Doug and Deb Hankes, Jabez Partners Inc: 9410 Elizabeth Lake Rd., White Lake, Mi 48386

4/21/14

**Re: Unlawful order to abandon apartment no 8 at the above address**

To: White Lake Township

Gregg Baroni: Supervisor

Sean Oneil: Planning Director

Brent Bonniver: Building Inspector

Lisa Hamameh: Subcontracted as current Township Attorney

Dear folks;

Introduction: I am hereby challenging the above order to abandon our apartment 8, and to freeze our grandfathered non-conforming mixed use, both dwelling and business, at the above address on the following legal arguments. I have chosen to e-mail this as it affords me the opportunity to reference web sites as direct click access, as some of the addresses are quite long. Also, not being an attorney, I will do my best to offer a legal challenge, of course lacking the legalese that makes this even more boring.

Also, please note, that our tenant occupying apartment 8 has been moved under emotional duress to smaller apartment no 6, and apartment 8 is now vacant, thereby fulfilling your order to vacate, or lose our building altogether. This course of action was emphatically demanded by Lisa during our meeting.

Therefore to avoid any action by Lisa to abandon our building for non-compliance, our council advised following the letter of your law, BEFORE CHALLENGING IT. A change of use form as directed has been filed today, although I expect to get my $300 back..Either refund, or in court.

Also, I do not have access to Michigan case law, excepting what is on the net…very little, although I have spent over twenty hours researching these issues, as they will mostly follow the Fourteenth Amendment to the Constitution of the United States, which of course, applies to everyone in the US.

As discussed with both Gregg and Sean in brief discussions, I believe most of White Lake’s confusion in this area, is because as Sean admitted, the White Lake code does not directly address existing non-conforming use, and its accompanying protection. (so called “Grandfathered”) (Note added later...The WL Code does address this under the Building Inspectors section of the code. Of course, not understanding zoning law themselves, neither Sean or Lisa even knew this section existed, and would not admit it later when presented. Sean had ruled. His position was final, and Lisa's job was to ram that home.)

Citing from the WL Code: <http://www.whitelaketwp.com/downloads/ord_58clearzoning_ordinance_hyperlinked_652012.pdf>

Section 3.3 In case any structure or part thereof is used, erected, altered or occupied contrary to law or the provisions of this Ordinance, such structure shall be deemed an unlawful structure and a nuisance and may be required to be vacated, torn down or abated by any legal means and shall not be used or occupied until it has been made to conform to the provisions of this Ordinance. Please note this clause says, "contrary to law, or the provisions of this ordinance." Section 7.26 of the code, states that my structure is legally used. No problem here.

Section 7.23 also alludeds to the rights I am claiming in saying: 7.23 NONCONFORMING STRUCTURES

Where a lawful structure exists at the effective date of adoption of this Ordinance, or any applicable amendment thereto, that could not be built under the terms of this Ordinance by reason of restrictions on area, lot coverage, height, yards, its location on the lot, or other requirements concerning the structure, such structure may be continued so long as it remains otherwise lawful, subject to the following provisions: A. No such nonconforming **structure** may be enlarged or **altered** in a way which increases its nonconformity.

Please Note: The term **altered refers to the structure!** Which of course means….

**NO STRUCTURAL CHANGE…RIGHT?**

And section 7.24: A. The nonconforming use shall not be enlarged or increased, nor extended to occupy a **greater area of land** than was occupied at the effective date of adoption or amendment of this Ordinance.

**PLEASE NOTE:** The language in this section applies to the use of the land, and not the mixed interior use, as long as the **structure** is not enlarged or increased, nor extended to occupy a greater area of land. Of course part of the test of a pre-existing mixed use, is that all uses are continually maintained, within the structure.

In this context, I might enlighten you that the term **structure**, applies to the legal definition, and not the trades definition of a structural change. Tradesmen may find that changing a partition wall is a structural change, however in the legal sense; a structure refers to the actual skeletal structure that supports the building. Ie; foundation, supporting walls, etc. Like sometimes at a highway bridge job you will see a crane that says so, and so..STRUCTURAL STEEL COMPANY. This refers to the steel for the **supporting structure** of the bridge, not the railings, signs, decking, etc So in the legal sense, changes to electrical, plumbing, non-supporting wall dividers, etc, are not structural changes. OK? By the way, I HAVE NOT MADE **ANY STRUCTURAL CHANGES TO MY BUILDING!**

But back to non-conforming land use. As you may well know, all zoning law refers to **land use**. So when you say, cannot be expanded, you are talking about the footprint of the structure on the land, not the interior use. Notwithstanding, of course the structure, and it’s use will add, (or maybe subtract) from the land value.

