THE CIRCUIT COURT, EIGHTH JUDICIAL CIRCUIT
IN AND FOR ALACHUA COUNTY, FLORIDA
CIVIL DIVISION

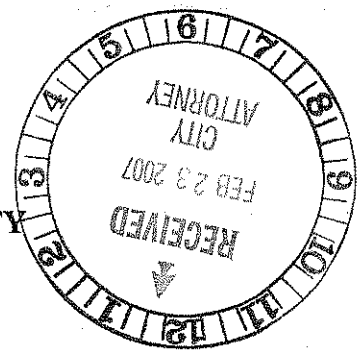
RALPH DUNNE,

Petitioner,

v.

BOARD OF ADJUSTMENT, CITY OF GAINESVILLE, a Florida Municipality,

Respondent.



Div. W

COPY

Case no.: 01-2005-CA-3978

ORDER TO SHOW CAUSE

THIS ACTION came before the Court upon the Petition for Writ of Certiorari filed October 3, 2005, and amended February 8, 2006. Petitioner seeks review of a decision by the City of Gainesville Board of Adjustment [Board], rendered 4 August 2005. The Board's decision granted the application of Banana Planet, Inc., owner of 3 N.W. 24th Street in Gainesville, Florida ["the property"], to reestablish the non-conforming use status of that property.

Petitioner seeks an order quashing the Board's decision below. Petitioner first argues that Respondent's order was not supported by competent and substantial evidence, on the grounds that the record reflects that the property was not used continuously as a non-conforming use as is required by City of Gainesville Ordinance Section 30-346. Second, Petitioner argues that the Respondent did not observe the essential requirements of law when it reestablished the property's non-conforming use and when it denied the City of Gainesville's petition requesting rehearing on the matter. The Court, having examined the petition and attachments, finds a response is warranted. Accordingly, it is

ADJUDGED as follows:

1. Pursuant to Rule 9.100, Florida Rules of Appellate Procedure, Respondent shall file a responsive pleading within **30 days** of entry of this order and show cause why Petitioner is not entitled to the relief he seeks.

2. Respondent shall address the above issue(s) and any others raised in the Petition. The response shall contain the factual basis of Respondent's position, supported by legal argument with proper citations to authority.

3. Petitioner will have **20 days** from the service of Response within which to file and serve a Reply and, if desired, a supplemental appendix.

Petitioner certifies that Respondent has been furnished with a copy of the petition and amended petition.

ORDERED on 22 February 2007.

FREDERICK D. SMITH, CIRCUIT JUDGE

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was mailed on February 22, 2007, to:

Jefferson M. Braswell, Esq.
Scruggs and Carmichael, P.A.
1 S.E. First Avenue
P.O. Box 23109
Gainesville, FL 32602

Marynell Hardee, Esq.
Assistant City Attorney
P.O. Box 490
Gainesville, FL 32602

Susan McNiel, Judicial Assistant

/mgt, bnl

IN THE CIRCUIT COURT, EIGHTH JUDICIAL CIRCUIT, IN AND FOR ALACHUA COUNTY, FLORIDA

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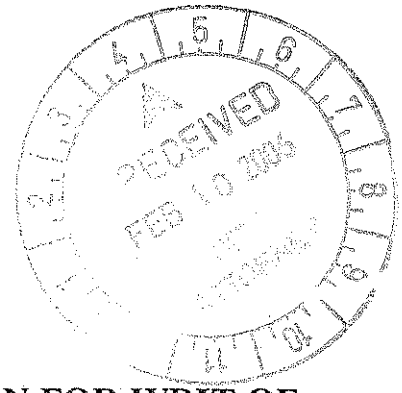

NOTICE OF FILING FIRST AMENDED PETITION FOR WRIT OF CERTIORARI, AMENDED APPENDIX AND INDEX

Comes Now, Petitioner Ralph Dunne, by and through the undersigned counsel, to file a First Amended Petition for Writ of Certiorari, Amended Appendix and Index thereto (a copy of each is attached and incorporated herein). The amendments incorporate citations to the transcript of the proceedings below, and include the transcript in the Appendix. The Petitioner filed a request for extension of time on October 3, 2005 that has never been ruled on by the Court. In order to advance this matter, the Amended Writ of Certiorari is being filed without the entry of the Court's

Order. The transcript had not been prepared at the time of filing the original Petition in this cause.

