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Mike Rouker
City of Bloomington, Legal Department
City Hall – Suite 220
401 N Morton St.
Bloomington, IN 47402
Sent electronically to roukerm@bloomington.in.gov

Re: Notice of Violation and Fines for Violations of Title 20 of the Bloomington Municipal Code
Property located at 523 W. 7th Street, Bloomington, IN
Failure to Obtain Certificate of Zoning Compliance (CZC)
Petitioners' Statement

Dear Mr. Rouker:

I am submitting this letter and attached documents as Petitioners' Statement for the appeal of the administrative decision of the City of Bloomington Planning and Transportation Department's Notice of Violation and Fines for Violations of Title 20 of the Bloomington Municipal Code addressed to Judie Baker and David Holdman and dated October 16, 2019. I am requesting that this Statement, along with the attached documents, be presented for consideration by the City's Board of Zoning Appeals ("BZA").

The City's Notice of Violation and associated fines should be overturned by the BZA because the City violated its own Code in failing to issue Petitioners a Certificate of Zoning Compliance. After the 90 day Demolition Delay waiting period ended, the City was required to issue a Certificate of Zoning Compliance and failed to do so. The City's failure to follow its own Code should not result in a fine to Petitioners.

Procedural and Factual Background

Petitioners, Judie Baker, through her contractor and son-in-law David Holdman, filed a Demolition Application with the Monroe County Building Department on May 17, 2019, indicating their intent to remove all existing structures on the lot located at 523 W. 7th Street (the "Structure" and the "Property"). (See Application.) The City deemed the Property was subject to Demo Delay, and on or around May 22, 2019, placed a sign in the yard of the Property. The Application was considered at the June 27, 2019, meeting of the Historic Preservation Commission ("HPC") as Demo Delay 19-09. No written notice of the

June 27, 2019, HPC meeting was received by Baker or Holdman. (Holdman Affidavit, Baker Affidavit.) Holdman received a phone call from Conor Herterich on June 27, 2019, who informed him that the HPC would be meeting that day to discuss the Application. (Holdman Affidavit.)

Staff initially recommended releasing the Property from Demo Delay because staff did not believe the designation would ultimately save the Structure. (HPC Packet, June 13, 2019.) However, at some point prior to the HPC officially discussing the Property, staff changed its recommendation to starting the process for historic designation "if the petitioner continues to pursue full demolition." (HPC Packet, June 27, 2019.)

Holdman appeared at the June 27, 2019, HPC meeting. At the meeting, Herterich noted that they were twenty days into the 90 day period. The HPC voted to continue Demo Delay 19-09 pending the Commissioners' inspection of the Structure. (Meeting Minutes and Recording of HPC Meeting, June 27, 2019.)

The Application was discussed by the HPC at the July 11, 2019, meeting as well. Baker and Holdman did not receive written notice of the July 11, 2019, meeting. (Holdman Affidavit, Baker Affidavit.) Holdman was informed of the meeting either by a telephone call from Herterich on July 8 or when the Commissioners were at the Property on July 10. (Holdman Affidavit.) Holdman and Diana Holdman, Baker's daughter and Holdman's wife, appeared at the meeting. The HPC voted to start formal review of the Property for recommendation for local historic designation. (Meeting Minutes of HPC, July 11, 2019.)

The HPC met again on July 25, 2019, but no action was taken regarding the Property at that meeting. (Meeting Minutes of HPC, July 25, 2019.) The Application was not on the agenda, but was discussed during Commissioners' comments. Neither Baker nor Holdman were in attendance at this meeting, as they received no notice of the meeting. (Holdman Affidavit, Baker Affidavit.)

The HPC met on August 8, 2019, to discuss the Property. Neither Baker nor Holdman received notice of the August 8, 2019, meeting. (Holdman Affidavit, Baker Affidavit.) Moreover, unlike the June 27 meeting, Holdman did not receive a phone call to let him know that the meeting was happening and that the Property would be discussed at the meeting. However, according to the Meeting Minutes of the August 8, 2019, meeting, Herterich sent notice to the adjacent property owners that the HPC would be discussing the Property, "the merits of historic designation, and that HPC would make a motion on whether to forward 523 W 7th to the Common Council for designation." Neither Baker nor Holdman were present at the meeting. After taking public comment from a neighbor, the HPC approved the following motion: "Today the HPC declares that the property at 523 W. 7th St meets the following criteria for local designation referred to in the staff report: 2a, 2e, and 2g. Consequently, the HPC recommends its historic designation under Title 8 of the BMC to the Common Council with the attached map." (Meeting Minutes and

Recording of HPC Meeting, August 8, 2019.)

Neither Baker nor Holdman received any notice of the HPC's decision. (Holdman Affidavit, Baker Affidavit.)

