

LAWRENCE BOARD OF ZONING APPEALS

AGENDA

MARCH 2, 2017 – 6:30 P.M., CITY COMMISSION MEETING ROOM, FIRST FLOOR OF CITY HALL AT SIXTH AND MASSACHUSETTS STREET, LAWRENCE, KANSAS

CALL THE MEETING TO ORDER

TAKE A ROLL CALL TO DETERMINE IF THERE IS A QUORUM OF MEMBERS PRESENT

ITEM NO. 1 COMMUNICATIONS

- a) Acknowledge communications to come before the Board.
- b) Board member disclosure of any ex parte contacts and/or abstentions from the discussion and vote on any agenda item under consideration.
- c) Announce any agenda items that will be deferred.

ITEM NO. 2 MINUTES

Consider approval of the minutes from the February 2, 2017 meeting of the Board.

ITEM NO. 3 ADOPT FINDINGS OF FACT FOR BOARD OF ZONING APPEALS DECISION UPHOLDING STAFF'S ADMINISTRATIVE DECISION DENYING THE SUFFICIENCY OF APPELLANT'S EVIDENCE TO SUPPORT REGISTRATION OF A 5-UNIT NON-CONFORMING RESIDENTIAL USE AT 433 OHIO STREET

Consider adopting findings of fact as reasons for the Board's decision in the matter of the following appeal:

B-16-00522: Consider an appeal filed by Paul R. Horvath, Morning Star Management, LLC, representing Jason E. Horvath, property owner of record of the real property at 433 Ohio Street. The appeal challenges an administrative determination, issued by letter dated November 21, 2016, from Ms. Sandra Day, AICP, Planner II, in the City of Lawrence Planning and Development Services Department, which determined the documentation provided to staff was not sufficient to certify registration of the property, located at 433 Ohio Street, as a five-unit non-conforming residential use. The appeal was filed under the guidelines of Section 20-1311 in the Land Development Code of the City of Lawrence, Kansas, 2015 edition. Reasons for filing this appeal are cited by the appellant in their appeal packet dated December 7, 2016, and received in the Planning Office on December 7, 2016.

BEGIN PUBLIC HEARING:

ITEM NO. 4 VARIANCE FROM THE ACCESSORY DWELLING UNIT BUILDING SIZE STANDARD AND RESIDENTIAL DRIVEWAY PAVEMENT STANDARD; 737 ELM STREET

B-17-00001: A request for variances as provided in Section 20-1309 of the Land Development Code of the City of Lawrence, Kansas, 2015 edition. The first request is a variance from the code permitted maximum size accessory dwelling unit defined in Section 20-534(2)(i) of the City Code. The code provision limits the size of an accessory dwelling unit to no more than 33 percent of the living area in the primary dwelling or 960 square feet,

Deferred by
Applicant

whichever is less. According to the Douglas County Appraiser's Office, the living area in the principal dwelling is 532 square feet which limits the size of an accessory dwelling unit to 177 square feet. The proposed size of the accessory dwelling unit is 675 square feet. The second variance is from the residential driveway pavement standards contained in Section 20-913(e) of the City Code. The applicant seeks a variance to allow the use of gravel to surface the driveway in order to reduce the impact of storm water runoff. The property is located at 737 Elm. Submitted by Susan Raines, the property owner of record. This item was deferred by the applicant from the February 2nd meeting.

ITEM NO. 5 **MISCELLANEOUS**

- a) Consider any other business to come before the Board.