Respectfully submitted,

SCRUGGS & CARMICHAEL, P.A.

By: _____

Jefferson M. Braswell, Esquire
Florida Bar No. 800996
Attorneys for Petitioner Ralph Dunne
One S.E. First Avenue
P.O. Box 23109
Gainesville, FL 32602
Phone (352) 376-5242
Fax (352) 375-0690

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been furnished to Marynell Hardee, Esquire, Assistant City Attorney, P.O. Box 490, Gainesville, FL 32602-0490, ☒ by U.S. Mail ☐ by telefacsimile ☐ by Hand Delivery this 8th day of February, 2006.

_____
Of Counsel

IN THE CIRCUIT COURT, EIGHTH
JUDICIAL CIRCUIT, IN AND FOR
ALACHUA COUNTY, FLORIDA

RALPH DUNNE,

Petitioner,

vs.

BOARD OF ADJUSTMENT, CITY OF GAINESVILLE, a Florida municipality,

Respondent.
_____/

CASE NO.: 01 2005 CA 003978

Division: W

PETITION FOR WRIT OF CERTIORARI, FILED PURSUANT TO FLA.R.APP.P. 9.100

Comes now, Petitioner, Ralph Dunne, a Gainesville resident and property owner, by and through the undersigned counsel, files this Petition for Writ of Certiorari, to obtain review of a decision by the City of Gainesville Board of Adjustment that reestablished a nonconforming use of land for a single-family dwelling at 3 N.W. 24th Street, Gainesville, Alachua County, Florida, to a multi-family dwelling. This Petition is filed without the availability of a transcript of the proceedings which will be supplemented when they become available.

The scope of the Circuit Court's review is two issues: 1) whether the judgment is supported by competent, substantial evidence; and 2) whether the essential requirements of the law were observed. Miami Dade County v. Reyes, 200 WL 1188330 (Fla. 3d DCA 2000), citing Hines City Community Dev. v. Heggs, 658 So.2d 523, 530 (Fla. 1995).

The Petitioner has also filed an accompanying Appendix and Index thereto to incorporate the evidentiary exhibits of the proceedings below. Cites to the transcript of the proceedings will reflect (T. pg#), and cites to the Appendix will reflect (App. pg#).

JURISDICTION

The Court has jurisdiction to issue a Writ of Certiorari under Florida Constitution, Article V, Section 5(b) and Section 30-354(n) of the City of Gainesville Land Development Code.

STATEMENT OF THE CASE AND FACTS

The Board of Adjustment ("Board") consists of five voting members duly appointed by the Gainesville City Commission. The Board's powers and duties are governed by both the City of Gainesville's Land Development Code and specific rules of procedure, adopted by the Gainesville City Commission. (App. 162). In determining whether an applicant's property qualifies as a nonconforming use, the Board is bound by the standards for Nonconforming Lots, Uses or Structures, contained in the City of Gainesville Ordinance Section 30-346 (City of Gainesville Ordinances hereafter referred to as "Sec. __-___").

Banana Planet, Inc. ("Applicant") is the owner of 3 N.W. 24th Street, Gainesville, Alachua County, Florida ("Subject Property") and applied for a nonconforming use permit, which is the subject of this request for judicial review. (App. 28).

The Applicant's Memorandum in Support of Appellant's position states in relevant part, "that at all relevant times and as a matter of fact and law; (i) since the Subject Property's purchase by Appellant, Appellant has neither failed to use, nor has never ever abandoned, vacated or discontinued the non-

conforming use of Subject Property as a duplex or multi-family dwelling; and (ii) the Subject property has always been used, maintained and treated consistent by respective owners with its prior non-conforming use as a duplex or multi-family dwelling." (App. 36).

In 1949, records indicate that the property was developed as a residential dwelling under the jurisdiction of Alachua County. (T. 17; App. 31). In 1961, the property was annexed into the jurisdiction of the City of Gainesville. (App. 31). Earliest zoning records of the subject property show a 1966 zoning of R-1b until 1982 when a zoning of RSF-2 was placed on it. (T.23; App. 31). The RSF-2 zoning suggests that existing developments would be those uses allowed by right or Special Use Permit within that zoning district; developments other than those uses would be nonconforming or illegal. (App. 31).

