the Code (and KRS 100.253(2)), progressed into a decision by the BOZA that the sign was an illegal nonconforming structure that could not be altered. The problem here is that there was no decision of a zoning enforcement officer before the BOZA on that issue that was being appealed. The BOZA is not an enforcement body but a quasi judicial body that has "the power to hear and decide cases where it is alleged by an applicant that there is error in any order, requirement, decision, grant, or refusal made by an administrative official in the enforcement of the zoning

regulation." KRS 100.257. Any attempt by the BOZA to usurp the powers of the zoning enforcement officer is void ab initio. See Bellefonte Land, Inc. v. City of Bellefonte, Ky. App., 864 S.W.2d 315 (1993). Therefore, we agree with the circuit court that the sign is a legal nonconforming use, subject to KRS 100.257, and Section 8 of the Development Code.

Both Section 8 of the Development Code and KRS 100.253(2) permit modifications or alterations to legal nonconforming structures - under the statute, when there are no enlargements, and, under the code, where there are no replacements of the structural elements, meaning the disassembly and subsequent reassembly or the substantial alteration of the pole, base, or frame. Planning was only concerned with the price pod or advertising cabinet, which rested on, or hung from a rung. Is the proposed change a substantial alteration of the pole, base, or frame? The BOZA said yes and the circuit court said no. We agree with the circuit court. A legal nonconforming use or structure is a constitutionally protected property right. Martin v. Beehan, Ky. App., 689 S.W.2d 29 (1985). Provisions of an ordinance which permit alterations, modifications, repairs, etc., should be liberally construed to prevent hardship to the owner. Bosworth v. City of Lexington, 277 Ky. 90, 125 S.W.2d 995 (1939). Here, going back to the ladder analogy, the sign or ladder has both poles or sides in

the ground (same base). The rungs (part of the frame) will remain intact. The pricing pod or cabinet rests on or hangs from a rung and is not part of the frame or for structural support. The total height of the sign will decrease as will the total square footage of the sign area. Clearly, neither Section 8 of the Code nor KRS 100.253(2) is violated, and the circuit court was correct in vacating the denial of the permit.

For the foregoing reasons, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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