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May 18, 2010

Brian Jimenez
City of Lawrence
1 Riverfront Plaza, Ste 100
P.O. Box 708
Lawrence, KS 66044

RE: 12th & Haskell Recycle Center

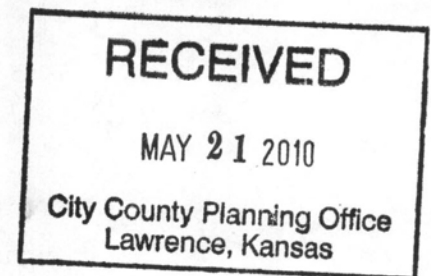
Dear Mr. Jimenez:

On behalf of my client, Bo Killough/12th & Haskell Recycling Center, please accept this letter as a response to your Notice of Violation dated May 4, 2010.

The primary violation you have asserted is that "the current use of the property has been expanded to a greater intensity than permitted in 2003 and is now classified as an Open Use of Land (salvage yard) which is not permitted." We respectfully dispute this finding both in law and fact.

To begin with, you assert that the property has "greater intensity than permitted in 2003." Although there is no question that my client's business has picked up over the years, it is well settled in Kansas that as long as the use does not change, the intensity of that use can expand. *See Union Quarries, Inc. v. Board of County Comm'rs*, 206 Kan. 268, 276, 478 P.2d 181 (1970). Specifically the Kansas Supreme Court has stated:

Generally speaking, the rule forbidding the enlargement or extension of a nonconforming use does not prevent an increase in the amount of use within the same area, so that a nonconforming use may be not only continued but also increased in volume and intensity. A nonconforming use is not limited to the precise magnitude thereof which existed at the date of the ordinance, but may be increased by natural expansion, and a nonconforming use is not unlawfully enlarged or extended although the number of employees has almost doubled. The natural growth of a business or an increase in the



amount of business done is not a change from the nonconforming use permitted by the zoning ordinances.

Thus, we believe the law is clear that the City can not punish my client because the recycling business has grown over the years.

You also allege that the “use has expanded.” To the extent you are alleging that the use has changed over the years, as opposed to the intensity of that use, the obvious question becomes, what was the “use” in 2003 and what is the use today.

The determination of the use of the property is determined by Section 20-1702 of the Development Code. This section sets out factors to be considered when trying to determine a “use.” The Code then requires you to match those factors in the defined uses in the Code. Upon examination of the definitions provided in the code, it is clear that the primary use of the property since 2003 has been as a “Recycling Facility”. A Recycling Facility is defined in Section 20-1752 as:

A facility for the collection and/or processing of Recyclable Materials. . . . (1) Collection Facility. A center or a facility for the acceptance by donation, redemption, or purchase of Recyclable Materials from the public . . . (2) Processing Center. A building or enclosed space used for the collection and processing of Recyclable Materials. Processing means the preparation of material for efficient shipment, or to the end-user’s specifications, by such means as baling, briquetting, compacting, flattening, grinding, crushing, mechanical sorting, shredding, cleaning and remanufacturing.

This is exactly how Mr. Killough has used the property since he purchased it. That is, when it opened, the business took in used/damaged house wares, outdoor appliances and furniture to be reassembled and sold. Those that could not be fixed and resold were compacted and taken to Topeka to be sold as scrap metal to be recycled. The property was not used as a salvage or junk yard – that is, customers were not allowed to come on-site and buy parts or broken machinery. It is also important to note, that from the beginning, Mr. Killough took aluminum cans and other scrap metal (not house wares, appliances and furniture) to Topeka to be sold and recycled. Thus the use of the property has always been as a recycling center that took in recycled materials and either “remanufactured them” or prepared the material for “efficient shipment.” Although it is true that Mr. Killough now accepts additional recycled materials (plastic, newspaper, etc..), such activity is within the “use” of Recycling Facility. Therefore the use has always been as a recycling facility, it has never been a salvage or junk yard, and the “use” has not expanded (the intensity has, but not the use itself).

You also contend that the 12th & Haskell Recycling Center is an “Open Use of Land” and is therefore barred under Section 20-1502(d). However, as you point out, Open Use of Land is defined in Section 20-1701 as “a use that does not involve improvements other than grading, drainage, fencing, surfacing, signs, utilities, or Accessory Structures. Open

uses of land include, but are not limit limited to auction yards, auto wrecking yards, junk and salvage yards, dumps, sale yards, storage yards, and race tracks.”

My client’s operation has always been very clear, they recycle material, they do not operate a salvage yard. Although “salvage yard” is not defined in the Code, traditionally a salvage yard is lot that is used to store junk or salvaged materials to be resold to the public. That is simply not what my client does. He only stores material for the “efficient shipment” of it to processing centers. To the extent that you wish to make it clear that my client can not act as a salvage yard, my client is willing to make such a stipulation.

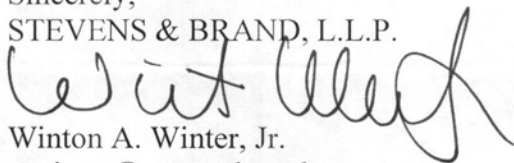
Given the above discussion, we do think it is important that City come and inspect the operation to satisfy itself that it is a recycling facility, not a salvage yard (and thus not an Open Use of Land). Please contact me and we can arrange such a tour.

As to the other issues presented in your letter: storing materials in the Floodplain Overlay District, completing the work on the pending floodplain development permit and adding surfacing to prevent the deposits of mud; these are all items my client wishes to continue to work with the city to accomplish once the nonconforming use issue is resolved. That is, my client has solutions ready to implement to solve those issues and looks forward to working with the City to implement those.

Finally, it should be noted that my client wants to be a good neighbor and would like to work with the City and the neighbors to come up with actions on how he can to eliminate or mitigate the concerns of the neighbors. To that end, please find a copy of the recent letter he received from KDHE acknowledging he has addressed all of their concerns. Any help the City can give in facilitating a working relationship with the neighbors would be appreciated.

Thank you for your continuing cooperation in this matter and I look forward to hearing from you to arrange a tour of Mr. Killough’s facility.

Sincerely,
STEVENS & BRAND, L.L.P.



Winton A. Winter, Jr.

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cc: Scott McCollough
Sheila Stogsdill
John Miller
Bo Killough