The City's staff ("The City") observed that there are four bedrooms and two bathrooms in the lower unit and three bedrooms and one bathroom in the upper unit of the subject property. Based on its observations in 2003 and 2004, the City concluded that there were two kitchens in the house from the time of construction. (T. 18; App. 26). The City further concluded that the subject property existed for several years as a nonconforming multi-family dwelling. (App. 27), but that the development ceased operation for more than nine (9) months, resulting in the loss of its nonconforming status. (T.22; App. 27). These findings were based on conversations with residents of the neighborhood who stated that the property was occupied and used as a multi-family dwelling during the period before and after annexation into the City of Gainesville (These particular residents are not identified in the City Staff report and were not called as witnesses in support of the application, therefore these findings by the City are considered hearsay testimony) (App. 31). The City's findings were also based on the frequency of landlord licenses and permits issued to the subject property. Additionally, City's staff determined that the house had essentially

not used minimal amounts of electricity and almost no water from January 2004 to October 2004. Based on this data, City Staff determined that the Applicant had not used the house for 10 months. (App. 187, 136-154).

During the periods of 1989-1991, 1997, 1998, and 2000-2004, the City issued Landlord licenses for one, two or three units. (T. 20; App. 31). However, no landlord permits were issued for the property for any period prior to 1989, the 5-year period of 1992-1996, or for the year of 1999. (T. 3-4; App. 31). In addition, during the 2003 year, the property was not used since it was undergoing renovations and remodeling. (T. 9-10; App. 32). However, it does not appear that building permits were requested or obtained for the intended work and attempts to obtain them were only initiated after citation by Code Enforcement. (App. 32). Moreover, City records show renewal of Landlord Licenses for only one unit during the 2003-2004 period establishing that there were not two units being rented for this period of time. (App. 55).

As recited in the City Staff report, landlord licensing records showed that during the period of the property's operation, there was more than one 9-month period during which the property did not have a valid permit to operate as a multi-family dwelling. (T.26; App. 32). Therefore, those periods without Landlord License Permits, years 1992-1996 and 1999, seem to suggest use as a single-family dwelling. Accordingly, the City concluded that since the property was not used for a period of more than 9 months, it lost its legal nonconforming use status. (T. 21; App. 32). The City determined that the use of the property as a multi-family dwelling was in violation of current city ordinances. (App. 32). As such, the City ultimately decided that until the Board granted a re-establishment of the nonconforming use, the

property should be used as a use permitted in the RSF -2 zoning district, i.e., a single-family dwelling. (App. 27).

On July 7, 2005, Applicant filed Petition No. 10APP-05, requesting a reestablishment of the nonconforming use for the subject property as a multi-family dwelling. (App. 211).

On August 4, 2005, Petitioner, Ralph Dunne, one of the residents of the neighborhood and 20-yr next-door neighbor to the subject property testified before the Board at the quasi-judicial hearing in this matter. (T. 28; App. 204). He explained that the subject property had been occupied by a family until about 3 years ago when multiple residents began occupying it. (T. 50). He stated that overcrowding had become a problem, since there was not adequate parking to accommodate 6 people and all of their friends who visit there. (T. 50). Moreover, he testified that garbage began to accumulate in both the subject property's yard and porch, since only one garbage can is provided per house. (T. 50; App. 204). Petitioner further testified that under the previous owner's, Mrs. Colson's, occupancy and ownership, the house had never been divided into two separate units. (T. 58). Although she rented rooms, she never divided the property into a duplex. (App. 204).

Faye Eng, a continuous resident of the neighborhood since 1951, also testified at the hearing before the Board on behalf of the Petitioner. (App. 206). She stated that the subject property was constructed as a single-family home, with the downstairs being designed to have room for kids and a guest room. (T. 36; App. 206). She further stated that in 1957, the home was sold to the Colson family, who used it as their family home and never rented out a room until 1979 or 1980, after Mrs. Colson's husband had died. (T. 39; App. 206). She continued to maintain it as a single-family dwelling and never divided the property into a duplex all the way up through her passing in 1999. (App. 206).

