



MEMORANDUM

Office of the City Attorney

000378

Phone: 334-5011/Fax 334-2229
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TO: Mayor and City Commissioners

DATE: September 11, 2000

FROM: City Attorney

CONSENT

SUBJECT: Giovanna Holbrook v. Board of Adjustment, City of Gainesville.
Alachua County Circuit Court; Case No.: 00-1838-CA

Recommendation: The City Commission authorize the City Attorney to represent the City in the case styled Giovanna Holbrook v. Board of Adjustment/City of Gainesville; Case No.: 00-1838-CA.

On May 4, 2000, the Board of Adjustment approved a petition filed by Suk Yoon reinstating a nonconforming use on a parcel of land (an auto repair facility) zoned MU-1 and located at 915 East University Avenue, Gainesville. This petition was seeking approval to operate a full service automobile repair facility. The petition was granted based on the fact that the business would not be suitable for any other permitted uses. Ms. Holbrook, who lives within 300 feet of the property, requested a rehearing, but the motion was denied.

On June 5, 2000, Ms. Holbrook filed a Petition for Writ of Certiorari objecting to the reinstatement of the nonconforming use, and petitioning the Court to quash the decision of the Board of Adjustment. Holbrook argues, among other things, that there was insufficient evidence to support the board's decision to reestablish the nonconforming use.

The circuit court has entered an order requiring the City to file a response to the petition by September 6, 2000. The issue before the court is whether the Board of Adjustments was correct in reinstating the permit for the nonconforming use of this land.

Prepared by:

Debra S. Babb,
Assistant City Attorney

Approved and
submitted by:

Marion J. Radson,
City Attorney

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

GIOVANNA HOLBROOK,

Petitioner,

v.

Case No.

Division:

BOARD OF ADJUSTMENT,
CITY OF GAINESVILLE, a
Florida municipality

Respondent.

**FIRST AMENDED
PETITION FOR WRIT OF CERTIORARI**

COMES NOW, Petitioner, Giovanna Holbrook, a Gainesville resident and property owner, by and through undersigned counsel, to file this First Amended Petition for Writ of Certiorari to obtain review of a decision by the City of Gainesville Board of Adjustment that reinstated a nonconforming use of land for operation of an unlimited automotive repair facility at 915 East University Avenue in Gainesville, Alachua County, Florida. The original petition was filed prior to availability of the transcript of proceedings.

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 the City of Gainesville's Land Development Code and specific Rules of Procedure adopted by the Gainesville City Commission. App. 14-20.

Suk J. Yoon is the applicant for a Nonconforming Use Permit that is the subject of this request for judicial review, and thus is the real party in interest. App. 12-13.

Petitioner also has filed an accompanying amended Appendix and Index thereto to incorporate the transcript of the proceedings below.

JURISDICTION

The Court has jurisdiction to issue a writ of certiorari under FLA. CONST. art. V, sec. 5(b) and Section 30-354(n) of the City of Gainesville Land Development Code.

STATEMENT OF THE CASE AND FACTS

1. On May 4, 2000, the Board of Adjustment ["Board"] approved Petition 4NCF-00 BA, which reinstated a nonconforming use (automotive repair) on a parcel of land zoned MU-1 located at 915 East University Avenue, Gainesville, Florida. App. 1-9; 25-51.
2. The Petition had been filed by Suk J. Yoon, a recent purchaser of the property who indicated in his petition that both the attorney who closed the real estate transaction and the lender represented to him that auto repair facilities were allowed in MU-1 zoning. Mr. Yoon also stated in his petition that the existing building "has 3 lift stations and 6 auto bays and was constructed for the purpose of automotive repair." App. 13.
3. The previous auto repair business, a legal nonconforming use, was discontinued on January 25, 1997. App. 12. To reuse the property for that nonconforming purpose, the owner is required to petition the Board of Adjustment pursuant to Section 30-346(5) of the City of Gainesville Land Development Code, to reinstate the prior nonconforming use that is now void by operation of law. App. 21-24.
4. In order for Mr. Yoon to prevail on a reinstatement petition, the Board is required to find 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." Sec. 30-346(5), Land Development Code. The Board also is required to hold a public hearing "to determine the question of suitability of uses permitted in the district in which such building is located." App. 21-24.
5. The Board issued a Notice of Public Hearing dated April 24, 2000, in which Petition

