

**ZONING BOARD OF APPEALS
CITY OF CINCINNATI, OHIO**

IN RE:	:	Case No.: Z-4058-2021
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APPEAL OF HISTORIC CONSERVATION BOARD CASE NOS. COA20210006 / ZH20210007 – 1617 ELM STREET AND 1621 LOGAN STREET	:	BRIEF IN OPPOSITION TO MOTION TO DISMISS
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For its brief in opposition to Owners’ Motion to Dismiss Appeal filed in the above captioned case, now come Appellants OTR Community Housing, Over-the-Rhine Foundation, OTR ADOPT, Danny Klingler, Margy Waller, Jennifer Lemasters Wirtz, Ted Leavitt, Vicky Leavitt, Peaslee Neighborhood Center, and Bonnie Neumeier.

BRIEF IN OPPOSITION TO APPEAL

Appellees’ motion is a complete distortion of the Cincinnati Municipal Code (“CMC”). It is nothing more than an attempt to block this Board’s jurisdiction over this non-conforming development and silence the voices of long-invested Over-the-Rhine stakeholders. In their motion, Appellees conveniently and incorrectly argue that the Historic Conservation Board is somehow subordinate to the City Planning Commission simply because the subject properties are located in a Planned Development (“PD”) district. Their argument is contrary to a plain reading of the Cincinnati Zoning Code (“CZC”) and the final appealable decision of the Historic Conservation Board dated April 7, 2021 (the “HCB Decision”).

If the CZC operated as Appellees suggest, which it does not, any property owner could rezone their property to a PD district in an attempt to avoid the authority of the Historic Conservation Board (“HCB”). This is exactly the result the Cincinnati City Council voted to avoid in adopting Cincinnati

Zoning Code (“CZC”) Section 1435-011-2 “Relationship to Planned Development (PD) Districts.”

Section 1435-011-2 reads in part as follows (emphasis added): **“the Historic Conservation Board shall make written findings to the City Planning Commission about its approval, conditional approval, or denial of any certificates of appropriateness....”** The HCB is clearly charged with making a final decision on certificates of appropriateness (COAs) as evidenced by the use of the words “findings,” “approval” and “denial.” The CZC does not use the words “suggestion,” “guidance” or “advice” as Appellees would like. Appellees conveniently did not attach a copy of the **“DECISION”** of the Historic Conservation Board dated April 7, 2021 (the “HCB Decision”) to their motion (emphasis added), which on its face in all bold, capital letters that “[t]he Certificates of Appropriateness are **APPROVED.**” (Decision at 1) (emphases in original).

The HCB Decision summarizes Appellees’ request as “a Certificate of Appropriateness to construct a five-story mixed-use structure at the corner of Liberty and Elm Streets, a Certificate of Appropriateness to construct a six-story residential structure on Logan Street and approve the demolition of a non-contributing building.” (Decision at 1). After hearing evidence and testimony on the application, the Board made findings of fact and conclusions of law. (Decision at 2-4). Among its conclusions of law, the HCB makes a point to recognize that the Historic Conservation Board is the sole arbiter of certificates of appropriateness (City Administrative Code Article XXX, Section 4), that Zoning Code Section 1435-09 contains the procedure by which the Board hears and decides certificates of appropriateness, that Zoning Code Section 1435-09-2 “authorizes the Board to approve certificates of appropriateness,” and that Zoning Code Section 1435-011-2 requires the Board to “review ‘all final development plans...located within or overlapping a Historic District,’ and submit ‘written findings to the City Planning Commission about its approval, conditional approval, or denial of any certificates of appropriateness.” (Decision at 4). The final conclusion of law (No. 5) is particularly damning to

Appellees' motion because it expressly states that the Board "determines" and "APPROVES" the certificates of appropriateness. (*Id.*) (emphasis in original). If the HCB had intended to simply provide advice or a recommendation relative to the certificates of appropriateness it would have titled the document as a recommendation or advice, not as a "DECISION" and it would not have used the words "determines" and "APPROVES." (*Id.*, at 1, 4) (emphases in original).

Further, Appellees ignore Zoning Code Section 1435-05-5, which provides as follows (emphases added):

Any Adversely Affected Person may appeal a decision of the Historic Conservation Board or the Urban Conservator, as applicable, made under this Chapter 1435 to the Zoning Board of Appeals pursuant to Zoning Code Chapter 1449. Notwithstanding anything to the contrary contained in this Chapter 1435 or Chapter 1449, all appeals of certificates of appropriateness shall be to the Zoning Board of Appeals pursuant to Section 1449-01(b).

Nowhere does the CZC strip away the authority of the Zoning Board of Appeals to review a final decision of the Historic Conservation Board irrespective of a property's location in a Planned Development District. To the contrary, Section 1435-05 preserves this right. This Board does not have the authority to amend or add language to the CZC to suit Appellees' desire to avoid an appeal hearing on the merits.

While Section 1435-011-2 provides that the City Planning Commission may overrule the HCB's decision by a super-majority vote as part of the Final Development Plan approval, regardless of the City Planning Commission ruling, the CZC makes clear that all HCB decisions on a certificate of appropriateness are separately appealable to the Zoning Board of Appeals. If the City Planning Commission had overruled the HCB's decision, which it did not, that decision could be appealed to the Zoning Board of Appeals under Section 1435-011-2. Likewise, if the City Planning Commission does not overrule the HCB's decision, which is the case here, that decision can also be appealed to the Zoning Board of Appeals under Section 1435-05-5.

The CZC does not require an appeal of the City Planning Commission's decision on a final development plan approval in order to appeal the decision of the HCB as Appellees argue. That is one pathway to appeal, but Section 1435-05-5 preserves the right to appeal a decision on a certificate of appropriateness directly to the Zoning Board of Appeals *notwithstanding* any other path to appeal.

Appellees seemingly understand this legal reality, which is why they have mischaracterized the HCB's decision as mere "advice" in an attempt to avoid the legal reality of Section 1435-05-5. Appellees' mischaracterization of the Decision as mere "advice" is not only demeaning to the HCB and its statutorily determined role in making decisions that impact the national historic treasure that is the Over-the-Rhine neighborhood. Moreover, it is simply incorrect and contrary to the HCB Decision and the law.

For all of the aforementioned reasons, Appellees' motion is contrary to the Cincinnati Zoning Code, contrary to law, and misleading, and it must be overruled. Appellants timely appealed the HCB Decision and deserve a full and fair hearing on the merits. To rule otherwise in light of Section 1435-05-5 would be a flagrant violation of Appellants' constitutionally protected rights of due process, equal protection, freedom of speech, and property, *inter alia*, under applicable local, state, and federal laws, including, but not limited to, U.S.C. Section 1983, *et seq.* If Appellees believe their argument has merit, which it does not, they can attempt to convince the Hamilton County Court of Common Pleas under R.C. 2506.01, *et seq.* that this Board lacks jurisdiction over this appeal after Appellants have received a full and fair hearing according to their constitutionally protected rights. It is not for this Board to elect to silence the voices of long-invested Over-the-Rhine community members because Appellees do not want their case challenged on the merits.

Respectfully submitted,

SUDER, LLC

/s/ Sean S. Suder

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was sent by electronic mail to Thomas M. Tepe, e-mail ttepe@kmklaw.com, of Keating Muething & Klekamp PLL, One East 4th Street, Suite 1400, Cincinnati, Ohio 45202, and Timothy M. Burke, e-mail tburke@manleyburke.com, of Manley Burke, 225 West Court Street, Cincinnati, Ohio 45202, attorneys for the Appellant, this 10th day of June 2021.

/s/ Sean S. Suder

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