**BEFORE THE BOARD OF ZONING APPEALS FOR
THE CITY OF LAWRENCE, KANSAS**

INTRODUCTION

On May 13, 2016, Paul R. Horvath, in behalf of his son, Jason E. Horvath, the owner of record of 433 Ohio Street ("the subject property"), asked the City, pursuant to City of Lawrence, Kan., Code § 20-1505 (Jan. 1, 2015), to register the nonconforming use of the subject property -- a five-unit apartment house located in a single-dwelling residential zoning district -- as a legal conforming use of the subject property. On November 21, 2016, the Director of Planning and Development Services ("Director") issued a letter denying that request on the ground that Mr. Horvath had failed to provide sufficient evidence establishing that a five-unit apartment house was a legal nonconforming use of the subject property. On December 7, 2016, in timely fashion, in accordance with City of Lawrence, Kan., Code § 20-1311(a) and § 20-1505(d) (Jan. 1, 2015), Mr. Horvath appealed that decision to the Board of Zoning Appeals ("BZA"). On February 2, 2017, after giving proper notice, the BZA conducted a hearing on Mr. Horvath's appeal. At the hearing, the BZA received evidence from the Director and from Mr. Horvath. At the conclusion of the hearing, the BZA voted, by a 3-1 margin (with two abstentions), to affirm the Director's November 21, 2016, decision. In accordance with City of Lawrence, Kan., § 20-1311(g) (Jan. 1, 2015), based on the credible evidence adduced at the hearing, the BZA makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

A. The Subject Property

1. Jason E. Horvath owns that real property commonly known as 433 Ohio Street, Lawrence, Douglas County, Kansas ("the subject property") and bearing the following legal description, to-wit:

LOTS 7 AND 9, LESS THE NORTH 40 FEET OF LOT 7,
ON OHIO STREET IN THE ORIGINAL TOWNSITE OF THE
CITY OF LAWRENCE, DOUGLAS COUNTY, KANSAS.¹

2. Located on the subject property is a structure that is currently used as a five-unit apartment house. The structure was built *circa* 1920.

B. A Brief History of City Zoning and the Subject Property

3. In 1926, the City adopted its first zoning ordinance. Commencing in 1927, the subject property was zoned "U-1," which use was defined as "a building arranged, intended or designed to be occupied by not more than two families." Apartments, boarding houses, and lodging houses were prohibited in "U-1" Districts.

4. In 1949, the City revised its zoning ordinance. Under the 1949 revised zoning ordinance, the subject property was zoned "B." Apartments were prohibited in "B" Districts.

5. In 1966, the City again revised its zoning ordinance. Under the 1966 revised zoning ordinance, the subject property was zoned "RM-1" (Multiple-Family Residential). Based on limitations established for "RM-1" districts, the subject property legally could have had, at that time, at most, three dwelling units.

¹ It must be noted that, since at least 1901, Lots 7 and 9 of Ohio Street have been owned and conveyed as one parcel.

6. In 1978, the City adopted the Pinckney Neighborhood Plan. In implementing that plan, the City rezoned the subject property from "RM-1" to "RS-2" (Single-Family Residential). Under the 1966 revised zoning ordinance, apartments were prohibited in "RS-2" zoned districts.

7. In 1996, Mr. Horvath purchased the subject property, which, as noted above, encompassed both Lots 7 and 9.

8. In 1998, the applicant sold and conveyed the north forty feet of Lot 7 to a third party.

9. In 2006, the City enacted its current zoning ordinance. Under the 2006 revision, the subject property was zoned "RS5" (Single-dwelling Residential), its current zoning designation. In "RS5" districts, five-unit apartment houses are prohibited.

10. In 2014 and again in 2015, the City issued to the subject property a Residential Rental License for five units on the subject property.²

C. Recent Events

11. On April 4, 2016, via e-mail, appraiser Jeff Hatfield of Larry A. Hatfield Appraisals, LLC, requested an opinion from the City regarding the legality of the use of the subject property as a five-unit apartment house in light of the fact that the subject property was zoned "RS5."

² It must be noted that, in issuing the Residential License, the City only found that the subject property was in compliance with the licensing requirements of Chapter 6, Article 13 of the City Code, not that the subject property was otherwise in compliance with the City's Land Development Code, Chapter 20, or other provisions of the City Code.

