

OFFICE *of the* CITY ATTORNEY

TO: President Terhaar and Members of City Council
FR: Lysia H. Bowling, City Attorney *MS*
DATE: November 12, 2015
SUBJECT: Ground Lease Agreement ("Agreement") between City of Pensacola, Florida ("City") and Divine Word Communications, dba Divine Word Radio, Inc. ("Tenant"), dated August 24, 2012.

You have asked me to provide my opinion as to whether the use of a portion of the Long Hollow drainage basin that is currently leased by the City to Divine Word Radio as the site of a radio tower as a part of a long-term ground lease dated August 24, 2012 is a lawful nonconforming use under the Land Development Code.

As you are aware, the Long Hollow drainage basin was previously leased¹ by the City to Pensacola Broadcasting Corporation for use as a radio tower and antenna site as part of a long-term lease agreement dated November 1, 1974; and pursuant to the lease terms, a radio tower was lawfully constructed and operated in compliance with the open space zoning classification in which the Long Hollow drainage basin was located.

Subsequently in 1991, during the initial term of the lease, the open space zoning classification was changed to conservation district,² a zoning classification under the Land Development Code in which radio towers are specifically prohibited.³ Since the lessee under this lease agreement was using the Long Hollow drainage basin for a radio tower lawfully and in compliance with the open space zoning classification prior to and at the time the conservation district zoning classification became effective, the property thereby became a lawful nonconforming use consistent with the law.

The basic legal principle applicable to this analysis, which is codified under the Land Development Code, is for a property owner to have the benefit of a nonconforming provision of a zoning ordinance, the use sought to be continued must be the use in existence on the effective date of the municipal

¹ Lease Agreement, dated November 1, 1974

² Ordinance No. 26-91, amending the zoning map of the City of Pensacola

³ Section 12-2-44, City Code

ordinance. Moreover, it is the definitely settled proposition of law that the continuance of a nonconforming use, existing at the time of the adoption of the zoning ordinance is a continuance of the same and not some other kind of use.⁴ In this regard, Section 12-1-6 of the Land Development Code provides for the lawful continuance of non-conforming uses and structures:

- (A) *Intent.* Within the districts established by this title, or amendments that may later be adopted, there may exist lots, structures, uses of land and or structures, and/or characteristics of use which would be prohibited, regulated, or restricted under the terms of this title or future amendments. It is the intent of this title to allow these nonconformities to exist but not to encourage their continuation.

.....

- (C) *Nonconforming structures.* Where a legal structure exists that would not be permitted under the terms of this title by reason of restrictions on area, lot coverage, height, yards, or other characteristics of the structure or its location on the lot, such structure shall be declared a nonconforming structure and may be maintained provided that no such structure shall be enlarged in a way which increases its nonconformity.

Thus, the use of the Long Hollow drainage basin site as a radio tower, and its construction and maintenance, has continued uninterrupted as a lawful non-conforming use and structure under the Land Development Code since 1991.

⁴ *Nicholson v. Wyatt*, 77 So.2d 632 (Fla. 1955); Yokely, *Zoning Law and Practice*, §§ 134 and 135.