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July 8, 2021

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

Re: *Follow up to Appellants' 7-7-2021 position - ZBA Case No. Z-4061-2021, 1009-1015 Delta Avenue*

Dear Zoning Board of Appeals Members,

In their notice of appeal letter, Appellants present a single appeal argument related to the procedural/jurisdictional basis of the use variance for demolition. At the end of the letter, Appellants suggest that based on this argument, the entire application should be overturned. No additional letters of justification were submitted by Appellants within the 30-day appeal period, or within the 21-day period following that period, accompanying the filing of the record.

Appellees were concerned with the Appellants' approach where they provide justification for their appeal solely related to jurisdictional grounds on the demolition variance issue and then expect the ZBA to overturn the entire application for all zoning relief based on this single, demolition-related appeal statement. On July 7, 2021, Appellees submitted their response to this letter outlining their concerns regarding this approach, and asked the ZBA to consider the proper scope of what is actually before the Board. Appellees' counsel received the attached email from Appellants' counsel shortly thereafter, confirming the Appellants' suspected position.

Appellees wish to respond to Appellants' confirmed position, which if followed, would deprive the Applicant/Owner of their vested property rights and the due process to which they are entitled, and which is not in line with the CZC or zoning law.

I. The Applicant/Owner must be put on adequate notice of the position of the Appellant.

As previously stated, notices of appeal under the CZC are required to provide a letter, stating “in detail” the basis of the appeal. This has long been the practice related to appeals to this body, and for good reason. Opposing parties must be put on notice as to the reasons for the appeal, so that they have a time to evaluate the substance and strength of the Appellant’s position, and to respond to and rebut those assertions. This is especially the case where the Appellee position is occupied by an Owner/Applicant whose property rights are at stake.

And, just as an applicant is on the hook to explain to the ZHE why individual requests for zoning relief meet the standards of the CZC, and opposing parties have the opportunity to respond to those requests; a party wishing to overturn the zoning relief granted to an applicant must provide some detailed basis for that position so that the Appellee/Applicant has a full and fair opportunity to respond. Appellants have not met that minimum burden.

Here, the Appellants’ expectation that the Owner/Appellees’ vested rights to the new construction and hillside relief they received would be revoked because of a demolition issue, is inappropriate. This hearing is not a “*de novo*” hearing – this is a record hearing before the ZBA. In other words, this is not simply an appellant’s shot at a second look at the entire application, by a different body. The ZBA is evaluating the ZHE’s decision on the record, and must determine whether, “the order, adjudication, or decision [of the ZHE] is illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence on the whole record.”

Appellees can only guess what the Appellants’ position is on why the use variance should be overturned – beyond the jurisdiction issue. The Appellants appealed to this body with a two-page justification letter explaining why they feel the use variance, from a jurisdictional perspective, is inappropriate. There is a total absence of narrative addressing why, should the ZBA find the use variance approach to be appropriate, they find the ZHE’s granting of the use variance to be in error from a substantive perspective. There is absolutely nothing in the letter providing why the Appellees’ request for a use variance under the CZC standards fails to meet the standards of the CZC, or why the ZHE’s granting of it was improper.

II. Appellees’ rights to the New Construction permit are vested; the status of the demolition permit does not change that.

Appellees' position, if followed by the ZBA, would afford the Appellants the opportunity to have the Appellees’ new construction approvals revoked without presenting a single explanation or justification for such revocation. This is inappropriate and falls far short of the minimum due process rights enjoyed by the Owner/Appellee. The City of Cincinnati Buildings and Inspections utilizes the adjudication letter as a “gatekeeping” mechanism to all permits sought by an applicant. Should an applicant seek a demolition, that demolition requires a permit, and may require certain relief prior to the issuance of that permit. Should an applicant request a permit for new construction that may require a series of variances or other

administrative relief, in order to be granted. The adjudication, or “denial” letter, guides the applicant with respect to the applicant’s requests and the respective need for relief.

Here, the applicant may seek two items separately: a demolition in the UD district, and new construction in the UD District. The demolition will require a demolition permit to be issued, and the new construction as proposed requires a building permit, cut/fill, and retaining wall permit to be issued. The City staff properly issued five adjudication letters related to this variety of requests: (1) four adjudication letters responding to the demolition request for each of the four houses: 1009, 1011, 1013, and 1015 Delta – those four letters are found in the record, pages 102 to 105; and (2) a UD new construction adjudication letter which outlines the seven points of hillside and design/site plan related-relief tied to new construction – found in the Record on pages 100-101. The Appellees duly filed their requests with the ZHE in response to these five letters.

Per CZC Sec. 1437-11(a), “[i]f the Zoning Administrator determines the application does not conform to the requirements of § 1437-09, a hearing and decision by the Zoning Hearing Examiner is required, pursuant to Chapter 1443, Zoning Hearing Examiner Procedures, prior to the issuance of a building permit.” Plans examination followed this by issuing adjudication letters stating that ZHE relief was needed for the demolition and new construction permits sought. Here, the ZHE granted the seven points of relief the City Staff determined were needed as part of the new construction permit, as outlined in the adjudication letter, pages 100-101. As the granting of new construction under these seven points was not appealed, the Appellees’ right to the permits related to this new construction, is vested. CZC §§ 1443-09 and 1441-09 provide that construction permits must be obtained within two years of a ZHE’s decision, and the rights related to that permit are vested:

§ 1443-09. - Zoning Hearing Examiner Decisions.