12. By letter dated April 11, 2016, the City issued to Mr. Hatfield its opinion that, under the City Code, the maximum number of dwelling units permitted on the subject property was two. The City also opined that, in order for the subject property to continue being used as a nonconforming five-unit apartment house, the owner would need to submit documentation establishing that its use as an apartment house predated the effective date of the City's 1926 zoning ordinance, which was 1927.

13. On May 19, 2016, after a meeting wherein Mr. Horvath requested that the City register the current nonconforming use of the subject property as a legal nonconforming use, the City sent a letter to Mr. Horvath explaining that, based on its research to date, the subject property could not be registered as a legal nonconforming use under the City Code, because the City could not determine that the current nonconforming use existed prior to the effective date of the City's 1926 zoning ordinance, which was 1927. Nevertheless, the City invited Mr. Horvath to submit any documentation that he had that might establish that the subject property was used as an apartment house prior to 1927.

14. In November 2016, Mr. Horvath submitted to the City historical records consisting of: (1) 1961-1978 Polk, Cole's, and Cross-Reference City Directories, showing that during those years a number of people resided at the subject property; (2) an undated photograph showing a number of mail boxes in front of the house; and (3) a November 30, 1922, *Journal-World* advertisement showing that, on the subject property, there was a room for rent.

15. Mr. Horvath submitted nothing else.

16. On November 21, 2016, after reviewing that evidence, the City issued a letter denying Mr. Horvath's request to register the subject property as a nonconforming use. That letter provides:

This letter is provided in response to additional documentation provided to the Planning Office regarding [the subject property] and your request to register the property as a five-unit nonconforming residential use per Section 20-1502 of the [City Code].

Based on previous research for [the subject property], the earliest possible date that an apartment (*Multi-Dwelling Residential*) use would have been permitted was in 1927. The additional documentation you provided for staff review consists of pages from the Journal World newspaper dated November 30, 1922. The paper included listings for both "Rooms for Rent" and "Apartments for Rent." The advertisements for [the subject property] are listed as room for rent. It does not list how many. A "room for rent" does not constitute an "apartment."

Apartment uses were permitted on this property prior to 1927 and for a period between 1966 and 1978 subject to a maximum density based on the size of the property. Staff's research concluded that the documentable, maximum number of dwelling units permitted for [the subject property] is two (2) dwelling units.

Sufficient documentation has not been provided to certify [the subject property] as a nonconforming use in accordance with [City Code] Section 20-1502[] as a five-unit *Multi-Dwelling Residence* (apartment building).

(Letter of November 21, 2016, from Sandra Day, City Planner, to Mr. Horvath ("the Director's decision").

17. At the same time, the City advised Mr. Horvath of his right to appeal the Director's decision under Section 20-1311 of the City Code.

18. On December 7, 2016, by written notice, in timely fashion, Mr. Horvath initiated this appeal to the BZA, challenging the Director's November 21, 2016, decision.

CONCLUSIONS OF LAW

1. Any person aggrieved by a decision of the Director, denying a request to register a nonconforming use of real property as a legal nonconforming use, may appeal that decision to the BZA. City of Lawrence, Kan., § Section 20-1505(d) (Jan. 1, 2015); see also City of Lawrence, Kan., § 20-1311 (Jan. 1, 2015).

2. Pursuant to City of Lawrence, Kan., Code § 20-1311(a) (Jan. 1, 2015), the BZA "is authorized to hear and decide appeals where it is alleged there is an error in any order, requirement, decision, or determination made by an administrative official in the administration or enforcement of the provisions of [the] Development Code." *Id.*

3. Because Mr. Horvath appeals a denial of a request to register a nonconforming use of the subject property as a legal nonconforming use and because said appeal was in writing and filed in timely fashion, see City of Lawrence, Kan., Code § 20-1311(b) (Jan. 1, 2015), the BZA has jurisdiction of this appeal.

