

CITY OF THORNTON
BUILDING CODE ADVISORY BOARD, (BCAB)
THORNTON LLC'S APPEAL OF NOTICE OF VIOLATIONS OF THE SOUTH
THORNTON URBAN RENEWAL AUTHORITY NON-RESIDENTIAL PROPERTY
MAINTENANCE CODE AS IT RELATES TO THE THORNTON SHOPPING CENTER
April 30, 2020
Virtual Meeting on Zoom

CALL TO ORDER: The meeting was called to order at 2:23 p.m.

ROLL CALL:

John Soper (Chairman)	Present
David Lucy (Vice Chairman)	Present
Kerry Babin	Present
Nelson Wolfmeier	Present

Also in attendance were, Greg Wheeler, Chief Building Official, (Assisting the Recording Secretary), Desirae Lovato, Administrative Supervisor and April O'Connell, Recording Secretary.

City Attorney Luis Corchado and Assistant City Attorney Shaun McCullough were also there to advise BCAB on procedural issues.

APPROVAL OF AGENDA:

APPROVAL OF MINUTES:

OLD BUSINESS:

NEW BUSINESS:

THORNTON LLC'S APPEAL OF NOTICE OF VIOLATIONS OF THE SOUTH
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Chairman, Soper, opened appeal hearing at 2:27 p.m. and gave opening statement.

Miss Lovato said the notarized meeting notice will be emailed to staff and Board for the record.

Chairman, directed the Recording Secretary, to enter the Thornton LLC's application of appeal into the record, dated March 11, 2020 and subsequent correspondence of parties. Appeal letter and position statements also entered into the record.

The City Attorney, asked parties whether they had an objection to BCAB member phoning in if they drops off of the Zoom meeting. Appellant's attorney, Mr. Kenneth Skogg, said he had no objection, but asked that if a Board member drops off, that it is announced immediately and the meeting is paused. Deputy City Attorney, "The City's Attorney", Mr. Mallonee had no objection.

Stipulated exhibits entered into record as evidence, which are Exhibits A-D (City) and 1-3, 5, 8 and 9 (Appellant).

Appellant gave his Opening Statement. He gave background about property and efforts to market property for potential redevelopment. Appellant has worked with the City to market the property. On February 20, 2020, Appellant received 10-242(b) (4) Notice requirements, requires a correction order to include a "reasonable time." Notice identified 110 violations, and City ordered these violations to be corrected in 15 days. This was the primary focus of appeal. Referenced 10-246(a) basis of appeal, including true intent. Code does not provide guidance about "reasonable time." Appellant said it will show the Notice did not provide a "reasonable time" and fails to comply with true intent of the code. In addition, COVID-19 pandemic further complicates completing repairs.

The City gave an Opening Statement. Violations are not news to Appellant. They were informed of violations as far back as December 2019. Board's purview is limited. Appeal limited to whether true intent (provide for health, safety and welfare of Thornton residents) correctly interpreted, full provisions do not apply or requirements of Code can be met in some other way. Code provides for minimum requirements for non-residential property. Violations generally consented to existence of violations, just wants more time. City can provide evidence for each violation. Will only provide evidence for 14 violations at issue. Great Recession beginning in 2008 as an excuse does not make sense, because it was followed by 12 years of the longest economic expansion in history. The Notice was issued before COVID-19 and economic impacts from occurring. Regardless of whether the property will be sold for redevelopment, Code requirement still apply. Do not get distracted by monetary arguments. Board member, Babin, announced he dropped off of the meeting for 2 minutes during City's Opening Statement. The City's Attorney continued by picking up with argument not to get distracted by financial arguments. Code uses words like "workmanlike manner" and "good condition" (?) and it is the Board's job to determine if Inspector was overzealous. Ask to uphold entire Notice. Ask only to fix typos or only few violations where Inspector might have gone too far.

1. Appellant's Presentation

a. Appellant Witness: Jay Brown. The Recording Secretary swore him in. Mr. Brown testified that he is a property manager and is a real estate developer and has been for more than 40 years in more than 30 states. He said he is the owner of Thornton LLC,

