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July 7, 2021

Zoning Board of Appeals  
 City of Cincinnati  
 c/o Kasandra Maynes  
 805 Central Ave., Suite 110  
 Cincinnati, OH 45202

**Re: *Appellee Brief in ZBA Case No. Z-4061-2021, 1009-1015 Delta Avenue***

Dear Zoning Board of Appeals Members,

This letter is written on behalf of Appellees and owners, L&D Real Estate Holdings, LLC, L&D Real Estate Properties, LLC, Linwood Real Estate Holdings, LLC, and R2 Partnership (hereinafter “Owner”)<sup>1</sup>.

***1. Appellants’ scope of appeal is limited to the zoning relief requested as to the use variance/demolition; Appellants have not perfected an appeal regarding any other zoning relief granted by the Zoning Hearing Examiner.***

On April 29, 2021, the Cincinnati Zoning Hearing Examiner (“ZHE”) issued a decision regarding 1009-1015 Delta Avenue granting eight points of relief. The fifth request out of the eight granted is regarding the use variance/demolition relief in the UD District: “The Applicant’s request for a use variance to allow the demolition of the four existing structures on the Property is hereby **APPROVED.**”<sup>2</sup>

<sup>1</sup> See Auditor Reports, Exhibit 12. At the time of the previous application, the owner of parcel -0063 was Center for Change on Delta, LLC. Also, 3152 Linwood is included for purposes of retaining wall encroachment only.

<sup>2</sup> Record, pg. 000024.

Per CZC Sec. 1449-11, “Notice of appeal must be filed with staff for the Zoning Board of Appeals within 30 days of the date of mailing of the decision...” Mt. Lookout Community Council (“MLCC” or “Appellant”) filed its Notice of Appeal form and justification letter on May 27, 2021, within the 30 day period from the date of the ZHE decision. Per CZC 1449-13(a)(2), “(2) All appeals must be accompanied by materials specified on the application form.” Per the filing instructions on the application form, the Notice of Appeal must include, “[a] letter explaining *in detail* the reason for filing the appeal.” (Emphasis added). Per its May 27, 2021 letter, Appellants discuss only the fifth point of relief regarding the use variance for demolition. No other zoning relief granted on April 29, 2021 is mentioned. Therefore, Appellants’ only perfected appeal item is that related to item # 5 - demolition (further limited as explained below), and Appellee objects to the discussion or review of any of the other items for relief granted. **Appeals of such, and the bases for them, have not been perfected, and Appellee hereby objects to the discussion of, or evaluation of, the validity of any other items of zoning relief granted in the April, 29, 2021 ZHE decision.**

Further, in its appeal letter, Appellant states, “[t]he illegal decision of the ZHE invalidates the entire decision as the City of Cincinnati has no authority to permit the demolition of the buildings absent a showing that they are a threat to public health, safety and welfare and have been ordered to be demolished.” **As the Appellants have not perfected an appeal for any of the other seven items of relief granted by the ZHE, there is no possibility that the ZBA’s decision as it relates to the demolition issue could ever, “invalidate the entire decision,” of the ZHE.**

Should the Appellants and ZBA disagree with this objection, Appellee hereby incorporates by reference the aspects of the ZHE justification letter which address the other relief sought, found in the record under justification letter sections IV(A) – Record, 000041 to 46, and IV(C) through (F), Record, 000050 to 000062.

***2. Appellants' scope of appeal is limited to whether the demolition request was permitted on procedural grounds; Appellants have not perfected an appeal regarding the merits of the use variance request itself.***

With respect to the minimum requirements for perfection of an appeal, Appellee hereby incorporates section (1), above. Per CZC 1449-13(a)(2), "(2) All appeals must be accompanied by materials specified on the application form." Per the filing instructions on the application form, the Notice of Appeal must include, "[a] letter explaining *in detail* the reason for filing the appeal." (Emphasis added).

Just as Appellant filed a Notice of Appeal and justification letter which does not include any commentary with respect to seven of the eight points of relief granted by the ZHE, Appellee likewise has provided nothing to indicate its intent to appeal the substance of the demolition-related use variance. Appellants' May 27, 2021 letter is confined solely to the question of whether the ZHE had jurisdiction to review the requested use variance within the use variance review procedure. There is no discussion as to how the ZHE's decision to grant the demolition within the use variance standards of CZC 1445-16 is substantively deficient or in error. In other words, it does not explain, "in detail," as required by the appeal form and by the CZC, why the use variance should be overturned. In fact, it does not even indicate that if the ZBA finds the procedural grounds for the use variance appropriate, that the use variance was in error.