On September 27, 2019, 134 days after the Application was submitted and 113 days after the HPC indicated the 90 day period began, the Structure was demolished.

During the October 10, 2019, HPC meeting, the City sought input from the Commissioners on the fine to be levied against Petitioners. After acknowledging that the process for interim protection was not followed, Commissioner Goldin stated that the Petitioners knew the HPC's "wishes" and went ahead with the demolition anyway, and expressed that an "example should be made." Commissioner Hutton described Holdman as a "big bucks guy". Other Commissioners expressed that they did not believe the family had a lot of money. (Meeting Minutes and Recording of HPC Meeting, October 10, 2019.)

The Property was deeded to Baker on 1976. Since that time, the Structure has come into disrepair. Baker's son (Holdman's brother-in-law) was killed in the house. After his murder, Baker could not return to the property. Holdman reported to the HPC during the June 27 meeting that used hypodermic needles and used condoms had been found in the house, along with other signs that people were squatting there. Fires had been set in the property on multiple occasions. At the July 11 meeting, Diana Holdman informed the HPC that the structure was sitting on dirt and that there was no crawl space, there was no central air, and only one window opened. Holdman informed the HPC that it was not his intention to build a new apartment building in place of the Structure.

The HPC focused on the central passage feature of the Structure. A central passage floorplan was projected on the screen during the HPC June 27 meeting. Commissioners referred to the central passage feature as "rare" and "distinctive." At the July 25 meeting, Commissioner Hutton stated that the HPC was considering designation of the Property because the structure was central passage and asked how HPC can ask the owner of the Property to preserve the central passage house if HPC deals only with the outside of structures. Commissioner Goldin stated that HPC is only asking that the owner retain the exterior, and can only hope the owner saves the inside, and the HPC can only advise.

Structural Engineer, Kevin Potter, conducted a structural inspection of the Structure. Potter found that the exterior ground level was touching the bottom of the wood siding in several locations and that the framing was supported by individual stone piers. The interior floors were out of level. Potter determined that a restoration of the Structure would include replacing the entire floor structure and foundation piers, installing new foundation walls and interior pier supports, and installing a new floor structure. (Potter Report, included in Appraisal.)

According to an appraisal completed by Figg Appraisal Group, based on Kevin Potter's report, the highest and best use of the Property was to raze the Structure. The home had no contributory value to the Property. The value of the Property is the value of the vacant lot, less the cost to remove the improvements. (Appraisal.)

Grounds for Appeal

Historic designation did not occur within 90 days and the CZC was improperly withheld.

Under 20.09.230(b), no certificate of zoning compliance ("CZC") authorizing release of a permit allowing the demolition listed as "Outstanding," "Notable" or "Contributing" on the City of Bloomington Survey of Historic Sites and Structures "shall be issued earlier than ninety . . . calendar days after notice has been given as provided herein." 20.09.230(b)(1).

During the 90 day period, "the HPC may conduct a hearing, in its sole discretion, . . . to determine if the HPC wishes to recommend any structure described below herein be locally designated by the common council." 20.09.230(b)(4) (emphasis added). If, within the 90 day period the property "is placed under interim protection or is locally designated as a historic or conservation district pursuant to Chapter 8.08, Historic Districts and Standards of the Bloomington Municipal Code, then no certificate of zoning compliance authorizing demolition or partial demolition may be issued." 20.09.230(d)(1). If, however, the 90 day period expires without such action, "a certificate of zoning compliance authorizing demolition shall be issued if owner has submitted a complete application and all other requirements of the Bloomington Municipal Code are met." 20.09.230(d)(2) (emphasis added).

Pursuant to 8.08.010, the City Council has the authority to designate structures as historic: "[b]efore an historic district or conservation district is established and the building classification takes effect, the map setting forth the district's boundaries and building classifications must be submitted to, and approved in an ordinance by the common council." 8.08.010(d).

The HPC may only make recommendations: "The Commission may recommend, and the council may provide that the establishment of an historic district shall occur in two phases. 8.08.010(b). Moreover, "[w]hen submitting a map to the city council under Section 8.08.010 of this title, the commission may declare one or more buildings, structures, or sites that are classified and designated as historic on the map to be under interim protection." 8.08.015(a).

It is not clear when the 90 day period began. Petitioners submitted the Application

on May 17, 2019, and the City placed the sign in the yard around May 22, 2019. At the June 27, 2019, HPC meeting, Herterich stated that the HPC was 20 days into the 90 day period, indicating that the 90 day period commenced on June 7, 2019. However, no notice was ever issued to Petitioners and no notice is included in the HPC packets indicating the date the 90 day period began. Pursuant to 8.08.015(b)(3), the 90 day period should have started when the sign was placed in the yard of the Property on or around May 22, 2019. Regardless of when the calculation started, the Property was not designated as historic during the 90 day period. Even assuming the 90 days commenced on June 7, 2019, with no explanation as to why the Application was held for 21 days without action, to date, the Common Council has not designated the Property as historic.