which owns Thornton Shopping Center. Appellant's attorney brought up Exhibit 1 (aerial view of shopping center). Mr. Brown described property owned by Thornton LLC. Mr. Brown described property's historical use. Built in 1955. Thornton LLC bought the property in May 2005. State of property was 65% lease. Intent of Thornton LLC in purchasing property was to fix up the property. Unable to do so because CDPHE sent letter saying it detected contamination across the street that originated with the property, which is the owner's responsibility. Had to spend substantial sums to address environmental issues. Believed he did due diligence based on 2004 insurance company's environmental report completed as part of previous owner's refinance. He received bad advice from a lawyer. Expenses to address environmental issues. The City's Attorney objected that economic outlay are irrelevant to whether February 20, 2020, Notice of Violation should be modified or overturned. Appellant's Attorney responded determining "reasonable time" can include property owner's ability to pay and therefore it is relevant. The City Attorney advised the Board that it could determine whether costs of environmental cleanup is relevant. Board member Wolfmeier said he did not believe economic hardship applied to this situation. Board member Babin said it does not apply either. Board member Lucy said he does not believe economic hardship does not relate to Code. Chairman said economic hardship is not relevant to purview of Board's review. Board decided testimony of economic hardship not admitted. City's Attorney objected to the question about prior contracts to purchase property. Appellant's Attorney responded that the City of Thornton desired for property to be redeveloped and it is relevant to notice of violation. Cities replied that issue is whether violations are actual violations, but property owner's aspirations of future development is not issue before the Board. Appellant's Attorney replied that City acknowledged that it had postponed requiring Code violations being addressed when property was under contract. City Attorney advised that it could reject testimony about prior contracts, but Appellant's Attorney could describe what he would have presented to preserve issue for the record. Chairman said violations are not a surprise. Appellant's Attorney clarified that question was about prior contracts, which led to City postponing efforts to pursue Code violations during pendency of contracts. City's Attorney responded that the postponement is irrelevant to issue of whether there were violations on February 20, 2020. The Board members decided to move on.

Appellant's Attorney brought up Exhibit 2 (admitted above) - appeal letter with notice of violation. Mr. Brown said this notice was the first formal notice from City and agreed there were approximately 110 violations in the notice. Testimony from Mr. Brown about timeframe given by City to complete repairs ("Unless otherwise approved by the City, repairs must be completed within 15 days from the date of correspondence") and Mr. Brown said his understanding was repairs must be completed within 15 days.

Testimony from Mr. Brown about Exhibit 3 (admitted above) - March 3, 2020 email from Jay Brown to Chris Kruhmin in which he says no property owner could complete all repairs in 15 days and repairs would cost \$100,000-\$200,000, most repairs are cosmetic, and property will be demolished and redeveloped in the future. Thornton LLC has made all repairs relating to potholes and asphalt at an expense of \$14,000; expects company to complete lighting repairs soon.

Exhibit 4 - March 4, 2020, email from Jason O'Shea saying the City is willing to work with you on determining a reasonable timeframe and repair schedule. City's Attorney objected to the extent "reasonable timeframe" is not issue for Board to decide. Appellant's Attorney responded the Board's is arbiter of whether a repair timeframe is reasonable. Board member, Wolfmeier moved to allow this questioning about reasonable timeframe to continue, seconded by Board member, Babin. Vote: Chairman – No. Board member, Babin – Yes. Board member, Lucy – No. Wolfmeier – Yes. Motion failed two (Chairman, Lucy) -2 (Babin, Wolfmeier). Motion to reconsider, (Wolfmeier/Babin) – passed unanimously. Chairman made a Motion to allow testimony about reasonable timeframe passed unanimously. Exhibit 4 admitted into evidence. Testimony by Jay Brown about Exhibit 4.

Exhibit 5 (admitted above) – Jay Brown's responses to violations, dated March 10, 2020. Testimony by Jay Brown about Exhibit 5. Said he never heard back from City before March 11, 2020, appeal deadline and so he filed a notice of appeal on March 11. Testimony by Jay Brown of Exhibit 2 (application of appeal) that time to correct violations was not reasonable and that another alternative (phasing the work and providing additional time to finish repairs) can satisfy code, per Sec 10-246(a) ("requirements of this code are adequately satisfied by other means"). Testimony by Jay Brown that City and Appellant reached standstill agreement re: appeal hearing due to COVID-19 pandemic. Testimony by Jay Brown about Exhibit 8 (March 17, 2020 email between City's and Appellant's Attorneys establishing this agreement). Testimony by Jay Brown that Thornton LLC has suffered from COVID-19 pandemic and asked for enough time to pay for violations, but not to ignore them. City's Attorney objected to relevancy of Thornton LLC's financial difficulties. Chairman, ruled testimony about financial wherewithal to make repairs is not relevant; question is whether Code violations exist. Appellant's Attorney made an offer of proof that the evidence wouldn't have gone to the financial impacts due to COVID-19 and that major tenants were completely shut down and rental income will be diminished while expenses will be the same, thereby affecting Appellant's ability to make repairs.

