INDEX

Page 1	July 24, 2012 Cover Letter forwarding Application for Appeal to Zoning Board of Appeals
Page 2	Application for Appeal to Zoning Board of Appeals
Page 3	July 10, 2012 Notice of Violation
Page 4	Chapter 1447 of Cincinnati Zoning Code, Section 1447-07
Pages 5-6	Justification for Appeal
Pages 7-8	Case Law - *Village of New Richmond v. Painter,* 2003 Ohio 3871; 2003 Ohio App. LEXIS 3490

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July 24, 2012

rlauer@rkpt.com

VIA HAND-DELIVERY
Zoning Board of Appeals
3300 Central Parkway
Cincinnati, Ohio 45225

To the Clerk:

RE: Application for Appeal to Zoning Board of Appeals
Subject Property: 4410 West 8th Street
RKPT File No. CL1490 L001

Enclosed please find the original and 8 copies of the Application for Appeal to the Zoning Board of Appeals regarding the above referenced property. Also enclosed is our firm's check in the amount of $750.00 for the associated filing fee. Please file the appeal and place this matter on the August 16, 2012 Zoning Board docket. Thank you for your assistance with this matter.

Sincerely,

Richard T. Lauer

Enclosures

7 West Seventh Street Suite 1400 Cincinnati, Ohio 45202-2417 Telephone (513) 721-3330 Fax (513) 721-5001
Mason Office: 315 West Main Street Mason, Ohio 45040 Telephone (513) 336-7550 Fax (513) 336-7750

www.rkpt.com

ZONING BOARD OF APPEALS

3300 Central Parkway, Cincinnati, Ohio 45225

APPLICATION FOR APPEAL TO THE ZONING BOARD OF APPEALS

FOR OFFICE USE ONLY

File No. _____

Date Filed _____

Date of Decision

Appealed _____

Hearing Date _____

ZBA Decision _____

Date of Decision _____

SUBJECT PROPERTY

ADDRESS 4410 West 8th St.

BASE ZONING CLASSIFICATION RMX

ZONING OVERLAY _____

APPELLANT V1P West 8th, LLC c/o Richard T. Lauer, attorney TELEPHONE 513-721-3330

ADDRESS 7 West 7th Street, Suite 1400

CITY Cincinnati STATE Ohio ZIP CODE 45202

EMAIL rlauer@rkpt.com

OWNER Same as above TELEPHONE _____

ADDRESS _____

CITY _____ STATE _____ ZIP CODE _____

EMAIL _____

AUTHORITY OF APPEAL - Indicate the appropriate section of 1449-03 that qualifies you to make an appeal 1449-03(a)

NATURE OF APPEAL - I am appealing a decision/order of the (indicate case #): CBG1200224

Director of City Planning and Buildings (1449-13) ✓

Zoning Hearing Examiner (1449-15) _____

Historic Conservation Board (1449-15) _____

JUSTIFICATION FOR APPEAL - Attach a separate sheet explaining in detail the basis of your appeal.

SUBMISSION REQUIREMENTS

1. The applicant is required by Section 1449-15(b) of the Zoning Code to file within 21 days of filing notice of appeal; a complete record of the proceeding along with a transcript of all testimony.

   FEES: Residential -- 1, 2, & 3, Family -- $500 Multi-Family/Commercial -- $750

2. Eight copies of the complete case file, including this application and a transcript of any public hearing if applicable. **No submittal will be accepted unless these materials are spiral bound or in a notebook, indexed and all pages numbered.**

Signature _____ Date 1.23.12

city of CINCINNATI
PLANNING & BUILDINGS

July 10, 2012

V1P WEST 8TH LLC
3883 VIRGINIA AVE
CINCINNATI OHIO
45227

Re: 4410 W 8TH ST CINC BPP: 01800A810100
NOTICE OF VIOLATION
Case number: CBG1200224

To: V1P WEST 8TH LLC

This letter is a notice of violation and order issued pursuant to 1451-01 Cincinnati Zoning Code (CZC). Each code violation in the attached **violation listing** includes the action necessary to correct the violation. Unless otherwise specified in a violation, you are required to make the noted corrections within 30 days of the date of this notice. **Please call me at 352-3959 , between 8:00 am and 9:30 am Monday through Friday to acknowledge receipt of this notice.** If I do not hear from you within ten days, a copy of this notice will be posted on the building. Failure to correct the noted defects within the time specified could result in civil or criminal enforcement actions. All repairs, except minor repairs and decorating, require permits. Permits may be obtained at the Business Development and Permit Center located at 3300 Central Parkway.