Despite the City's previous findings and the neighbor's testimonies, the Board reversed the determination of the City and reestablished the nonconforming use as a multi-family dwelling on the subject property zoned as a RSF2 (Single-Family Residential District). (App. 232).

On August 15, 2005, at the request of the City Commission of the City of Gainesville ("Commission"), the City was directed to request a rehearing by the Board on its August 4, 2005 determination. (App. 240). The request for rehearing argued that the Board overlooked or failed to correctly interpret the facts before it and this failure led to an erroneous application of the City Code.

In relevant part, the City stated in the request for rehearing (App. 241): "The Board overlooked or erroneously deemed irrelevant the fact that the property (even if properly nonconforming at some time in the past) had not been used for the nonconforming use for at least nine consecutive months." The City presented Code Enforcement records which showed that the property had not been used in such a manner for at least 9 consecutive months. The Code read in relevant part as follows:

> "... When a nonconforming use of a structure or structure and premises in combination, is discontinued, vacant, abandoned or not used for nine consecutive months, the structure, or structure and premises in combination, shall not thereafter be used except in conformance with the regulations of the district in which it is located ..." (Sec. 30-346(d)(5)) (emphasis added). The word "shall" is mandatory.
>
> The Board did not have the power to change the Code and it cannot change the factual requirements of the stated regulations in Code. If the Board had examined and focused closely on the nonconforming provisions stated in the Code, the Board would have concluded that the provisions strictly address nonconforming uses, structures and

conditions. The City's intent as stated in the Code, is to remove or eliminate the nonconformity. Moreover, the City asserted that the Board overlooked the only relevant evidence before it, namely the fact that the property had not been used in the manner alleged by the Petitioner and instead erroneously based its decision on the Petitioner's reasons the property was not used for the nonconforming use for at least 9 months.

On September 1, 2005, the Board voted against a request to grant a rehearing of Petition 10APP-05 BA, and later reaffirmed its decision in writing by a letter dated September 7, 2005. (App. 244)

ARGUMENT

A. THE BOARD'S ORDER IS NOT SUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE, SINCE THE RECORD CONTAINS UNDISPUTABLE PROOF THAT THE PROPERTY WAS NOT USED CONTINUOUSLY AS A NONCONFORMING USE AND THE USE WAS ABANDONED FOR SEVERAL YEARS WHERE IT WAS NOT A LEGAL MULTI-FAMILY DWELLING.

The first and primary issue before this Court is whether the Board's order is supported by competent and substantial evidence, since the record contains undisputed proof that the subject property had not been continuously used as a nonconforming use and the use was abandoned for several years.

Sec. 30-346(a) states that "within the districts established by this chapter there exist lots, structures and uses of land or land and structures which were lawful before this chapter was adopted or amended but which will be prohibited, regulated or restricted under the terms of this chapter. It is the intent of this

chapter to permit these nonconformities to continue until they are removed but not to encourage their continuation."

Sec. 30-346(d)(5) further states that "when a nonconforming use of a structure, or structure and premises in combination, is discontinued, vacant, abandoned or not used for nine consecutive months, the structure, or structure and premises in combination, shall not thereafter be used except in conformance with the regulations of the district in which it is located; provided, the board of adjustment may permit the reestablishment of the nonconforming use where it is determined by the board of adjustment after public hearing that the design, construction and character of the building is not suitable for uses permitted in the district in which such nonconforming use is situated. The board of adjustment shall hold a public hearing on each case in question after giving ten days' public notice of the time and place of such hearing, in order to determine the question of suitability of uses permitted in the district in which such building is located. In no event shall the board of adjustment permit a change to another nonconforming use except those of the same major group, as identified by the Standard Industrial Classification Manual; nor shall it permit any structure to be enlarged, extended, constructed, reconstructed, remodeled, moved or structurally altered for any purpose other than changing the use of the structure to a use permitted in the district in which it is located."

Since the property was not continuously used in a nonconforming fashion from the time the property became subject to City's RSF-2 zoning ordinance in approximately 1981, the Board should have denied granting the Applicant's nonconforming use status. Sec. 30-346 unambiguously states that if the nonconforming use is not used for a period of 9 months, the property loses its nonconforming status, can then only be used in conformance with the applicable zoning district; i.e., limiting the property to a single-

family dwelling. In the current situation, the evidence clearly demonstrates that the subject property went for several years as a single-family dwelling based on the City's own findings.

