CITY OF WICHITA

Wichita-Sedgwick County Metropolitan Area Planning Department

12/17/2010

Greg Ferris
PO Box 573
Wichita KS 67201

RE: BZA2010-00053: City Appeal of Administrative Decision of loss of nonconforming use rights for a manufactured home park on property zoned "GC" General Commercial., generally located at the northeast corner of North Beech Avenue and East Central Avenue (700 N Beech).

Dear Ladies and Gentlemen:

Enclosed is a signed copy of the above-referenced BZA Resolution adopted by the City Board of Zoning Appeals on **November 23, 2010.** This resolution reflects the official action of the Board. It is forwarded to you for your information and files.

If you have any questions concerning this matter, please call our office at 268-4421.

Sincerely,

Derrick Slocum, Associate Planner
Current Plans Division

Cc: Kurt Schroeder, Office of Central Inspections, 1-72
Paul Hays, Office of Central Inspections, 1-72
J R Cox Office of Central Inspection, 1-72
Susan Schlapp, WCC II, 1-13

BZA RESOLUTION NO. 2010-00053

HAVING CONSIDERED THE ENTIRE RECORD REGARDING THIS MATTER AND HAVING HEARD THE EVIDENCE AS PRESENTED TO THE BOARD HERE TODAY, THE BOARD MAKES THE FOLLOWING FINDINGS:

1. That the Board of Zoning Appeals has jurisdiction to hear this appeal, pursuant to K.S.A. 12-759(d) and Section 2.12.590 of the Code of the City of Wichita, Kansas;

2. That the Board makes the following finding of fact:

    a. Based upon the evidence presented the Board reverses the decision of the Superintendent of the Office of Central Inspection and determines that the legal nonconforming use of the property in question was not abandoned by the owner.

THEREFORE, BASED UPON THE FOREGOING, THE BOARD RESOLVES THAT THE DETERMINATION OF THE OFFICE OF CENTRAL INSPECTION THAT THE NONCONFORMING USE OF THE PROPERTY LOCATED AT 700 N. BEECH AVE., WICHITA, KANSAS WAS ABANDONDED IS HEREBY REVERSED SUBJECT TO THE TERMS AND CONDITIONS SET FORTH ABOVE.

ADOPTED AT WICHITA, KANSAS, this 23rd day of November, 2010.

Dwight Greenlee, BZA Board Chair

ATTEST:

Derrick Slocum, Assistant BZA Secretary

CITY OF WICHITA

APPEAL MEMORANDUM

TO: Members of the Wichita Board of Zoning Appeals

FROM: Derrick Slocum, Assistant Secretary

SUBJECT: BZA 2010-00053, Appeal of Administrative Decision of loss of nonconforming use rights of 700 N. Beech, Wichita, KS

DATE: November 10, 2010

At the November 23, 2010 meeting of the City of Wichita Board of Zoning Appeals, the Board will be asked to hear an appeal of the Office of Central Inspection's refusal to renew a Mobile Home Park License made on November 19, 2007 by Kurt Schroeder, City of Wichita Office of Central Inspection Superintendent. Since 2007, the property owner filed bankruptcy. The applicant contends that since the property was placed in a bankruptcy trust, that the city would toll on the non-conforming licensing of the property. The appeal has been filed by John Hund, who on October 13, 2010 attempted to relicense the property located 700 North Beech Avenue as a nonconforming 27-lot mobile home park.

Mr. Hund and his agents first contend that the property is under Chapter 7 Bankruptcy and that alone should disallow the City from changing the status of the property. They also claim that the owner of the subject property had made attempts to continue the non-conforming use through relicensing. Those attempts failed due to the claim that the City refused relicensing. The applicants state that the previous owner's abandonment was not voluntary or intentional. The City's position is that the license could not be renewed without first correcting the existing code violations. The applicants claim that the City's position that he cannot renew his license without first curing the code violations does not amount to a voluntary act on his part to abandon the non-conforming use. His financial inability to cure code violations is not a voluntary or intentional release of his right to the non-conforming use. The zoning of the subject property is GC General Commercial ("GC"), which does not permit a mobile home park as a use of right, thus necessitating registration of the use as a nonconforming use to allow it to lawfully continue.

The Office of Central Inspection denied the relicensing of the nonconforming use on the basis that the owner had not cured the past and current code violations and the payment for the renewal of the license was never received. Therefore, the issue for the Board to decide in this appeal is not whether or not the property is a nonconforming mobile home park; instead, the Board needs to decide if the abandonment of the non-conforming status is to be upheld or if the applicant is allowed to relicense the property as a non-conforming use.

The authority of the Board of Zoning Appeals to hear appeals is set forth in Article VI, Section E (2) of the Wichita-Sedgwick County Unified Zoning Code ("Code") which states:

The Board of Zoning Appeals shall have the authority to hear all appeals of the Zoning Administrator's written interpretation of provisions in this Code including interpretations of provisions of Conditional Uses, CUPs, PUDs and P-Os. In exercising such appeal power, the Board of Zoning Appeals may reverse or affirm wholly or partly or may modify the interpretation of the Zoning Administrator. If the Board of Zoning Appeals determines that is necessary to obtain additional evidence in order to resolve the matter, it shall have the authority to remand the appeal to the Zoning Administrator with directions to obtain such evidence and to reconsider the decision in light of such evidence. The Board of Zoning Appeals' decision shall be the final local action on such an application.