You have a right to appeal certain orders under **Section 1449-09 (CZC)** within 30 days of the date of this notice by filing an appeal with the Secretary of the Board of Zoning Appeals at 3300 Central Parkway, Cincinnati, Ohio, 45225.

The City of Cincinnati has enacted various codes that regulate building standards and property maintenance throughout the City. Maintaining our homes and properties ensures the availability of decent and safe housing, contributes to an improved quality of life for all residents, and leads to an increase or stabilization of property values.

Your cooperation in correcting these violations will assist the City of Cincinnati in maintaining quality housing and property conditions in your neighborhood.

Sincerely,

Roger Foster

Roger Foster
District Inspector

Doc ID # GBIC10017

1 ABANDONMENT OF NONCONFORMING USE

CHAPTER 1447 of the Cincinnati Zoning Code, section 1447-07.

A nonconforming use of land or of a structure in a district that is abandoned may not be reestablished or resumed. Any subsequent use or occupancy of the structure or land must conform to the regulations for the district in which it is located.

Abandonment means the interuption for a period of 365 consecutive days of active or productive operations of the nonconformng use on the land or within the structure or the removal or destruction of the nonconforming elements. Any period of abandonment caused by governmental action and without any contributing fault by the nonconforming user is not considered in determining the period of abandonment.

CBG1200224

Justification for Appeal

V1P West 8th, LLC ("V1P") is the owner of the real property located at 4410 West 8th Street, Cincinnati, Ohio ("the Property"). The Property is improved with a nine-unit residential apartment building that was built in approximately 1955.

Effective February 13, 2004, the Property was rezoned "RMX," or "Residential Mixed." The RMX classification permits multi-family residential dwellings of up to three units. As a result of this rezoning, the use of the Property as a nine-unit multi-family dwelling became a legal, non-conforming use. The use of the Property as a multi-family dwelling has not changed since the enactment of the RMX zoning classification.

The CZC sets forth the "specific purpose" of the RMX classification: "This subdistrict is intended to create, maintain, and enhance areas of the city that have a mix of lot sizes and house types at moderate intensities (one to three dwelling units). *Existing multi-family buildings of four or more units are acknowledged but new construction is not permitted.*" CZC §1405-03(a) (emphasis added). Thus, by enacting the RMX classification, it is clear that the City intended to "maintain" and "acknowledge" existing structures like the Property; the classification was intended to limit *future* development of larger multi-family buildings.

V1P purchased the Property in May 2012. Subsequently, V1P sought and received building permits necessary to perform plumbing and electrical repairs to the Property. Prior to V1P's ownership, the Property was damaged by vandalism and theft, leaving the apartment units uninhabitable. At the time V1P sought the necessary building permits, it was not informed that a zoning permit would be required, or that there was any limitation on its ability to repair the Property and use it for its intended, residential purpose. V1P has been performing the needed repairs and expects to return the apartments to habitable condition in the near future.

In July 2012, a community organization called West Price Hill Block Clubs sent a letter to Majed Dabdoub of the City's Department of Planning and Buildings opposing "any effort to resume the abandoned non-conforming use of" the Property. On July 10, 2012, Roger Foster, Zoning Inspector for the City, issued to V1P a notice of violation and order pursuant to CZC §1451-01 ("the Violation"). The Violation suggests that V1P's repair of the Property is contrary to CZC §1447-07 which provides that a non-conforming use that is "abandoned may not be reestablished or resumed."

V1P contends that the Violation is illegal, arbitrary, capricious, unreasonable and unsupported by the preponderance of substantial, reliable, and probative evidence on the whole record. In addition, V1P contends that the Violation is unconstitutional.

V1P contends that the legal use of the Property as a nine-unit multi-family residential structure was never "abandoned."