In addition, under Sec. 14.5-1(a) of the City's Landlord Permit ordinance "Every owner of a single-family dwelling, two-family dwelling, three-family dwelling, four-family dwelling, multiple-family dwelling, roominghouse, dormitory or other dwelling unit within a district designated in section 30-57 of this Code is required to get an annual landlord permit from the city manager or designee prior to leasing, subleasing, renting or allowing the occupancy of such unit to another natural person or other natural persons, unrelated to the owner, whether or not for consideration, except as provided in subsection (b). In the case of multiple owners of any such dwelling unit, it shall be sufficient for any one of the owners to have obtained a permit on the unit. The application shall be in writing and on a form provided by the city."

Moreover, Sec. 30-57(a) of the City's Landlord Permit ordinance states that "Certain designated districts within the corporate limits of the city are in many cases being plagued by violation of limitation as to single-family occupancy. The number of persons occupying a dwelling in certain designated districts, if increased above one family as defined in section 30-23, is detrimental and hazardous to the public health, welfare, safety and morals of the citizens of this community. The result of more persons occupying a dwelling than is permitted by the aforementioned section is a public nuisance and causes deterioration of the surrounding property values." Sec. 30-57(a)(1) states that "Districts RSF-1, RSF-2, RSF-3, RSF-4 and RC as specified by this chapter, and all properties zoned planned development, PD, on July 14, 1980, with an overall residential density limit of no more than five and four-tenths dwelling units per acre, all planned developments designed for residential use at a density of no more than eight dwelling units per acre, and all other planned developments as specified in the rezoning ordinance in accordance with section 30-

217 shall be subject to this section." Sec. 30-57(a)(2) of the City's Landlord Permit ordinance also states that "No owner or landlord shall enter into any agreement, contract, lease or sublease which provides for, permits, allows, contemplates or facilitates occupancy of any single-family dwelling, two-family dwelling, three-family dwelling, four-family dwelling, multiple-family dwelling, roominghouse, dormitory or other dwelling unit in a designated district by more than one family as defined in section 30-23. Any agreement, contract, lease or sublease which provides for, permits, allows, contemplates or facilitates such occupancy by more than one family is unlawful and is hereby declared to be contrary to public policy."

Sec. 30-57(a)(3) of the City's Landlord Permit ordinance further states that "It shall be unlawful: (a). For any landlord or owner as defined in this chapter to rent, lease, sublease or allow the occupancy of his/her property by another person or persons not related by blood, marriage or legal adoption, excluding foster children and residents of community residential homes in a designated district, without having a permit as provided herein; (b). For any landlord as defined herein, for any owner of property, or for any tenant, subtenant, lessee, single-family dwelling, two-family dwelling, three-family dwelling, four-family dwelling, multiple-family dwelling, roominghouse, dormitory or other dwelling unit, to violate or to cause or allow a violation of any of the ordinances of the city, including this subsection (a) and (c). For any person, lessor, tenant, lessee, occupant, landlord, sublessee, owner, individual, firm or corporation to violate any of the provisions of this subsection (a).

Sec. 30-57(a)(4) of the City's Landlord Permit ordinance provides that "In addition to any other remedy provided for herein, if the building official has reasonable cause to believe that this subsection (a) is being violated, he/she may request the city attorney to file an appropriate action to correct the violation."

Sec. 30-57(a)(5) of the City's Landlord Permit ordinance further provides that "Whoever shall erect, establish, continue or maintain, own or lease, or occupy any place where any law of the state or ordinance of the city is violated, including this subsection (a), shall be deemed guilty of maintaining a nuisance. All such places shall be abated and persons enjoined as provided in F.S. §§ 60.05(1) or F.S. §§ 60.06."

Therefore, under the City's Landlord Permit ordinance, the Board should have denied granting the nonconforming use status to the subject property, since the Applicant and the Applicant's predecessors in title would have had to rent the house illegally and in contravention of the City's Landlord Permit requirements, creating a public nuisance. The record is undisputed that the property had no landlord permits for the years 1992-1996 and the year 1999. In the Code Enforcer's, Lawrence Caulderon's, letter dated May 4, 2005, he finds that landlord permits were not issued for the property for the years 1992 through 1996, a period of 4 consecutive years and for the year of 1999. In addition, without any additional proof, the existence of legal Landlord Permits is the only proof that the property was actually rented and is an absolute prerequisite to showing a continuous nonconforming use. Therefore, if the Applicant cannot establish that the property had been legally rented in compliance with applicable laws, then they cannot establish that nonconforming use existed for an entire gap of four years well over the 9-month vacancy, abandonment, or non-use stated in the ordinance.

