From:	Leslie Van Frank
To:	Lewis, Katherine; "Craig Call"
Cc:	"Jon H. Rogers"; Haws, Betsy; Slark, Samantha; Bradley Strassberg; Shepard, Nora; Severson, Deborah; Paterson, Joel; Moeller, Michelle
Subject:	RE: CBS Appeals PLNAPP2015-00973 and 00974 - Nonconforming Use Questions
Date:	Friday, January 15, 2016 8:52:49 AM

Mr. Call –

I agree with Ms. Lewis that the statutes dictate that a landowner has no right to continue the nonconforming use on the vacated property. I disagree with her, however, that the analysis cannot be viewed through a nonconforming use lens.

As Ms. Lewis points out, state statutes prevent the landowner from rebuilding the sign, and therefore the nonconforming use does not stay with the landowner. However, pursuant to state statutes (the relevant ones here being Utah Code 10-9a-511 and -513), the billboard owner can reestablish the same nonconforming use on other land within the City in certain circumstances. Thus, while the legislature's treatment of this nonconforming use is not traditional, the statutes necessarily transport the nonconforming use to the land where the billboard owner's has chosen to relocate.

The fact that billboards have greater protections than other nonconforming uses does not mean that the nonconforming use analysis can be ignored. Cities cannot amortize billboards, but as Mr. Call points out, the right to the nonconforming use terminates if not re-established within a year. The City's power of eminent domain to prevent the reestablishment of the nonconforming use on different property does not change the analysis. Effectively, that is the protection the legislature gave to municipalities in exchange for not being able to amortize or otherwise prevent this nonconforming use from continuing under the state-mandated relocation circumstances.

Thus, CBS has a transportable right to re-establish its non-conforming use elsewhere. It can be anywhere else in the City with the City's consent, or within 5,280 feet over the objection of the City. CBS applied to move 40 feet from the original location and is entitled to reestablish the nonconforming use there. In the parlance Mr. Call used in his email, the new proposed location must be considered the equivalent of a pre-existing sign located within the minimum 300 or 500 feet of the proposed new Corner

See you all shortly.

Leslie

From: Lewis, Katherine [mailto:Katherine.Lewis@slcgov.com]
Sent: Thursday, January 14, 2016 2:50 PM
To: 'Craig Call'; Leslie Van Frank
Cc: 'Jon H. Rogers'; Haws, Betsy; Slark, Samantha; Bradley Strassberg; Shepard, Nora; Severson, Deborah; Paterson, Joel; Moeller, Michelle
Subject: RE: CBS Appeals PLNAPP2015-00973 and 00974 - Nonconforming Use Questions

Mr. Call,

The City offers the following response to your questions.

Utah law has carved billboards out as uniquely protected nonconforming uses. It is important to understand that billboard nonconforming uses are not the same as any other nonconforming uses and do not have the same limited land use entitlements that other nonconforming uses do under Utah law.

Like other nonconforming uses, an existing billboard becomes nonconforming if the City prohibits billboards in a certain zone. As the City noted in its briefing, billboards are prohibited in certain areas of the City, including the gateway streets where both the CBS and Corner Property billboards are/were located. Under a typical nonconforming use analysis, the City would have the right to terminate these billboard through amortization under Utah Code 10-9a-511, and would have the right to restrict the expansion and modification of billboards under City Code 21A.38 and 21A.46.160. However, 10-9a-511, 512, and 513 give billboards additional protections that prohibit the City from terminating or regulating the nonconforming use in the same way the City would every other nonconforming use. Billboards could be thought of as "super nonconforming uses" because a municipality cannot terminate the billboard under most circumstances, a municipality must pay just compensation to a billboard that is denied a relocation application, billboards constructed illegally may not be terminated by the City without an onerous process, and billboards are considered personal property of a billboard company, not the landowner, even if the billboard is abandoned on the landowner's property. This is unprecedented for any other nonconforming use in Utah, and for that reason, the hearing officer should not treat billboards like other, traditional nonconforming uses.

Billboards are the only nonconforming use that cannot be terminated via amortization by a municipality. Utah Code 10-9a-511(1)(b). Further, billboards are the only nonconforming uses that can be moved from one location to another pursuant to the provisions of Utah Code 10-9a-511(3)(c). And, as discussed extensively in this appeal, if the City exercises its discretion and declines to allow a billboard to relocate, it has to pay just compensation to the billboard owner. No other nonconforming use enjoys those protections. For instance, if a bar is a nonconforming use in a downtown zone, if the bar owner asks to relocate to another building 50 feet away where it would still be a nonconforming use, the City can simply decline the request. It is not compelled to decide to either allow the relocation of the bar or pay the bar owner just compensation. This is a unique protection for billboard nonconforming uses.

In addition, billboards are considered personal property, not fixtures to real property under Utah law, which is different from any other nonconforming structure which is considered real property because it is attached to the land. The result is that the landowner has no residual property interest in the billboard, even if it is abandoned by the billboard owner. Billboard owners also may keep a landowner from using a sign that's attached to the landowner's real property, even if the sign has been abandoned. This was established by SB114 in 2005 and was codified as Utah Code 10-9a-513(4), and states that "A municipality may not allow a nonconforming billboard to be rebuilt or replaced by anyone other than its owner or the owner acting through its contractors."