Think of the Silver Dome: its very existence as a HIGHLY MIXED USE STRUCTURE, in fact became part of the land value, which is protected under the 5th and 14th amendments. However, now that most of the mixed uses have gone away, the structure is probably more of a liability to the land, rather than the great asset it once was.

But before we move on to the fifth and fourteenth amendments, let me give you a brief history of our building, how its mixed use evolved, and why this value is protected. The primary building was built in 1926, during the roaring twenties, as an auto service station. In fact the massive I Beams that supported the car hoist, in the former “plumbers” space are still there, as they were incorporated into the **structure** to support the roof decking in that part of the building, and removing them would result in a structural change..Right? Ray Kee testified to that fact, when he ask why there were massive I beams running through the proposed apartments living room.

However, shortly after construction, in 1929, the stock market crashed, resulting in the GREAT DEPRESSION and the service station fell on hard times. The then owner of the building, compensated for the hard times by adding residential apartments to the building, and at one time, encompassed the entire building; as there was a need for economical housing for the struggling masses. And while, business eventually returned to the building, it was all too short lived. When M-59 was developed as the major east-west corridor in the area, the business use of the structure all but disappeared, and in fact, as the area shows, has never returned, and it is likely..never will.

Therefore, the building owners through the years have added more apartments, while downsizing the unprofitable business uses. **THIS IS THE REAL VALUE OF THE MIXED USE,** as it can ebb and flow with more with the real needs of the community. Of course, as I wrote to Gregg in previous writings, **IF** the WL efforts to develop a business center in this area, ever do bear fruit, then I will demolish the thing, and sell my land to Roy Rogers Roast Beef. Right?

In the meantime however, the apartments are still in bigger demand than the commercial, and naturally provide a greater “land “use, than the GB zoning. This is the value of this mixed use, which subsequent zoning CANNOT TAKE AWAY, except by **due process of law.** Azoning **rule** is not due process of law.

But the fifth and fourteenth amendments to the constitution, both use the language, due process.

<http://en.wikipedia.org/wiki/Fourteenth_Amendment_to_the_United_States_Constitution>

The Due Process Clause prohibits state and local government officials from depriving persons of life, liberty, or property without legislative authorization. This clause has also been used by the federal judiciary to make most of the [Bill of Rights](http://en.wikipedia.org/wiki/United_States_Bill_of_Rights) [applicable to the states](http://en.wikipedia.org/wiki/Incorporation_of_the_Bill_of_Rights), as well as to recognize [substantive](http://en.wikipedia.org/wiki/Substantive_due_process) and [procedural](http://en.wikipedia.org/wiki/Due_process#Procedural_due_process) requirements that state laws must satisfy.

The Due Process Clause of the Fourteenth Amendment applies against only the states, but it is otherwise textually identical to the Due Process Clause of the [Fifth Amendment](http://en.wikipedia.org/wiki/Fifth_Amendment_to_the_United_States_Constitution), which applies against the federal government; both clauses have been interpreted to encompass identical doctrines of [procedural due process](http://en.wikipedia.org/wiki/Procedural_due_process) and [substantive due process](http://en.wikipedia.org/wiki/Substantive_due_process).[[73]](http://en.wikipedia.org/wiki/Fourteenth_Amendment_to_the_United_States_Constitution#cite_note-constitutional-gov-73) Procedural due process is the guarantee of a fair legal process when the government seeks to burden[[*jargon*](http://en.wikipedia.org/wiki/Wikipedia:Explain_jargon)] a person's protected interests in life, liberty, or property, and substantive due process is the guarantee that the fundamental rights of citizens will not be encroached on by government.[[74]](http://en.wikipedia.org/wiki/Fourteenth_Amendment_to_the_United_States_Constitution#cite_note-74) The Due Process Clause of the Fourteenth Amendment also incorporates most of the provisions in the [Bill of Rights](http://en.wikipedia.org/wiki/United_States_Bill_of_Rights), which were originally applied against only the federal government, and applies them against the states.[[75]](http://en.wikipedia.org/wiki/Fourteenth_Amendment_to_the_United_States_Constitution#cite_note-incorp-75)