4NCF-00 BA was noticed for a public hearing to be held on May 4, 2000. App. 10-11. Petitioner Holbrook in the instant case received the notice of public hearing because she owns property located within 300 feet of the subject property. The map accompanying the Notice of Public Hearing, which was prepared by the City's Department of Community Development, depicted the area under petition consideration with shaded hatch marks. App. 11. The entire 1.85-acre parcel located at 915 East University Avenue was depicted as affected by the petition proposal.¹

6. The matter proceeded to public hearing on May 4, 2000. Lawrence Calderon, a City staff member of the Department of Community Development, presented the background facts and matters at issue in the petition. He specifically stated that City code requires that once a nonconforming use is no longer used for more than nine months, as here, "you have to convert the facility to a use which is allowed in the MU-1 district." The only exception, according to Mr. Calderon, is where the Board grants a petition for reinstatement. App. 28.

7. Mr. Calderon stated that the ordinance "emphatically states that, in order to reestablish the use, it must find that the **design, construction and character of the building are not suitable for uses permitted in the district**, and these are the sole criteria that you need to review in deciding whether to reestablish this use or not." [emphasis added]. App. 28.

8. Mr. Calderon also stated that it was the express intent of the City's code provisions to eliminate nonconforming uses when they are discontinued, and to not encourage their continuation. App. 28.

9. Mr. Calderon also noted that the City has a plan to improve the East University Avenue

¹Notably, on May 15, 2000, after the Board's public hearing, and in the presence of Petitioner Holbrook, City Planning official Lawrence Calderon initialed a notation of the face of the Petition application indicating the acreage subject to the reinstatement was only .32 acres. App. Exhibit 4.

area, including streetscaping and urban revitalization. App. 35.

10. Mr. Calderon also informed the Board that one of the permitted uses in the MU-1 District is "Limited Automotive Service," which is allowed by Special Use Permit. App.37. In fact, one of the previous occupants was a limited auto service facility, a tire and brake service establishment. App. 26. Limited automotive service allows tire repair, jiffy lubes, car detailing, "in other words, you would not be able to have the full noise operation that you have under the full auto repair." App. 37.

11. In contrast, Mr. Yoon sought permission to operate a "full auto repair service and that is where there is no restriction on the type, the extent of the operation. ... (A)utomotive repair generally has a high noise activity, a propensity to generate and store inoperable vehicles and a propensity to salvage vehicles which have been determined to be too expensive to repair." Id.

12. At the hearing, Mr. Calderon also offered his expert opinion that placing an auto repair facility at the property as a new use "is inconsistent with the goals and intent of the district, that's why it was rezoned to MU-1. So, a new use is definitely inconsistent." App. 38-39.

13. The Board's attorney opined at the hearing that Mr. Yoon probably should have determined whether his nonconforming use was still valid when he purchased the property to do what he intended to do. App. 41. Mr. Yoon operated an auto repair facility near the University of Florida, but lost his lease. App. 29.

14. At the close of the hearing, Board member Frederic Peterkin made the following motion, which ultimately passed by a 3 to 2 vote: "Make a motion to grant the petition based on the fact that the design, construction and character of the building is not suitable for any other uses." App. 43.

15. The existence of lifts and bays in the building when operated as an automotive repair

facility was greatly emphasized by the majority of the Board in its deliberations, to the exclusion of most other debate. App. 46. The "character" of the building was typified by the presence of lifts. App. 47.

16. The Board erred in disregarding the fact that limited automotive services, which is a permitted use in the MU-1 District by Special Use Permit, requires the presence of lifts and bays, and Mr. Calderon's testimony that one such previous occupant operated a limited auto service facility. App. 25-26; 36-37. The Board also erred in denying Petitioner Holbrook's request for rehearing on this point. App. T32-T39.