Pursuant to 20.09.230(b)(4) and 8.08.010(b), it is the Common Council, not the HPC, that was the power to designate a property as historic. During the 90 day period, a property may be designated as historic or placed under interim protection. If neither occurs, a CZC shall be issued. Although the HPC took action to recommend designation to the Common Council, such action was not an official designation.

Moreover, the HPC's action did not include declaring the Property to be under interim protection. It is unclear whether the property could have been placed under interim protection. See HPC Meeting Minutes of June 7, 2018 ("Philippa Guthrie pointed out that the code provides for placing interim protection only on the structures that are classified and designated as historic.")

As no designation took place within the 90 day period and because the Property was not under interim protection, the CZC was required to be issued immediately upon expiration of the 90 day period. Because the CZC was improperly withheld, Petitioners should not be subject to fines for failure to obtain a CZC.

No notice was provided to Petitioners depriving them of their Procedural Due Process Rights.

Under 20.09.230(b)(2), Planning Staff is required to provide notice to the property owner or his/her representative "for any petition involving a demolition or partial demolition covered by this section." Section 8.08.010 further provides that the commission shall adopt rules that ensure that owners of all property within the property district, and all adjacent property owners, as determined by the most recent real estate tax lists, shall receive written notice of the hearing on the proposed historic district." 8.08.010(d)(3).

Planning failed to provide required notices to Petitioners. No notice was issued to Petitioners of any of the HPC meetings discussing the Property. Moreover, no notice was issued to Petitioners of the August 8, 2019, HPC decision recommending designation. Because no notice was given, the Petitioners were deprived of their procedural due

process rights afforded by the United States Constitution. The Fifth and Fourteenth Amendments to the Constitution provide that no person shall "be deprived of life, liberty, or property, without due process of law." The HPC recommendation of historic designation, if timely passed by City Council, would deprive Baker of the full use of her property. Moreover, the City's attempt to fine Baker and Holdman constitutes a deprivation of property. Each of these violations stem from the August 8 HPC meeting, to which Petitioners were not provided notice or the opportunity to be heard.¹

Fines assessed for second and subsequent violations are inappropriate in this matter and in violation of Home Rule.

Under 20.10.040, certain "violations of this title shall be subject to the fines listed in the table below for the first offense." The table listed "Failure to obtain CZC" as a \$500 fine for a first offense.

Section 20.10.040 also provides, "if a responsible party commits a second or subsequent violation of the same provision of this title within three years of the first such violation, regardless of whether the second or subsequent violation is on the same property as the first such violation, the listed fine for such second or subsequent offense shall be twice the previous fine, subject to the maximum set forth in subsection (a) above."

It appears that the basis for assessing fines for a second violation is Planning's mistaken belief that the Property included two structures. Only one structure sat on the Property—a house with an attached garage. Although there was an error on the County Assessor's Property Record Card, aerial photographs show that the Property only contained one structure. (Property Record Card.) The drawing submitted with the Application also shows that the garage was attached to the house. Regardless, even if there had been multiple structures, all structures were included in the single Application, which stated the request was to demolish all structures, and only one CZC was to be issued. Because the fine is based on failure to obtain a CZC, instead of demolishing a structure, the number of CZCs that are alleged to have not been obtained is the standard.

The City does not have the power to prescribe a penalty of more than \$2,500 for a first violation of an ordinance and does not have the power to prescribe a penalty of more than \$7,500 for a second or subsequent violation of an ordinance. Ind. Code 36-1-3-8(a)(10)(B).

In Ritz v. Area Planning Commission, the local Planning Commission sought an injunction to prevent the Ritzes from storing automobiles and buses on their property. Ritz

¹ Petitioners also contend that the HPC is not a neutral decisionmaker, as required by the Due Process clause.

v. Area Planning Comm'n, 698 N.E.2d 386, 388 (Ind. Ct. App. 1998). The Ritzes were fined \$147,500, based on a fine structure of \$500 per vehicle per day for each day the vehicles remained stored on their property. Id. The ordinance provided that "automotive vehicles" without current license plates or in inoperable condition were prohibited in residential districts. Id. The Court of Appeals found that the ordinance did not specify that the presence of each vehicle constituted a separate violation. Id. Moreover, the Court found that the focus of the zoning code was on the property itself, not the vehicles. Id. "A single parcel of real property will be out of compliance with the zoning code whether one or one hundred inoperable or unlicensed vehicles are present. Thus, there cannot be multiple violations of the zoning code due to the presence of more than one non-compliant vehicle." Id.