Additionally, under The Board of County Commissioners of Brevard County v. Snyder, the burden of proof to establish the continuous existence of the necessary nonconforming use is on the Applicant, and the continuous nonconforming use must exist for the current owner and all predecessors in title. 627 So.2d 469 (Fla. 1993). Competent substantial evidence is evidence a reasonable mind would

accept as adequate to support a conclusion. DeGroot v. Sheffield, 95 So.2d 912 (Fla. 1957) In a quasi-judicial hearing, the Board is limited merely to the evidence that is actually submitted in the course of the hearing. City of Fort Pierce v. Dickerson, 588 So2d 1080 (Fla. 4th DCA 1991).

Therefore, since the Applicant failed to provide any evidence that there was continuous nonconforming use of the property from the period of 1981 through the present and the Applicant was unable to provide any evidence that the property was used, maintained and treated consistent with its prior non-conforming use, i.e. divided into 2 distinct units, the Board should have denied granting the nonconforming use status. The only evidence concerning the use of this property exists from 1981, when the zoning ordinance was passed, until 1998, came from the undisputed testimony that the property was a single-family dwelling during the 1980's and much of the 1990's. Since 1949, the year of the subject property's construction, until the Applicant filed its petition for nonconforming use, the property had never been granted a nonconforming status from the City. The Applicant's petition in 2005 is the first time the issue has ever been raised for this property, and it was only presented by a new property owner after they were cited for illegal construction and code violations related to the unkept grounds. The predecessors in title to the Applicant never submitted an application, never requested confirmation from the City that the property was nonconforming, and never submitted any notice that they believed the property to be nonconforming. Therefore, since the record is completely replete of any evidence that anyone considered the property nonconforming during the 1980's and early 1990's, the Board should have denied the granting of the nonconforming use status.

B. THE BOARD DID NOT OBSERVE THE ESSENTIAL REQUIREMENTS OF LAW WHEN IT REESTABLISHED THE SUBJECT PROPERTY'S NONCONFORMING USE AND WHEN IT DENIED THE CITY'S PETITION REQUESTING REHEARING ON THE REESTABLISHMENT.

The second issue before this Court is whether the Board observed the essential requirements of law when it reestablished the nonconforming use, after a 10-month period of vacancy, abandonment, and non-use and when the Board denied the City's Petition requesting rehearing on the reestablishment.

Sec. 30-346(d)(5) states that "when a nonconforming use of a structure, or structure and premises in combination, is discontinued, vacant, abandoned or not used for nine consecutive months, the structure, or structure and premises in combination, shall not thereafter be used except in conformance with the regulations of the district in which it is located; **provided, the board of adjustment may permit the reestablishment of the nonconforming use where it is determined by the board of adjustment after public hearing that the design, construction and character of the building is not suitable for uses permitted in the district in which such nonconforming use is situated.**" On June 26, 2002, the Applicant purchased the subject property. (App. 214). Gainesville Regional Utility records show water usage before December 2002 and after December 2003. (App. 214). In January 2003, Codes Enforcement received complaints that the property was vacant and the yard overgrown. (App. 214). The Code Enforcer, Mr. Caulderon explained that no building permits were obtained for initial renovation work on the house. (App. 214). Mr. Caulderon even pointed out had the Applicant contacted the appropriate city departments for permits and placed information regarding the situation on the record, the nonconforming status would have been

maintained. (App. 215). However, the Applicant did not obtain building permits until after Code Enforcement Officers inspected the subject property and issued a stop work order. (App. 215). The Applicant, itself, even admitted that the subject property was vacant for more than 10 months after they purchased the house in 2002 and was not being used as a dwelling during the time of the illegal renovations. (App. 216). The Applicant stated that tenants did not occupy the property until August 2004. (App. 214). Therefore, the facts are undisputed that from January 2003 to October 2003, the Applicant essentially abandoned the nonconforming use, by not using the property as a residence of any kind nor did not make any effort to establish the property as a nonconforming use. However, although their order does not have specific findings of fact, from the Board's discussion, they voted in favor of reestablishing the nonconforming use and granted Applicant's Petition, because the Applicant was renovating the house during portions of the 10-month vacancy and non-use. The Board again reaffirmed its earlier decision, when it denied the City's request for rehearing on the Petition.