The Board must first determine if it has jurisdiction to hear the appeal of the appellant. This includes three aspects: 1) the authority of the Board to hear the appeal; 2) is the appellant the appropriate party to file and appeal and, (3) the timeliness of the appeal. To assist in making this determination, the Board is directed to the following provisions of the Code or the Board's Bylaws:

1) Article V, Section V-F (1) of the Code states as follows: "The Board of Zoning Appeals is authorized to hear and decide appeals where it is alleged there is an error in any order, requirement, decision, enforcing any provision of this Code or any other development code, including but not limited to the Sign Code and the Landscape Code, wherein the appeal authority has been granted to the Board of Zoning Appeals."

2) Article V, Section V-F (2) of the Code states that as follows: "An appeal may be filed by any person aggrieved, or by any officer of the city or county or any governmental agency or body affected by any decision of any officer administering the provisions of this Code or the provisions of any other development code wherein the appeal authority has been granted to the Board of Zoning Appeals.

3) Article V, Section V-F (3) of the Code provides that the appeal must be directed to the appropriate Board depending on the location of the property. Thus, appeals for property located within the city limits must be directed to the Board of Zoning Appeals. Also this Section specifies that the application for the appeal must be made within the time limit specified by the rules of the appropriate Board of Zoning Appeals. The Bylaws of the Wichita Board of Zoning Appeals, Article III(3)(a)(i) specifies that appeals shall be filed within 30 days after a ruling has been made by the Superintendent of Central Inspection.

If the Board determines it does not have jurisdiction to hear this appeal, then the Board should articulate its reasons for the lack of jurisdiction and the appeal is dismissed. If the Board determines it does have jurisdiction, the next step is to review the appropriate Code provisions relating to nonconforming use, the standards for resumed abandonment of the nonconforming use and the evidence presented by the appellant to overcome said presumption of abandonment.

The standards for nonconformities are set forth in Article VII of the Code. The policy of the City and County is stated in Section VII - A (2) of the Code as follows:

> It is the general policy of the City and County to allow Uses, Structures or Lots that came into existence legally and in conformance with then-applicable requirements but that do not conform to all of the applicable requirements of this Code to continue to exist and be put to productive use, but to bring as many aspects of such Use into conformance with the current Code as is reasonably practicable, all subject to the limitations of this Article. The limitations of the Article are intended to recognize the interests of the property owner in continuing to use the property but to control the expansion of the Nonconformity and to control re-establishment of abandoned Uses and limit re-establishment of Buildings and Structures that have been substantially destroyed. An exception to this general policy relating to the location of Sexually Oriented Businesses is set forth in Sec. VII-J.

The applicability of this Article of the Code, as set forth in Article VII - A(3), is stated as follows:

> No use of a Building, Structure or property and no Building, Structure or property that complied with the zoning ordinance or zoning resolution in effect prior to March 25, 1996, shall become or be deemed to have become nonconforming or noncomplying due to the adoption of this Code. Any use of a Building, Structure or property and any Building, Structure or property that complied with the zoning ordinance or zoning resolution in effect prior to March 25, 1996, may be rebuilt, repaired or otherwise re-established to the extent that it existed prior to March 25, 1996, subject to the limitation in Sec. VII-I. [Registration of Nonconformities]

Section VII-H requires that in all cases "the property owner shall have the burden of establishing that a Nonconforming Use or Nonconforming Structure lawfully exists under this Code by a preponderance of evidence that shows the existence of the Nonconformity is more likely than not when the evidence is viewed in its totality."

Section VII-G addresses the issue of discontinuance or abandonment of the nonconformity and G(2) sets forth examples of when the nonconforming use shall be "presumed" abandoned. Under Kansas law, a presumption of abandonment can be challenged by the party aggrieved by the determination of abandonment. Abandonment, under the law, imports an intent on the part of the user to abandon his or her right to an nonconforming use of the premises, as well as an actual cessation of the use in issue. Therefore, abandonment requires an intention to abandon or relinquish the nonconforming use and some overt act, or some failure to act, which carries the implication that the owner neither claims nor retains any interest in the subject matter of the abandonment. Section VII-G (3) provides examples of situations which can be used to overcome the presumption of abandonment under the Code. Although, this Section references that these examples may only apply to Sections VII-G(2)(e) and VII-G(2)(f), utilizing the general principals of document interpretation under Kansas law that the document should be viewed as a whole, Section VII-G(2)(g)(1), (2) and (3) are presumptions of abandonment subject to being challenged by an appellant.

If the Board determines that the decision of the Office of Central Inspection to deem the nonconforming use of the subject property as abandoned was reasonable then it's decision should be affirmed. If the Board determines that the Office of Central Inspection's decision was unreasonable or that the appellant has presented sufficient facts to rebut the presumption of abandonment, then the Board has the authority to reverse, affirm wholly or in

part, or modify the decision of Central Inspection. The burden of proving the determination of the Office of Central Inspection as unreasonable or overcoming the presumption of abandonment is on the appellant.

In rendering its decision, it is important for the Board to issue an order that summarizes the evidence and outlines the basis for its decision.