Ohio law makes clear that the government, not the property owner, bears the burden of showing that a non-conforming use has been abandoned.[1] The government must show that there has been a "manifest intention to abandon the nonconforming use."[2] The intent to abandon must be coupled with acts or omissions implementing that intent.[3] "Non-use alone is insufficient to establish abandonment."[4]

In *Village of New Richmond v. Painter*, 2003 Ohio 3871 (copy attached), the court considered whether a vacant mobile home had been "abandoned" such that the owner lost the right to continue the non-conforming use of his property. The property owner admitted that he had not used the home as a dwelling for more than two years, and that repairs were necessary before it could be inhabited. But, the owner also testified that he did not intend to abandon the home and that he had made repairs since it had been damaged in a flood some time earlier. Under those facts, the court found that the Village had not satisfied its burden to prove that the owner had intentionally abandoned the non-conforming use of his property.

There is no evidence in this case (and there was none at the time the Violation was issued) that any owner of the Property intended to abandon its use as a multi-family dwelling. To the contrary, by obtaining building permits and making necessary repairs, V1P has affirmatively shown that it intends to continue to use the property as an apartment building. The fact that the apartments have been vacant for some period of time is not, alone, enough to constitute "abandonment" under Ohio law. That is especially so when, as here, the non-use was the result of damage to the Property rather than the affirmative acts of the owner. Accordingly, the claim that the non-conforming use of the Property was abandoned is contrary to both law and fact.

In addition, V1P reserves the right to raise the following constitutional and legal issues:

1. Enforcement of CZC §1447-07 in this situation would result in an unlawful taking of V1P's property without compensation and is, therefore, unconstitutional;

2. Because the City granted V1P's building permits and, thus, was aware of V1P's intent to repair the Property, and because V1P has incurred significant expenses in reliance on those permits, the City must be estopped from enforcing CZC §1447-07; and

3. Enforcement of CZC §1447-07 in this situation violates V1P's due process rights because such enforcement does not advance a legitimate governmental interest.

For all the reasons set forth above, the appellant respectfully requests that, pursuant to CZC §1449-17, the Zoning Board of Appeals reverse and vacate the Violation issued to it on July 10, 2012.

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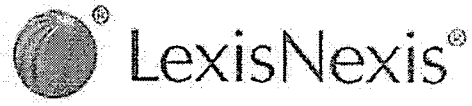
[1] *Board of Trustees of Williamsburg Twp. v. Kreimer* (1992), 72 Ohio App.3d 608.

[2] *Bowling Green v. Sarver* (1983), 9 Ohio App.3d 279.

[3] *Davis v. Suggs* (1983), 10 Ohio App.3d 50, 52.

[4] Id.



Cited
As of: Jul 16, 2012

VILLAGE OF NEW RICHMOND, Plaintiff-Appellant, -vs- DAVID PAINTER, Defendant-Appellee.

CASE NO. CA2002-10-080

COURT OF APPEALS OF OHIO, TWELFTH APPELLATE DISTRICT, CLERMONT COUNTY

2003 Ohio 3871; 2003 Ohio App. LEXIS 3490

July 21, 2003, Decided

PRIOR HISTORY: [**1] CIVIL APPEAL FROM COURT OF COMMON PLEAS. Case No. 2001CVH826.

DISPOSITION: Judgment affirmed.

COUNSEL: George Leicht, Bethel, OH, for plaintiff-appellant.

John Woliver, Batavia, OH, for defendant-appellee.

JUDGES: YOUNG, P.J. WALSH and POWELL, JJ., concur.

OPINION BY: YOUNG

OPINION

YOUNG, P.J.

[*P1] Plaintiff-appellant, Village of New Richmond ("Village"), appeals a Clermont County Court of Common Pleas decision finding that defendant-appellee, David Painter's, mobile/manufactured home was a lawful pre-existing nonconforming use of his property. We affirm the decision of the trial court.

[*P2] The Village of New Richmond passed a zoning code in 1975 that did not permit mobile or manufactured homes on the property upon which appellee's mobile/manufactured home ("home") is located. This property is located at 503 Washington Street, New Richmond, Ohio. However, the home has been in place since approximately 1973, and so was permitted to remain as a pre-existing nonconforming use. Appellee purchased the home and property in 1984. He rented the home from 1985 through 1997.