The language of the ordinance specifically refers to the circumstance where the "nonconforming use" is discontinued, vacant, abandoned or not used. The Board, by its approval of the Applicant's Petition and by its denial of the City's request for rehearing, did not observe the essential requirements of law that essentially revoke a nonconforming use when it is discontinued, vacant, abandoned, or not used for a period of nine consecutive months. In this case, the nonconforming use was clearly discontinued, vacant, abandoned, and not used during a 10-month period, since the Applicant was not renting the subject property to any tenants during this time and was conducting renovations, albeit illegally without the necessary building permits.

The Board has misinterpreted and misapplied the applicable ordinance and allowed a nonconforming use in a zoning district where multi-family housing does not fit, Dowd v. Monroe County, 557 So. 2d 63, 65 (Fla. 3d DCA 1990), and has essentially created an exception to the plain language of Sec. 30-346(d)(5), where one does not simply exist. This conclusion is not only inconsistent with the clear and unambiguous language of the ordinance, but also with the ordinance's stated intent to eliminate and phase out nonconforming uses. Moreover, the reestablishment does not even fit into the explicitly stated ordinance's exception, since there is no evidence to suggest that the "design, construction and character of the building is not suitable for uses permitted in the district in which such nonconforming use is situated," since the subject property's design, construction and character is suitable for a single-family dwelling, a use permitted in the RSF-2 district.

CONCLUSION

In 2002, the Applicant purchased the subject property. The Applicant was under the perception at the time of the purchase that the property was a legal duplex and evidently did not perform any due diligence to determine whether it was a legal nonconforming use, relying upon the real estate flyers. The property was somewhat in need of renovations, and the Applicant illegally proceeded with repairs without seeking any building permits and without consulting the City on what was necessary to preserve their property interest. During the renovations, the Applicant left the property vacant for approximately 10 months, and even admitted this during the Board's quasi-judicial hearing.

In addition, they failed to properly maintain the property, and allowed multiple students to occupy it, violating ordinances and creating code enforcement issues. After the Applicant was cited for code violations, the Applicant filed Petition No. 10APP-05 for reestablishment of a nonconforming use.

When the City's staff began its investigation of the property, somehow they mistakenly determined that it was always used as a duplex, even without any evidence prior to 1991 to support such a determination. Instead they based their determination on the 2004 design, overlooking the possibility that the design might have changed or that during the 1950's and 1960's lots of homes were constructed with a second kitchen. The City's staff indicated that they interviewed neighbors who stated that it was always used as a multi-family dwelling, but yet not a single witness came forward at the quasi-judicial hearing to validate the City's staff findings. On the contrary, the undisputed sworn testimony of neighbors who had visited the house and lived next door, for as many as 40 years, verified that the house was built as a single-family dwelling and had always been occupied by a single family up until recently. Yet, despite the undisputed fact that the property had not been occupied in 2003 for up to 10 months, despite the fact that their were no landlord permits for the property for up to 4-year periods, and despite the fact that the neighbors provided undisputed testimony that the subject property had always been a single family home, the Board ruled against the City's well-reasoned position and approved the Applicant's Petition, reestablishing the subject property's nonconforming use.

The undersigned represents the Petitioner, the subject property's next-door neighbor, and one of many neighbors who has testified and attempted to reverse the Board's erroneous decision.

WHEREFORE, the Petitioner respectfully requests that this Court enter an order vacating and rescinding the City of Gainesville Board of Adjustment's order.

SCRUGGS & CARMICHAEL, P.A.

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been furnished to Marynell Hardee, Esquire, Assistant City Attorney, P.O. Box 490, Gainesville, FL 32602-0490, ☒ by U.S. Mail ☐ by telefacsimile ☐ by Hand Delivery this 8th day of February, 2006.

_____
Of Counsel