The effect of this provision means that if a billboard company is leasing the property from a landowner and the lease is terminated or abandoned, the landowner gets no value from the remaining nonconforming sign structure because only the owner of the sign (the lessee) can rebuild and continue to use it. This is markedly different from the hearing officer's analogy to a Wal-Mart and a property owner's right to re-lease the structure to a different big box store. In addition, Utah Code 10-9a-513(3)(a) prohibits a municipality from terminating an illegal sign—one that was never a permitted land use—without an onerous showing by clear and convincing evidence that the billboard company intentionally made a false statement about the location or construction of the billboard. This again shows that billboards are a specific category of nonconforming uses with different protections than any other land use under Utah law and should not be analyzed through a traditional nonconforming use lens.

For these reasons, the City asks that the hearing officer consider billboards as a specific type of land use with additional protections that no other nonconforming use has. Because of that, the question of which property owner has a land use entitlement to build a billboard is not relevant--rather, the question is whether the City appropriately exercised its discretion to allow Corner Property's nonconforming billboard to relocate and also appropriately exercised its discretion to deny CBS's application to relocate.

Best,
Katie

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From: Craig Call [mailto:ccall@andersoncall.com]
Sent: Wednesday, January 13, 2016 5:42 PM
To: 'Leslie Van Frank'
Cc: 'Jon H. Rogers'; Lewis, Katherine; Haws, Betsy; Slark, Samantha; 'Bradley Strassberg'; Shepard, Nora; Severson, Deborah; Paterson, Joel; Moeller, Michelle
Subject: RE: CBS Appeals PLNAPP2015-00973 and 00974 - Nonconforming Use Questions

Would Ms. Frank, Ms. Lewis or Ms. Slark, and Mr. Rogers please verify receipt. Thanks.

As to the issues related to non-conformities, please help me clarify.

My experience with non-conforming uses is that they are considered as site-specific. For this

reason, it is the real property owner who typically and ultimately controls a non-conforming use. A non-conforming use can be established by a tenant, but if the tenant loses its lease, the use remains with the landlord who can continue it so long as the use is not abandoned under the statute or ordinance. For example, if Wal-Mart builds a big box on leased property, which they do all the time, and moves out, the owner of the property can put another big box retailer in the building even if a zoning ordinance enacted after Wal-Mart was built would otherwise prohibit it.

In the current situation, it appears we had a non-conforming structure (the billboard) associated with a non-conforming use (the billboard location). CBS lost its lease and demolished the sign improvements, which I presume were the personal property of the tenant. Before the demolition, CBS filed an application to relocate the sign. The property owner leases to a new tenant which immediately files an application for a new sign in the old location. Traditional non-conforming use law would declare that the Corner Property sign is the legal survivor of the original non-conforming sign and that CBS has no sign or sign entitlement with regard to the former sign because non-conforming uses are traditionally tied to the land, not the tenant/occupant.

That said, we look at the state billboard statutes cited which are, by the way, in the same land use code as the non-conforming use statute. There is no question that the billboard statutes consider a non-conforming billboard use to be transportable under certain circumstances. If the billboard owner concurrently gives up a non-conforming use in one location, it has the right to reinstate it in a new location. This would seem to indicate that a billboard non-conforming use does not belong to the landowner, but to the tenant, but the statute does not say that. If the tenant takes that sign entitlement to a new location, it seems counterintuitive that the former landlord can also put another new sign where the old one was. The statute does not appear to encourage duplication of signs, but only relocation of signs. So the statute clearly provides that if there is no gap in ownership, a sign owner can move the sign and thus implies that no sign is to exist in the former location.

There is no problem with this if the legislature says there is not – the legislature defines the law related to both billboards and nonconforming uses. I understand that the two parts of the land use statute are to be reconciled in a harmonious manner if at all possible. However, if CBS remains the owner of the nonconforming use, without any interest in the real estate where the use was located, and with a right to relocate the use within a mile of the original location, then that seems to be counter to the traditional law of non-conforming uses. The assumption that the owner of the former property had no interest in the non-conforming use, absent some contractual arrangement, also seems counter to tradition. Did the CBS lease expire prior to the date that the transfer application was filed? How does CBS have a sign entitlement now and why does the property owner not have one? Is there a contractual provision in the former lease agreement that provides that the billboard use belongs to the tenant and not to the landlord?

It seems illogical that there are two entitlements, and also logical that there must be one entitlement under traditional law. If there is an entitlement to a sign in the former location, which will exist until it is abandoned if not reconstructed in the same location within a year, then is the CBS application premature – the former location must be considered the equivalent of a pre-existing sign located within the minimum 300 or 500 feet of the proposed new CBS sign location?

If the entitlement to a sign on the former sign location was extinguished, then is the proposed sign a “new” sign in the gateway that is also too tall?

Both sides seem to be citing the principles of non-conforming uses. CBS claims a transferable sign entitlement. Corner Properties wants a sign in the same location and the same height as the old sign, even though it has been argued that it exceeds the height limits in the ordinance and would be a “new” sign in a gateway.

There may be an easy answer – Please help me understand where the positions of each party come from. I am not attempting to agitate, but am not sure that I can make a reasoned decision about this matter with this loose end unresolved and don’t wish to ask these questions for the first time at the hearing tomorrow night.

I do not need a response to this until the hearing tomorrow – this is just an attempt to give a heads up on these questions. Perhaps there is some case law that I am unaware of related to billboards and non-conformities. Thanks for your assistance.

Craig Call
Hearing Officer