4. In reviewing a Director's decision, the BZA "has all the powers of the official from whom the appeal is taken, and the [BZA] may reverse or affirm wholly or in part or may modify the decision being appealed." City of Lawrence, Kan., Code § 20-1311(f)(2) (Jan. 1, 2015).

5. However, the BZA may reverse a Director's decision "only when [it] finds substantial, factual evidence in the official record of the application that the [Director] erred." City of Lawrence, Kan., Code § 20-1311(g) (Jan. 1, 2015).

6. In the present appeal, Mr. Horvath, in behalf of the owner of record, presents two arguments. First, he argues that, based on the evidence he submitted, the Director erred in finding that the nonconforming use of the subject property as a five-unit apartment house is not a legal nonconforming use of the subject property. Second, he argues that, even if the Director did not err, the City is estopped from denying legal nonconforming use status in this case, because, in issuing a rental license and collecting utility fees for five dwelling units on the subject property, the City, at least tacitly, approved such nonconforming use.

A. The Legal Nonconforming Use Argument

7. In Kansas, a "nonconforming use" is defined as "a land use that **was** legally established, but that is no longer allowed by the use regulations of the Zoning District in which it is located." City of Lawrence, Kan., § 20-1502(a) (Jan. 1, 2015) (emphasis added); *Johnson County Memorial Gardens v. City of Overland Park*, 239 Kan. 221, 224, 718 P.2d 1302 (1986) (citing 1 Anderson, *American Law of Zoning* § 6.01 (2d ed. 1976)); see also K.S.A. 12-758.

8. In Kansas, the party claiming a legal nonconforming use bears the burden of establishing that the nonconforming use commenced prior to effective date of the ordinance restricting such use. *Crumbaker v. Hunt Midwest Mining, Inc.*, 275 Kan. 872, 881-82, 69 P.3D 601 (2003). Accordingly, a use which, from its inception, violated a zoning ordinance has no lawful right to continue as a nonconforming use. See *Goodwin v. City of Kansas City*, 244 Kan. 28, 32-33, 766 P.2d 177 (1988).

9. The subject property is zoned "RS-5" (Single-family Dwelling). The subject property is currently being used as a five-unit apartment house, which is a multi-family dwelling. As such, the current use is a nonconforming use of the subject property. Under Kansas law, Mr. Horvath bears the burden of establishing, by a preponderance of the evidence, that the nonconforming use of the subject property as an apartment building was commenced prior to the effective date of the 1926 zoning ordinance, which was 1927, restricting such use.

10. Here, viewing the evidence in the light most beneficial to Mr. Horvath, the BZA finds that Mr. Horvath has presented circumstantial evidence from which one can infer that the subject property has been used as a five-unit apartment house for a lengthy period of time -- clearly since before he and his son owned it -- and that, during 1922, at least one of the rooms on the subject property was available for rent. However, when that evidence is viewed in its totality, the BZA concludes that, by itself, it is insufficient to establish, by a preponderance of the evidence, that the subject property was used as an apartment house before the effective date of the City's 1926 zoning ordinance, which was 1927. As such, the BZA concludes that Mr. Horvath failed to sustain his burden, see *Crumbaker v. Hunt Midwest Mining, Inc.*, 275 Kan. at 881-82, and cannot establish, therefore, that the Director's November 21, 2016, decision is erroneous. On that basis, the BZA rejects Mr. Horvath's nonconforming use argument and affirms the Director's November 21, 2016, decision.

B. The Estoppel Argument

11. A City may be estopped from acting or taking a position in those situations where it has acted in accordance with the law. However, a City may not be estopped from acting or taking a position in those situations where it has acted in violation of the law or under mistake of fact. *City of DeSoto v. Centurion Homes, Inc.*, 1 Kan. App.2d 634, 640, 573 P.2d 1081(1977).