17. Board Chair Steven Reid by way of rhetorical questioning of staff, evinced that the determinative factor for him was a presumed "taking" of property rights, which of course was not at issue in the proceedings on May 4, 2000, and thus cannot form a proper basis for approving the reinstatement of a nonconforming use. App. 35, 41-42.

18. Nonetheless, the Board voted 3 to 2 to approve the Yoon petition and reinstate the nonconforming use. App. 43.

19. Ms. Holbrook, the petitioner in the instant case, filed a request for rehearing to present evidence that the Board overlooked a crucial point regarding the suitability of the building for other, permitted uses in the MU-1 zoning district – that lifts are necessary for operation of limited automotive services. App. 49.

20. At a public hearing on June 1, 2000, after about an hour of testimony, argument and deliberation, the Board voted 4 to 1 to deny Ms. Holbrook's request for rehearing. App. T39.

21. The Board again overlooked the simple fact that lifts and bays are necessary installations for limited auto services.

22. Petitioner Holbrook has no other remedy available to her to enforce the land

development code of the City of Gainesville.

23. Petitioner Holbrook is an affected party who testified in opposition to the reinstatement of the nonconforming use at the Board's hearing on May 4, 2000. App. 2, 30-32.

24. For the reasons set forth below, Petitioner objects to the reinstatement of the nonconforming use, and petitions this Court to quash the May 4, 2000, decision of the Board of Adjustment.

ARGUMENT

A. THE BOARD DEPARTED FROM THE ESSENTIAL REQUIREMENTS OF LAW BY INCORRECTLY APPLYING THE CITY'S ORDINANCE GOVERNING REINSTATEMENT OF NONCONFORMING USES.

25. The Land Development Code of the City of Gainesville provides that a nonconforming use, once void through operation of law, may be reinstated only when the design, construction and character of the existing building are not suitable for uses permitted in the zoning district in which the nonconforming use is situated. Section 30-246(5), Land Development Code. App. 21-24.

26. In the instant case, the record supports a conclusion that the design, construction and character of the building render it suitable for use in an automotive services capacity. The record is clear that "Limited Automotive Services" is one such use which is suitable for the existing building in that the allowable services in this category require the presence of lifts and bays. App. 25-26; 36-37. Where a permitted use exists for an existing building, the City's regulations do not permit reinstatement or continuation of a nonconforming use, such as the one sought by Yoon.

27. The uncontroverted testimony of Planning official Lawrence Calderon shows that

"Limited Automotive" is one of the permitted uses for which the design, construction and character of the building at 915 East University Avenue is suitable. Id. There was no competent substantial evidence offered to prove that it was not feasible to operate a limited auto service facility at the property.

28. Thus, the Board erred as a matter of law when it reestablished the nonconforming use in light of the permitted uses which could be made of the existing building. In so doing, it deviated from the requirements of the City of Gainesville's ordinance governing reestablishment of nonconforming uses, a deviation it had no authority under Florida law to make. In sum, the Board departed from the essential requirements of the law in this regard.

29. Based on the foregoing, the Court should find that the Board's decision does not meet the requirement that there be no other suitable uses for the property that are permitted in the zoning district applicable to the subject property, and should declare the reestablishment of the nonconforming use invalid.

**B. THE BOARD DEPARTED FROM THE
ESSENTIAL REQUIREMENTS OF LAW
BY PERMITTING A USE OF LAND
NOT ALLOWED IN THE MU-1
ZONING DISTRICT**

30. It is axiomatic that the Board of Adjustment does not possess the authority to re-zone property, to amend the comprehensive land use plan, or to permit uses of land which are not allowed in a particular zoning district. See, Section 30-354(d), Land Development Code. App. 21-24.

31. In the City of Gainesville, only the Plan Board may review and conduct hearings on proposed re-zoning and land use amendment applications prior to final consideration by the City

Commission. Section 30-353, Land Development Code, in particular, sub-sections 30-353(f)(1), (6), (9) (10) and (11).

32. Notwithstanding the limitations on its powers, the Board on May 4, 2000, approved an automotive repair use which is not permitted within an MU-1 District. Such a decision is ultra vires.