- (a) *Permit Expiration and Extension.* A permit for construction or the use of land or buildings for which an approval has been granted must be obtained within two years from the date of the decision of the examiner, unless the decision specifically provides a different time frame for commencement of work. Prior to the ending of the two year period, the applicant may submit a written request for an extension of the decision to the Zoning Administrator. If the Zoning Administrator determines that the approval is still in compliance with all applicable codes, the decision may be extended for an additional six months. Any further extension requires the approval of the examiner; a public hearing is not needed for such approval.

§ 1441-09. - Building Permits.

(c)Time Limits for Zoning Approvals. Issuance of a building permit vests the applicant the right to construct the work for which the permit was issued in accordance with the provisions of the Cincinnati Zoning Code in effect at the time of application. That right expires with the expiration of the building permit as provided in the Cincinnati Building Code, Title XI of the Cincinnati Municipal Code.

Appellants' argument that you cannot build the buildings without demolition, holds no water with respect to the legal rights attached to the property. Should this board reverse the use variance, the Appellants are still entitled to seek any other remedy for demolition that may be appropriate, and if such demolition approval is obtained within that two-year period that the new construction approval is still active, the applicant can proceed with the demolition and the new construction. Examples of situations where the ZBA overturns the demolition permit, but the Appellees obtain a legal right to the demolition in that period include, but are not limited to: (1) Applicant appeals to the common pleas court on the demo issue, and either settles to obtain the permit, or the court reverses the ZBA and grants it; (2) the buildings reach a condition under which the demolition is ordered; (3) the CZC is amended to provide a more flexible means for relief than the current version, and the applicant seeks that relief; (4) the ZBA decides the Appellants' argument about notwithstanding ordinances is correct, and the applicant seeks and obtains approval via that means, to demolish the buildings.

In other words, while the Appellees believe that the use variance approach used is appropriate for the reasons outlined in the July 7, 2021 letter, there are a number of other ways the demolition permit may conceivably be obtained in the two-year period in which the Appellants retain a right to the new construction approvals granted by ZHE. There is simply *no* basis to revoke/overturn the ZHE's new construction approvals based on the current appeal, and the right to the new construction approvals are vested.

III. An argument can reasonably be made that if a new construction permit is revoked, then the demolition variance is, too – but the reverse approach employed by Appellants does not have this effect.

Our rationale provided to the ZHE for the new construction did not rely in any way on the demolition variance sought. The demolition variance sought *did* rely on the new construction proposed. The ZHE granted the demo permit in large part to pave the way for a new construction that is in keeping with the district. The ZHE did not grant the new construction based on the Applicants' need for demolition.

To put it another way, had the Appellants appealed the substance of the new construction permit, and the ZBA fully or partially overturned the seven points of relief comprising that request, the Appellants could reasonably make the argument that the eighth point of relief - use variance - should be revoked too. This is because the use variance request was made, and granted, in part on the fact that the demolition makes way for new construction that is much

more in keeping with the district. The Appellants could argue, if the demolition permit was granted to make way for this new construction that the ZHE finds to be in the interest of the community and in conformance with the intent of the code, and that new construction approval goes away, then the underlying basis for the use variance for demolition goes away, too. That approach would be logical, but the reverse approach employed by Appellants is not.

The new construction proposed supports the demolition request, but not the other way around. Here, the Appellants are arguing the reverse – that if the demolition approval is found to be inappropriate, that it undermines the basis for approval of the UD new construction. This is not the case. The need to demolish the buildings is necessary from a practical perspective, but it does not form the basis of rights to build on the property from a *legal* perspective.

So long as the Applicant retains or obtains a legal means to demolish the four houses within the two-year period that its new construction approvals are active under 1443-09, the new construction approval has no grounds for revocation or reversal by this body. If the Appellant desired a means to obtain the reversal/revocation of Appellees' new construction approvals, it should have filed a notice of appeal that states that the seven points comprising the new construction relief are being appealed, and explained in detail, the basis for such position. That did not occur here, and the appeal period to do so has since passed.

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

KFR
3089129.1

Kathy F. Ryan

From: Sean Suder <Sean@Ssuder.com>
Sent: Wednesday, July 7, 2021 4:27 PM
To: Kathy F. Ryan
Subject: RE: Letter from Appellee in Case Z2021-0005 1009 Delta Ave

Kathy,

I reviewed your letter brief in opposition to the appeal. I am puzzled by the argument that we did not perfect our appeal. I believe the argument to be disingenuous to the ZBA and ask that it be withdrawn in advance of the hearing.

The appeal was perfected on the issue we appealed and addressed in detail in our appeal letter. If the demolition is overturned because the use variance is overturned as a matter of law (there are no facts in dispute around the issue of demolition because it is undisputed that the city did not issue any type of emergency demolition permit and, therefore, demolition is not permitted in the UDOT), then none of the other discretionary issues matter. The development cannot proceed without demolition of the existing structures. This is a threshold issue. The demolition should have never been granted under the law. We perfected a timely appeal on this issue. I hope that you will correct your response to be more accurate.

Thank you,
Sean

Suder llc

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From: Kathy F. Ryan <KFRyan@woodlamping.com>
Sent: Wednesday, July 7, 2021 1:04 PM
To: 'Maynes, Kasandra' <Kasandra.Maynes@cincinnati-oh.gov>; Sean Suder <Sean@Ssuder.com>
Cc: Paul Schirmer <paul.schirmer@cdsg-us.com>
Subject: Letter from Appellee in Case Z2021-0005 1009 Delta Ave

Kasandra and Sean

Attached please find a letter on behalf of Owner/Appellee in the above captioned ZBA case. Thank you.



Problems solved.

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