Exhibit 9 (admitted above) - 4/17/20 email from Appellant's Attorney to City's Attorney asking for City to slow down process to allow more time to complete repairs in a reasonable and timely manner. Jay Brown testified that request to extend time was not an attempt not to remedy violations, but to prioritize violations, and would complete all of them and tried to give a realistic timeframe to get them done and to pay for them. Reiterated that he was not trying to ignore violations. Chairman, asked if City was willing to extend timeframes, and Mr. Brown answered yes and gave what he thought were realistic timeframes to complete repairs and pay for them. Mr. Brown testified he did not receive an answer from the City after providing timeframes. Mr. Brown testified that, as stated in Exhibit 9, he be given 4-6 weeks to complete repairs of highlighted items once Stay at Home Orders are lifted. Mr. Brown testified that he wants to work with City to repair violations and redevelop property.

b. City's Cross-Examination. Re: March 3, 2020 response to City, said it would take 1,000 man-hours to complete all repairs. Did not have an estimate from a contractor. For each violation, that would take 9.5 hours, and some violations were removing pigeon nests. 1,000 man-hours could be on high side. Said contractor told him it would take about 45 hours (2-man crew). Even if it would take 1,000 man-hours, if crew of 10-people work could be completed in 2 weeks. Mr. Brown's testimony re: Exhibit 5 (Thornton LLC's responses)—Counter-proposal was to complete some repairs by end of June and others by end of September (6 months after date of counter-proposal). Lighting has not been fixed yet. Next line of questioning was about the violations Mr. Brown had questions about. City's Attorney showed photos of these violations. City's Attorney said 8949 Washington Street is typo, address does not exist; Board could reverse.

Exhibit B (Notice of Violations with photos): Mr. Brown indicated he had seen this document.

- 831 E. 88th Washington Street – City's Attorney: Board can decide whether this is violation of 10-253(h).
- 8866 Washington St. – exposed OSB; can allow pests in.
- 8946 and 8948 Washington St. where Mr. Brown asked question – Mr. Brown said contractor is working on it.
- 831 Washington St. – broken lamp and sign: City's Attorney: Board could decide whether broken sign should remain or be removed.
- 8876 Washington – Mr. Brown had question about. Mr. Brown acknowledged photo showed damage.
- 8804 Washington St. – post office. Mr. Brown said he determined building was his responsibility.
- 831 Washington St. east side of building the roof edge and wall. Mr. Brown acknowledged issue and understands painting required.
- 8858 Washington St. foundation eroding: Mr. Brown identified the violation.
- 8949 Washington St. light post—erroneously listed. City's Attorney said City can drop it or Board can decide to modify address to correct one (8948 Washington St.),
- 8868 Washington St. soffits – Mr. Brown acknowledged the disrepair
- 8948 Washington St. – Mr. Brown said repairs gone out to bid.
- 8860 Washington St. – Mr. Brown could identify violations.

Re: "Reasonable Time": Mr. Brown testified that he spoke to Bob Gardner either on March 11th or 12th and Bob Gardner had a problem with the proposed timeframe, that they weren't specific enough, but never expressed problem with August deadline or that the proposed timeframes were reasonable.

Redirect: Mr. Brown testified re: Exhibit B, he did not receive photos in the February 20 Notice. He also testified that the City did not meet with him on site to go through violations; he was not in town. Appellant's Attorney objected to re-cross question. Chair affirmed the objection.

c. Chairman and Board member Wolfmeier asked about permits. Mr. Brown testified that most repairs did not require permits, and permits were not discussed in conversations

with the City. Mr. Brown testified that safety items can be completed no later than end of June and other items can be completed by the end of September.

Appellant rested its case.

2. City's Presentation

a. City's Witness: Chris Kruhmin. The Recording Secretary swore him in. Mr. Kruhmin is an ICC-certified inspector. Has put together work crews to perform maintenance. He is who noted all the violations in the February 20 Notice. Re: Mr. Brown's estimate of 1,000 man-hours, it would take 2 weeks to complete if crew of 10 people. Appellant's Attorney objected to Mr. Kruhmin serving as expert in performing repairs. Mr. Mallonee responded that Board opened up the issue of whether 2 weeks is a reasonable amount of time, and Mr. Kruhmin has experience in the area of how long it takes to repair. The Chairman sustained the objection.

Mr. Kruhmin described on site what the violations were to an agent of Thornton LLC (Joel Graham). Mr. Kruhmin believed this conversation took place in November. Appellant's Attorney objected because witness cannot testify to events that took place before February 20. Mr. Mallonee responded that point of question is to establish that Thornton LLC, through its agent, had actual notice of violations on February 20. Objection overruled. Mr. Kruhmin testified that in Notice of violation, Code section was included next to each and every violation. In his opinion, the violations existed.

b. Cross-Examination. Mr. Kruhmin testified he is the only Property Maintenance Inspector and reports to Bob Gardner, Building Inspection Supervisor. He has been the inspector for few months before this case. In addition, has had around 60 violations issues. Most violations are for this case. 15 days is a standard time provided, whether it is 1 violation or 111, but City allows Mr. Kruhmin to give leeway to property owners? No extension of time had been given to Thornton LLC. Penalties and fines could become liens on the property if compliance not had in 15 days. Re: conversation with Mr. Graham, he is a facility manager. Mr. Kruhmin said his understanding is Mr. Graham is a direct employee of Thornton LLC, but he worked for TSC Maintenance, a separate entity. Photos were not included because of file size. No hard copy provided.