33. Based on the foregoing, the Court should quash and thus invalidate the Board's May 4, 2000, action to allow the automotive repair use within the MU-1 District of East University Avenue.

**C. THE BOARD'S DECISION WAS NOT
SUPPORTED BY COMPETENT SUBSTANTIAL
EVIDENCE OF RECORD**

34. There is a dearth of competent substantial evidence in the record to establish that no other use permitted in the MU-1 Zoning District could be made of the existing building at 915 East University Avenue; moreover, the Board made no findings of fact nor did it offer a supportable basis for its decision to reestablish the nonconforming use that is the subject of this litigation. App. 43. The uncontroverted testimony of Mr. Calderon is that one such feasible use, "Limited Auto," indeed is permitted in the existing building. App. 25-26; 36-37.

**D. THE BOARD'S DECISION VIOLATED
ITS ADOPTED RULES OF PROCEDURE,
AND THUS DEPARTED FROM THE
ESSENTIAL REQUIREMENTS OF LAW**

35. The Rules of Procedure for the Board of Adjustment, which were adopted by the City Commission on April 12, 1999, provide in Article V ["Hearing; Rehearing"] Section 4(j) that "The Board shall issue an order. That order shall contain findings of fact and conclusions of law

and state the affirmative relief, if any, granted by the Board...". App. 18.

36. A close reading of the verbatim minutes of the May 4, 2000, proceedings reveals that no such findings of fact or conclusions of law were provided in the motion made by Board member Peterkin and ultimately adopted by a 3 to 2 vote. App. 43. The Board is without power to deviate from the rules of procedure implemented by the City Commission for the Board of Adjustment. In short, the Board's May 4, 2000, decision departed from the essential requirements of law by not comporting with the Board's rules of procedure.

37. At least one member of the prevailing majority on the Board considered issues not in evidence at the hearing. The Board's Rules of Procedure provide in Article V ["Hearing; Rehearing] Section 4(h) that "The Board may only consider evidence presented at the hearing." App. 18.

38. There was no competent substantial evidence of record to establish that the lifts in the existing building "can be used for nothing else" except heavy auto repair. App. 35. Apparently the specter of "loss of the right to use his property in that manner" and lack of compensation for that "loss" affected at least one Board member, despite the irrelevance and incorrectness of that position and the lack of supporting competent substantial evidence in any event on this point. [App. 35].

39. Likewise, in a series of questions [App. 41-42], Chair Reid belied his predisposition to vote in favor of the petition based on real or perceived slights to the alleged property rights of the owner of an expired, void, nonconforming use. There is no basis in law or competent substantial evidence of record to have considered this issue let alone base any decision on such a philosophical bias.

40. The outcome of the Board's 3 to 2 decision would have been materially different but

for this improper consideration of matters and issues outside the record of the proceedings. Thus, the Court should quash the decision of the Board as departing from the essential requirements of law.

**E. THE BOARD'S APRIL 24, 2000,
NOTICE OF PUBLIC HEARING
INACCURATELY PORTRAYED
THE AMOUNT OF LAND SUBJECT
TO THE PETITION REQUEST
AND THUS DEPRIVED AFFECTED
PARTIES OF PROPER NOTICE AND
DUE PROCESS**

41. The April 24, 2000, Notice of Public Hearing, which was mailed to affected parties owning property within 300 feet of the 915 East University Avenue subject property, identified tax parcel 12620 as the affected property. App. 10. The accompanying map, prepared by the City's Department of Community Development, depicted the entire parcel located at 915 East University Avenue as the subject parcel. App. 11. In addition, the application for non-conforming use permit stated that the amount of affected land was 1.85 acres. App. 12.

42. At the May 4, 2000, hearing, it was revealed that the acreage eligible for reinstatement of a nonconforming use was actually .32 acres. A notation to that effect, initialed by Mr. Calderon on May 15, 2000, 11 days after the Board's hearing, was made on the first page of Mr. Yoon's application. App. 12.

43. Although the amount of land affected by the Board's decision is in reality smaller than advertised in the Notice, and presumably the impacts could be less, nonetheless, the discrepancy created confusion among members of the public affected by the petition. This confusion was apparent in the testimony of several members of the public during the June 1, 2000, hearing on Ms. Holbrook's request for rehearing. App. T15-T16.