[*P3] In March 1997, a flood damaged the home. Appellee performed many repairs on the property, including repairing [**2] the skirting, washing the walls, leveling the deck, removing the furniture and carpet, and cleaning the refrigerator. In May 1997, the Village issued an occupancy permit to appellee for the home. Appellee continued to pay taxes on the property and home and maintain it; however, no one lived in the home after the 1997 permit was issued.

[*P4] In March 2001, the Village sent notices to appellee notifying him of noncompliance with existing zoning ordinances because no individuals had lived in the home since 1997. In May 2001, the Village notified appellee that it considered the home as being stored on the property.

[*P5] Consequently, the Village filed a declaratory judgment action against appellee. The trial court overruled the action and found that appellee maintained a lawful pre-existing nonconforming use of the property. The Village appeals raising one assignment of error as follows:

[*P6] "THE TRIAL COURT ERRED IN RULING THAT APPELLEE DID NOT VOLUNTARILY DISCONTINUE OR ABANDON THE PRE-EXISTING NONCONFORMING USE OF HIS MOBILE HOME LOCATED AT 503 WASHINGTON STREET, NEW RICHMOND, OHIO."

[*P7] The Village maintains that appellee has voluntarily discontinued or [**3] abandoned the nonconforming use of the home on the property for a period of more than two years. Therefore, it argues that appellee is in violation of the Village's zoning ordinance pertaining to the type of buildings that may exist where the lot is located.

[*P8] Article 4, Section 403.3 of the Village's zoning ordinance states that "if any such nonconforming uses of land are discontinued for more than two (2) years, (except when government action impedes access to the premises), any subsequent use of such land shall conform to the regulations specified by this ordinance for the district in which such land is located."

[*P9] The Village retains the burden of proving that appellee has voluntarily discontinued or abandoned the nonconforming use. *Board of Trustees of Williamsburg Twp. v. Kreimer* (1992), 72 Ohio App.3d 608, 595 N.E.2d 945. The Village must establish that there has been a manifest intention to abandon the nonconforming use. *Bowling Green v. Sarver* (1983), 9 Ohio App.3d 279, 9 Ohio B. 494, 459 N.E.2d 907. "Abandonment requires affirmative proof of the intent to abandon coupled with acts or omissions implementing the intent." *Davis v. Suggs* (1983), 10 Ohio App.3d 50, 52, 10 Ohio B. 59, 460 N.E.2d 665. [**4] Non-use alone is insufficient to establish abandonment. Id.

[*P10] Appellee has admittedly not rented or used the home as a dwelling for more than two years. Appellee also admits that he needs to replace the carpet in the home and reconnect the water, because the Village disconnected it. However, appellee testified that he did not intend to abandon the use of the home. After the flood, among other things, he replaced the water valve, repaired the skirting, washed the walls and leveled the deck. Appellee also testified that he continued to maintain the home, visiting it weekly to do such things as mow the lawn, coat the roof, check the electricity, and check the windows. Appellee paid the property taxes and mobile/manufactured home taxes on the property.

[*P11] The Village cites to *Sarver* and *Bell v. Rocky River Board of Zoning Appeals* (1997), 122 Ohio App.3d 672, 702 N.E.2d 910 for the proposition that once an owner discontinues the nonconforming use of property, the owner loses the nonconforming status. In *Sarver*, testimony was presented that the prior property owner did not want to continue the nonconforming use of renting the apartments on the [**5] property. In *Bell*, the property owner, who had operated a gasoline station as a nonconforming use, admittedly removed the gasoline tanks and stated that she intended to voluntarily discontinue selling gasoline forever.

[*P12] Unlike the property owners in *Sarver* and *Bell*, appellee has never affirmatively stated that he wants to discontinue the present nonconforming use of his property. Appellee has stated that he wants to continue using the property as a home.

[*P13] We cannot find error in the trial court's determination that the Village failed to establish that appellee abandoned or discontinued the nonconforming use of the property. Accordingly, the Village's assignment of error is overruled.

Judgment affirmed.

WALSH and POWELL, JJ., concur.