Appellees therefore have not been placed on adequate notice to explain or defend the ZHE's decision to approve the use variance, and the 30-day period in which the Appellants had that opportunity has long since passed. Thus, Appellants have only perfected an appeal related to the ZHE's jurisdiction to review the use variance, and have not perfected an appeal related to the merits of the request. **Appellee objects to the discussion or review of the merits of the demolition within the confines of the use variance procedure, as Appellee takes the position that such appeal has not been perfected.**

**Additionally, because Appellants have only perfected an appeal related to the jurisdiction/procedural issue, Appellee objects to any witnesses being called at the hearing.**

The matter appealed is purely a legal argument and no witness testimony is appropriate. Should the Appellants and/or ZBA disagree with this position, Appellant hereby incorporates by reference its ZHE justification letter section IV(B) – Record, 000041 to 46, and IV(C) through

(F), Record, 000047 to 000050 which explains the substantive basis for the use variance request. And, should the ZBA disagree with the Appellee's position regarding witnesses, Appellant reserves the right to call its own witnesses to speak at the hearing.

**3. Procedural Grounds for Use Variance Request – Response to Appellants' Appeal.**

CZC Sec. 1437-09(i)(D1) states that demolition of a structure in the UD District is only permitted if, “[d]emolition has been ordered by the Director of Buildings and Inspections for reasons of public health and safety.” Because this provision completely cuts off a property owner's ability to return the property to a vacant use of land, without providing the minimal due process provisions, the Owner sought a use variance from the ZHE to allow the demolition within the UD District to move forward.

The Appellant asserts that the Owner may not seek to demolish the existing structures under the use variance procedure because the, “ZHE simply does not have the authority to grant a variance in this instance.” Owner applied for the use variance at the direction of the ZBA. MLCC asked the ZHE to dismiss Owner's request for a use variance, thereby ignoring the ZBA's remand of the demolition issue in Case No. Z-4053-2020 to be reviewed under the CZC use variance standard. The Appellant is now appealing the ZHE's denial of its motion to dismiss the Appellee's request for a use variance. The ZBA's determination that the use variance was an appropriate means by which the demolition remedy may be sought, and the ZHE's decision to honor that procedural directive, were proper for the following reasons.

*i. The Owner is seeking a vacant use of the land.*

The existing language of the demolition standards requires that **only** structures that have been deemed condemned may even be considered for demolition, and that those structures which are not condemned, are devoid of relief from the zoning code. This amounts to a prohibition on returning land to “vacant” within the UD District. This is true even where the properties sought to be demolished are not in conformance with the existing zoning on the property, and the granting of the demolition will help a property to ultimately achieve greater conformance with the zoning code. MLCC's interpretation of the CZC leaves no path for relief for the Owner – it amounts to a violation of the Owner's due process rights, and exacts an unconstitutional taking on the property by denying it any and all economical viable use of the land.

The ZBA and ZHE recognized this when they interpreted the use variance option as the appropriate administrative method by which such relief may be sought.

CZC Sec. 1445-16 states, in pertinent part, “...No variance shall be granted to allow a use not permissible under the terms of the Zoning Code or the Land Development Code in the zoning district in which the property is located...” The Applicant here is seeking a demolition of buildings – i.e., a return to the use of the land within the district as “vacant land”. The UD District regulations unlawfully and unconstitutionally prohibit this change of use without, at minimum, a condemnation order on a property. Vacant land is indeed a “use of land” in the zoning code, and the use variance sought by Appellants should be granted to achieve that use.<sup>3</sup>

*ii. A notwithstanding ordinance is relief from procedure; Owner is seeking relief from a zoning requirement within the confines of the existing procedure.*

MLCC asserts that because Notwithstanding Ordinances (NWO's) exist as a general means of relief from some Cincinnati municipal provisions, that the use variance sought by Owner was improper. Specifically, MLCC describes the NWO as, “a process by which City Council can vary laws in extraordinary circumstances.”<sup>4</sup> This is an incorrect description of the NWO mechanism. The exact wording of CMC Sec. 111-5 governing NWO's states that when seeking a NWO, “[t]he property owner shall file a written application with the Director of City Planning outlining the need for *relief from existing legislative and administrative procedures.*” (Emphasis added). The Owner in this case seeks relief from the requirements of section CZC Sec. 1437-09(i)(D1) which prohibits returning the property in the UD District to vacant land via demolition. Owner sought the use variance to allow such demolition within the confines of the existing use variance procedure – the Owner did not seek relief from the “procedure” itself. The Owner is not seeking relief from, “existing legislative and administrative procedures.” Relief from the CZC provisions, and relief from procedures, are distinct.