3. Persons Whose Interests Are Affected,

None. Recording Secretary stated no one had contacted the City about wanting to speak in this hearing.

4. Closing Arguments

a. Appellant. Notice incorrectly interprets true intent of Code by not providing reasonable timeframe in which to complete repairs, and intent can be satisfied by allowing phased approach to remedying repairs, starting with safety issues.

b. City. It is clear that all violations exist, save potentially the one wrong address (8849 Washington St). Testimony by Mr. Brown and Mr. Kruhmin establish this. Only issue is whether 15 days a reasonable time. City contends this is outside of the Board's purview, because it does not pertain to protection of public health, safety and welfare. Mr. Brown testified 10 people could finish all repairs in 14 days. Financial aspect is not a consideration. Therefore, the timeframe is reasonable. If correction order timeframe is modified, do not set it out to June or September. The City requests 15 days was a reasonable time and not to modify the order at all.

c. Appellant's Rebuttal

Role of Board is broader than City's Attorney claims. Board is a gatekeeper as to what constitutes a reasonable time.

*City Attorney said we have two issues: (1) Whether violations, as stated, are violations; and (2) Whether 15 days was unreasonable, if decide that issue, what to do? Recommendation is to divide issues out. Decide whether to modify violations and whether to modify the 15-day time frame. Allow parties to have a week to draft briefs on what is a reasonable time, if the Board thinks it has the authority, and how to determine what timeframe to give, and what factors to give. Appellant's Attorney does not have a strong objection to additional briefing; leave it up to the Board. City does not have a problem with bifurcating the issues. Board can deliberate whether they additional briefing.

5. Hearing Closed at 6:26 p.m.

6. Deliberation

Member Wolfmeier: Both sides make good points, but in reality, most crews do not work in teams of 10 and work 10-hour days. Appellant knew of violations in November. Cities are cooperative when they see property owner attempting to make repairs.

Member Lucy: Question is, are these violations, valid violations? There are photos of violations. Do not think Board has authority to change timing of a City official. Board only governs the violations. The issues should be violated. Violations should be affirmed, and there should be some accommodation to complete repairs.

Member Babin: Violations are valid. They could have been taken care of a long time ago. Board does not have the authority to change timeline that was given.

Chairman: Violations exist. Issues can be split into two parts.

7. Motion:

Board member, Lucy motioned to bifurcate issues. Board member, Babin seconded. Passed unanimously.

a. Violations: Motion/Vote/Deliberation

Affirm all violations in the Notice, Motion: Board Member, Wolfmeier. Seconded Board member, Lucy). Passed unanimously. Deliberation occurred above.

b. Timeframe: Deliberation; Motion/Vote

i. Deliberation

Board member, Lucy: It is up to City official whether to accommodate property owner.

Board member, Wolfmeier: Board is here to determine whether 15 days was reasonable.

City Attorney clarified reasonable time is not defined and no clear statement in Code whether Board can modify timeframe. It is not clear. Board has discretion. First decide if Board believes it has authority to modify timeframe and if so what to do?

Board member, Lucy: Board should not be doing administrative work that is the duty of the City. Parties should get back together and decide what is a reasonable time. We should order parties to consult on what is a reasonable time.

City Attorney recommended that Board first decide whether Board has authority to decide timeframe issue and make motion to rule on it. If they decide it does not, then the Board is done. If they decide it does, could ask parties for further written argument on what is reasonable, or have parties come back with written statement.

Board member, Lucy: Parties need to decide what a reasonable time is.

ii. Motion/Vote.

(1) Board member, Wolfmeier: Given Notice's date of February 20, 15 days was not reasonable amount of time and parties should get together and agree on what is a reasonable timeframe. Board member, Lucy seconded. Passed unanimously.

(2) Board member Wolfmeier: Modify the City's decision as follows: All parties should, within 30 days, meet and come to an acceptable time to complete repairs; no need to return to Board; appeal is concluded. Seconded by Board member Lucy. Passed unanimously.

Meeting Adjourned:

6:47 p.m.

BUILDING CODE ADVISORY BOARD
CITY OF THORNTON, COLORADO

John Soper/Board Member Chair

ATTEST:

April O'Connell, Recording Secretary