The City's attempt to exponentially increase its fine against Petitioners is similar to the municipality's attempt in Ritz v. Area Planning Commission. The City's ordinance allows it to issue a fine of \$500 for failure to obtain a CZC. The CZC covered all structures on the Property. However, the City is attempting to turn a single violation fine of \$500 into multiple, ongoing violations. If Holdman and Baker failed to obtain a CZC, that is a single action for which they can be fined. They did not, however, fail to obtain a CZC on each day. The alleged violation here, failure to obtain a CZC constitutes a single violation. There has been no allegation that Petitioners have failed to obtain a CZC on more than one occasion.

Moreover, as stated above, it was mandatory for the City to issue the CZC by the time the Structure was demolished. Petitioners did not have a CZC or a demolition permit only because the City improperly withheld it. The City's continuing to improperly withhold the CZC should not result in an ongoing violation for the Petitioners.

Planning has improperly applied the fine structure for second, subsequent, and ongoing violations. A failure to obtain a CZC is a single action, not meriting ongoing violations. Moreover, the City violated its own Code in failing to issue the CZC after the 90 days had lapsed. Petitioners were entitled to the CZC and City's failure to issue the CZC should not result in a windfall for the City.

Excessive fines violate the United States and Indiana Constitutions.

The City's Notice of Violation and assessed fines to Petitioners are excessive, in violation of the United States and Indiana Constitutions.

Pursuant to the Eighth Amendment to the United State's Constitution, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The Supreme Court has held that the Eighth Amendment Excessive Fines Clause is incorporated by the Due Process Clause of the Fourteenth

Amendment, and thus applies to the States. Timbs v. Indiana, 139 S. Ct. 682, 687 (2019).

The Indiana Constitution provides further protection from citizens against excessive fines. Section 16 of the Indiana Constitution states: "Excessive fines shall not be imposed. . . . All penalties shall be proportioned to the nature of the offense."

"When authorized, reasonable penalties may be imposed by ordinances and statutes in order to induce compliance with their terms, but such excessive penalties may not be exacted as are calculated to intimidate and coerce a party from testing the validity of the requirement. Whether a given penalty is reasonable or excessive must be determined in the light of the particular circumstances." Walkerton v. N.Y., C. & S. L. R. Co., 18 N.E.2d 799, 803 (Ind. 1939).

"A fine is considered excessive if it is grossly disproportional to the gravity" of the offense." Id. "Courts consider four factors when determining whether a fine is excessive: (1) the essence of the crime and its relation to other criminal activity; (2) whether the defendant fit into the class of persons for whom the statute was principally designed; (3) the maximum sentence and fine that could have been imposed; and (a) the nature of the harm caused by the defendant's conduct." Id.

The City's fine is neither a fixed sum nor linked to the harm caused by the underlying violation. The October 10 HPC meeting reveals that the City was not following a set code requirement for assessing the fine because it sought the HPC's input. Some of the HPC Commissioners desired for the City to consider other factors in determining how much to fine Petitioners, including Holdman's perceived financial status, their perception that Petitioners went against the HPC's desires to preserve the Structure, and whether an example should be made of Petitioners. The City arbitrarily and capriciously decided to assess a fine that was more than the value of the Property.

Based on the structural engineering report, an appraiser has determined that the Structure had no contributory value to the Property. The value of the Property immediately prior to demolition was \$83,000. The City's fine of \$83,500 exceeds the value of the Property by \$500.² This fine is disproportionate to the Petitioners failure to obtain a CZC that the City was improperly withholding.

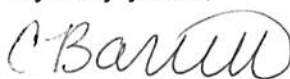
The HPC improperly considered the interior features of the structure, which it could not protect.

Throughout the HPC's consideration of the structure, it focused on the central

² Petitioners further contend that the City's levy of a fine in excess of the Property's value constitutes a taking in violation of the United States and Indiana Constitutions.

passage feature of the home. A central passage house is a house in which the hall and parlor are divided by a central passageway. Central passage is an interior floor plan feature. After a property is designated historic or placed under interim protection, the exterior appearance of the structure cannot be conspicuously changed. (8.08.015, 8.08.020) The HPC has no authority to control the interior of the Structure. Thus, the HPC's focus on the interior feature of the Structure in recommending the Property for historic designation was improper.

Very truly yours,



Christine L. Bartlett
David L. Ferguson

DLF/clb

Exhibits:

June 27, July 11, July 25, August 8, and October 10, 2019, Meeting Minutes and Recordings
June 13 and June 27, 2019, Packets
June 7, 2018 Meeting Minutes
Holdman Affidavit
Potter Report
Figg Appraisal
Fox Article
B Square Beacon Article
PRC
Demolition Application