44. To preserve the public trust in the processes of government, the Court should, based on the foregoing, quash the May 4, 2000, decision of the Board because the notice for public hearing was flawed, thus depriving affected parties of due process and actual notice of the property at issue.

WHEREFORE, Petitioner Giovanna Holbrook respectfully submits that the Board of Adjustment's May 4, 2000 decision to approve reestablishment of a nonconforming use at 915 East University Avenue should be declared invalid and unlawful in its entirety, and quashed or otherwise rendered null and void.

Furthermore, if Petitioner prevails, she requests that the Court award her the costs of bringing this litigation, as the Court may determine.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing have been furnished by U.S. Mail the 11th day of June, 2000, to:

Mayor Paula Delaney
City of Gainesville
P.O. Box 490
Gainesville, Florida 32602

Debra Babb, Esq.
Asst. Gainesville City Attorney
P.O. Box 1110
Gainesville, Florida 32602

Manuel A. Disgdierertt, Jr., agent
of record for Yoon Suk-Jang.
915 East University Avenue
Gainesville, Florida 32601


Patrice Boyes, Attorney

PETITIONER'S INDEX TO APPENDIX

Page(s) no.	Title of Document
1-8	(Draft) Minutes of Board meeting, May 4, 2000
9	Notice of appellate/rehearing rights, May 15, 2000
10-11	Notice of (May 4) Public Hearing, April 24, 2000
12-13	Petition to the Bd. of Adj. Non-Conforming Use Permit
14-20	Resolution 981343 (Rules of Procedure), April 12, 1999
21-24	Excerpts, City of Gainesville Land Development Code
25-48	Verbatim Minutes of Bd. of Adj. meeting, May 4, 2000
49	June 1, 2000, Bd. of Adj. Agenda
T1-T40	Transcript of Hearing before City of Gainesville, Florida, Board of Adjustment, Petition No. 4NCF-00 BA, June 1, 2000

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

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CITY OF GAINESVILLE
CITY COMMISS
2000 JUN 20 AM 10:11

GIOVANNA HOLBROOK,

Petitioner,

v.

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

Respondent.

Case No.
Division:



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

COMES NOW, Petitioner, Giovanna Holbrook, through 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 transcript had not been prepared at the time of filing the original Petition in this cause.

Respectfully submitted,

BOYES & ASSOCIATES, P.A.

Patrice Boyes

Patrice Boyes, Esq.
Florida Bar No. 892520
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing have been furnished by U.S. Mail the 16th day of June, 2000, to:

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Patrice Boyes
Patrice Boyes, Attorney

cc: City Atty.

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

Calandaro
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GIOVANNA HOLBROOK,

Petitioner,

v.

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

Respondent.

CASE NO.: 00-1838-CA



ORDER TO SHOW CAUSE

THIS CAUSE comes before the Court upon "First Amended Petition for Certiorari" filed June 19, 2000. Petitioner argues that a May 4, 2000 decision of the City of Gainesville Board of Adjustment ("Board"), granting an petition to reinstate a non-conforming use of land, failed to comply with the essential requirements of the law and was not supported by competent substantial evidence in the record. In addition, Petitioner contends that the Board failed to afford her procedural due process. Petitioner asks the Court to quash the Board's order and award her the costs of bringing this action. The Petition appears to be timely filed. Having reviewed the Petition, the Court finds that a response is warranted. Accordingly, it is

ADJUDGED as follows:

1. Respondent shall file a responsive pleading within 30 days after entry of this Order and show why Petitioner is not entitled to the relief she seeks.
2. Respondent shall address all issues raised by Petitioner in the "First Amended Petition for Certiorari" filed June 19, 2000.

3. The response shall contain thorough legal analysis with proper citations to authority.

ORDERED this 1 day of Aug 2000.

ORIGINAL SIGNED BY
JUDGE STAN R. MORRIS
CIRCUIT JUDGE

STAN R. MORRIS, CIRCUIT JUDGE

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