12. Here, Mr. Horvath argues that, because the City granted a rental license for the subject property for five units and because the City has, over the years, sent utility billings to the subject property for five units, it has, at least tacitly, approved the use of the subject property as a five-unit apartment house. Therefore, he asserts that the City is estopped from contending herein that a five-unit apartment house is not a legal nonconforming use of the subject property.

13. The BZA is unpersuaded by Mr. Horvath's argument for two reasons. First, by granting a rental license for five units on the subject property and in sending utility bills to the subject property for five units, the City merely enforced those applicable sections of the City Code applicable to rental licensing and utility billing. The City did not confer any right upon the subject property under any other provision of the City Code, including the Land Development Code, set forth at Chapter 20; nor did it find that the subject property is in compliance with any other provision of the City Code, including the Land Development Code, set forth at Chapter 20. As such, Mr. Horvath's estoppel argument fails.

14. Second, and additionally, because, as discussed above, Mr. Horvath cannot establish that the subject property was legally being used as an apartment house before 1927, the City's actions in granting rental licenses to the subject property or in utility billing five units on the subject property either were done under mistake of fact or in violation of the law. Because such action was taken in this case, either by mistake or in violation of the law, the City cannot be estopped in this case from contending that the subject property is **not** a legal nonconforming use of the subject property. *City of DeSoto v. Centurion Homes, Inc.*, 1 Kan. App.2d at 640. On that basis, the BZA rejects Mr. Horvath's estoppel argument and affirms the Director's November 21, 2016, decision.

C. Conclusion

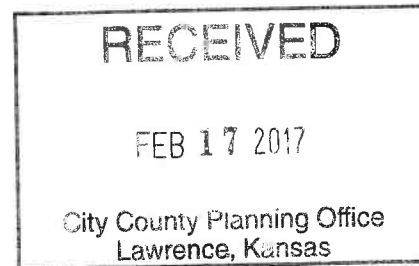
15. In sum, it is clear to the BZA that Mr. Horvath has done nothing wrong or illegal in this case. He is an unfortunate victim of circumstances. He simply purchased the subject property and used it as it was used before him. However, unfortunately, as corroborated by the credible evidence in the record, there is nothing that would establish that that use was ever legal. Because that is the case, the five-unit apartment use of the subject property is not a legal nonconforming use of the subject property. Accordingly, the BZA affirms the Director's November 21, 2016, denial of the request to register the nonconforming use of the subject property as a legal nonconforming use under Section 12-1505 of the City Code.

Dated at Lawrence, Kansas, this 2nd day of March, 2017.

JOSHUA MAHONEY
Chair

February 16, 2017

Paul R. Horvath
917 Tennessee St.
Lawrence, KS 66044



Planning Department, BZA
City of Lawrence

Dear Planning Department,

As was indicated in the BZA hearing, it was suggested that if I had any news evidence that I present it prior to the next BZA meeting in march and request that this be reconsidered. I also understood that the Planning Department would consider new evidence.

It seems to me that we have overlooked the obvious in terms of the actual physical structure. I am enclosing photos demonstrating - suggesting - that the original design and build was for multi-family. Please note that there are four separate exterior entrances with an additional separate four interior entrances off of a common hallway. In the exterior photos, please note, all doorways are obviously original, as evidenced by the consistency of the stone headers.

I am including some interior photos which show the majority of the extensive piping is galvanized, suggesting original circa 1920 plumbing. I've included a downloaded drawing of a circa 1920 kitchen sink, which you can see is very similar to the original kitchen sink present in at least the basement apartment. In addition, the other fixtures appear to be of similar age. (Due to current occupancy, I did not take recent pictures.)

Sincerely,

Paul R. Horvath
Director, Morning Star Management



1920's kitchen from
Internet



433 #3 ↑

↓ 433 #1 ↓





Multiple
Original
Exterior
Entrances
(4) Plus
Separate
Interior upstairs
(4)





Mostly all original galvanized
pipe serving home
since 1920.



multiple sewer lines
multiple meters