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<sup>3</sup> CZC 1401-01-L18 defined a “vacant lot,” as, “a lot without a building or structure.”

<sup>4</sup> Suder Appeal Letter, Record Pg. 000008.

- iii. *Even where the use variance method was improper, its use should not occasion reversal of the ZHE decision because Appellants have not described how their rights have been violated, or how they have been unduly prejudiced by the procedure employed, and the procedure followed imposes the highest burden of proof required of a requestor.*

Additionally, the decision of the ZHE as to the use variance sought should not be reversed because the Appellants have not articulated in any way whatsoever how the procedure employed has violated their rights or prejudiced them. And, if it did, such grievances should have been detailed in the Appellants' notice of appeal. **Appellee objects to any discussion of how such decision violates their rights or prejudices them, as Appellant has not put Appellant on notice by detailing the grounds of such grievances in its Notice of Appeal, as required by CZC Sec. 1449-13(a)(2).** Even if this board were to find that the procedure for relief was improper, it should not be grounds for reversal because the procedure employed amounts to harmless error. "A harmless error is one which does not affect the substantial right of the parties." Civ.R. 61; *Knor v. Parking Co. of America*, 73 Ohio App. 3d 177, 189, 596 N.E.2d 1059, 1066, 1991 Ohio App. LEXIS 1658, \*18; *Leichtamer v. Am. Motors Corp.* (1981), 67 Ohio St.2d 456, 475, 21 O.O.3d 285, 297, 424 N.E.2d 568, 581.

"Mere proof of a procedural violation by itself is insufficient to warrant judicial relief, and Ohio courts will ignore 'harmless' errors which do not affect the substantial rights of the parties..." *Motorists Mutual Insurance Company v. Hall*, -- Ohio App. 3d --, 2005 Ohio 3811, -- N.E. 2d --, 2005 Ohio App. LEXIS 3505 (July 28, 2005).

"In litigation arising from the parties' business disputes, although the trial court employed the clear and convincing evidence standard for purposes of appellee's fraud claim, rather than the proper preponderance of the evidence standard because he was only seeking compensatory and punitive damages rather than reformation or rescission of a contract, any error was harmless; the trial court had still found that fraud was proved under the higher burden of proof." *Aztec Int'l Foods, Inc. v. Duenas*, -- Ohio App. 3d --, 2013 Ohio 450, -- N.E.2d --, 2013 Ohio App. LEXIS 370 (Feb. 11, 2013).

Here, (1) MLCC has not appealed the substance of the decision to grant the use variance – simply that the variance, procedurally, was an improper vehicle for relief; (2) MLCC was afforded full notice and opportunity to be heard with respect to the relief sought before multiple administrative boards on the current and prior application; and (3) the use variance relief sought by the owner is subject to the, “clear and convincing evidence” standard – the highest burden of proof available in any administrative review available before any administrative body within the City of Cincinnati. Appellants appeal to this Board citing the “incorrect” procedure, but they do so having given absolutely no reason why such procedure deprives them of rights they would otherwise have, or unduly prejudices them. If anything, the procedure employed provides the highest proof threshold required of administrative applicants within the confines of City of Cincinnati administrative procedures, it does so while providing opponents a full opportunity to object to the substance of the request, and the Appellees were granted relief based on meeting those high standards over the objections of the Appellants in a full and fair hearing.

And finally, the procedure employed does not ignore the zoning requirements of the district. The set of use variance standards require an Applicant to explain by clear and convincing evidence why the request, while varying the use in a district, allows the property to otherwise meet the standards and goals of the zoning code. The Owner explains in the justification letter why the use variance sought conforms with all of the use variance standards (CZC 1445-16(a) through (g)), including those specifically requiring the request to advance the goals of the UD district in which the property is located (CZC 1445-16(f) requiring that the variance sought, “...will be consistent with the general spirit and intent of the Zoning Code or the Land Development Code, as applicable...”).

The Appellee asks that the ZBA consider the Appellants’ appeal only to the extent such appeal has been properly perfected, placing Appellee on notice as to Appellants’ reasons for objection. And to the extent that the ZHE’s order has been properly appealed, Appellee respectfully requests that this Board uphold the decision of the ZHE.

Sincerely,  
***s/ Kathleen F. Ryan***  
*Attorney for Owner/Appellee*