And while it has been argued, that this language, is very broad, it has been the underlying statute for protecting an individual’s property’s rights. And I might add from additional research as to why this vague language has become the benchmark of US property rights, is because the courts have unanimously felt there is an innate **RIGHT** to life, liberty, **and property,** and have interpreted this part of the Constitution as such.

And so, an established thread of case law, has evolved across the nation, relying on this theme. And while, once again, I was not able to access much Michigan case law in this area, I have found that there are many legal analysis’s on this topic in virtually every state in the union.

My favorite is this one, and while it refers to Utah, its foundations are built on the same constitutional rights, as every other states, so as I explained to Gregg, this becomes a common benchmark to all states. Besides, this analysis is accepted by the Board of Realtors, and the American Association of Planners, because of its thoroughness.

<http://www.smithhartvigsen.com/resources/archive/nonconform.htm>

And while reading the entire essay will provide a worthy primer to zoning law in general, I will quote the appropriate passages, as Gregg has already noted that I write way too much. I guess he has never been forced to read all this legal crap…..TELL EM LISA.

**2.1.2.1 The General Rule**

The well-settled, general rule is that a non-conforming use cannot be expanded or enlarged beyond that which existed at the time the right vested.See, e.g., Harper v. Summit County, 2001 UT 10, ¶ 46, 414 Utah Adv. Rep. 21 (citing Utah County v. Baxter, 635 P.2d 61 (Utah 1981)) (Eyre, J., concurring & dissenting: noting that where "use of . . . property is a nonconforming use of land. . . . [it] may not be extended or expanded in any fashion.) The rationale behind this rule is that nonconforming uses should be discouraged and terminated at the earliest possible time through obsolescence or deterioration.

Once again, this refers to a "use of . . . property is a nonconforming use of land. . . . [it] may not be extended or expanded in any fashion. Key word being **property. RIGHT?**

Going back to the 14th amendment, taken from the <http://en.wikipedia.org/wiki/Fourteenth_Amendment_to_the_United_States_Constitution#Due_Process_Clause>

piece.

**Procedural due process**

When the government seeks to burden a person's protected liberty interest or property interest, the Supreme Court has held that procedural due process requires that, at a minimum, the government provide the person notice, an opportunity to be heard at an oral hearing, and a decision by a neutral decision maker.

In any event, this concludes this challenge at this time. As our apartment now stands vacant, I would appreciate your timely handling of this.

As stated to Gregg, even though I believe I have strong arguments to support a court case, and I have some substantial losses due to this affair, I will be happy to have you just drop the whole thing.

Yours truly;

Doug Hankes

Additional references:

<http://www.mass.gov/hed/docs/dhcd/cd/zoning/nonconforming.pdf>

<http://www.planningmi.org/downloads/nonconforming_uses_of_land.pdf>

<http://www.cooley.edu/faculty/fisher.html>

<http://en.wikipedia.org/wiki/Due_Process_Clause>

<http://en.wikipedia.org/wiki/Strict_scrutiny>

<https://sites.google.com/site/minnesotaszoninggateway/grandfathering>

<http://www.bsmlawpc.com/municipal_law/PDF/Municipal_Articles/The%20Law%20of%20Nonconforming%20Use%20Seminar%20Outline.pdf>

http://www.smithhartvigsen.com/resources/archive/nonconform.htm

<http://www.mass.gov/hed/docs/dhcd/cd/zoning/nonconforming.pdf>

<http://www.nhmunicipal.org/TownAndCity/Article/101>

<https://www.nh.gov/oep/resource-library/land-use/documents/gradfathered-nonconforming-uses.pdf>

reference 6-c Zoning Clauses Paragraph 2 titled For Illustration.

<http://prfamerica.org/positions/ZoningGlossary.html>

ref: Euclid v Ambler on last page