

BEFORE THE CODE ENFORCEMENT MAGISTRATE,
OF THE CITY OF MOUNT DORA, FLORIDA

Case No.: 2017-0187


CITY OF MOUNT DORA,
a municipal corporation,
Plaintiff,

vs.

NANCY NEMHAUSER, and
LUBOMIR JASTRZEBSKI,
Defendants.

NOTICE OF APPEAL

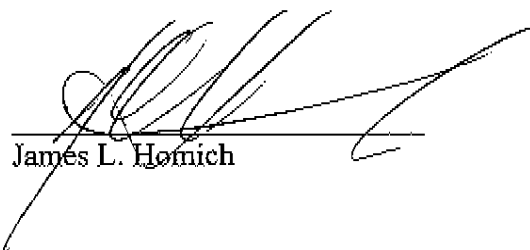
NOTICE IS GIVEN that Nancy Nemhauser and Lubomir Jastrzebski, the defendants/appellants, appeal in accordance with Fla.R.App.P. Rule 9.030(c)(1) to the Fifth Circuit Court, the Order of this court rendered October 6, 2017. A conformed copy of the order is attached to this notice. The nature of the order is a final order finding a violation of code and that such violation was not selectively enforced.



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CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished by facsimile transmission this day, October 11, 2017, to: Ms. Jennifer Cockcroft at 407-330-2379.



James L. Homich

BEFORE THE CODE ENFORCEMENT MAGISTRATE
FOR THE CITY OF MOUNT DORA, FLORIDA

CITY OF MOUNT DORA, FLORIDA,
a municipal corporation,

Petitioner,

vs.

CASE NO.: 2017-0187

NANCY NEMHAUSER and
LUBOMIR JASTRZEBSKI,

Respondents.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This matter was heard on September 29, 2017, by the undersigned Magistrate, after due notice to the Respondents and public hearing. The undersigned, having received evidence, heard testimony and being otherwise fully advised in the premises, makes the following FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER:

1. The property which is the subject of this code enforcement action is located at 306 West Sixth Avenue, Mount Dora, Florida ("Subject Property") and is more particularly described as:

ALTERNATE KEY: 2720697

2. The Code Enforcement Officer, Cindy Sommer, testified at the hearing that she received a complaint about painting on a wall at the Subject Property on July 26, 2017 and that she then inspected the Subject Property on that date.

3. Photographs of the Subject Property taken by the Code Enforcement Officer on July 27, 2017 were admitted into evidence at the hearing without objection, and showed that graphic designs in mostly blue and yellow colors had been painted on a wall at the Subject Property, and that an advertising sign for a "Painter Artist" with a telephone number was placed

in the ground adjacent to the painted wall.

4. The Code Enforcement Officer testified that she place a courtesy Notice of Violation on the door of the Subject Property on July 27, 2017, which stated that the painting on the wall must be covered/painted immediately.

5. The Code Enforcement Officer also testified that she later spoke to one of the owners of the Subject Property, Nancy Nemhauser, and told her that the painting on the wall and the advertising signs were in violation of City Codes.

6. The Code Enforcement Officer testified that she sent the owner of the Subject Property an email on July 31, 2017 to explain that the painting on the wall was a "sign" under the definition in the City's Land Development Code and was not permitted in the R-3 residential zone, and that the painting on the wall was disallowed "graffiti" under Section 22.960(b) of the City's Code of Ordinances.

7. The Code Enforcement Officer also testified that she spoke to one of the owners of the Subject Property, Nancy Nemhauser, on July 27, 2017 and told her that the painting on the wall and the advertising sign were in violation of City Codes. One of the owners of the Subject Property, Nancy Nemhauser, testified that she immediately removed the advertising sign.

8. Nancy Nemhauser testified that the painter, Richard Barrenechea, had come to her and suggested painting the graphic designs on the walls, and that she entered into a written contract with the painter for the painting of graphic designs on the walls with compensation to the painter.

9. Photographs of the Subject Property taken by the Code Enforcement Officer on August 1, 2017 were admitted into evidence at the hearing without objection, and showed that the graphic designs were still painted on the wall at the Subject Property, and that additional

graphic designs had been painted on another wall at the Subject Property facing Old Route 441. The photographs also showed that the advertising sign was no longer on the Subject Property.

10. The Code Enforcement Officer testified that she mailed a Notice of Violation on August 1, 2017 by both U.S. First Class Mail and U.S. Certified Mail to the Respondents at 601 N. McDonald Street #401, Mount Dora, Florida 32757. A return receipt admitted into evidence at the hearing without objection showed that N. Nemhauser received the Notice of Violation on August 9, 2017. Counsel for the Respondents stipulated that the Notice of Violation had been received by the Respondents. The Notice of Violation stated that the painting on the walls was in violation of Code Section 22.960 as "graffiti," and in violation of Code Section 6.7 as an unpermitted "sign" within the R-3 zoning district. The Notice of Violation directed the Respondents to correct the violation by August 15, 2017.

11. The Code Enforcement Officer testified that she sent an email to the owner of the Subject Property on August 3, 2017 to explain the City's Code Enforcement procedures.

12. Photographs of the Subject Property taken by the Code Enforcement Officer on August 7, 2017 were admitted into evidence at the hearing without objection, and showed that the graphic designs were still painted on the walls at the Subject Property, and that additional graphic designs had been painted on the wall at the Subject Property facing Old Route 441.

13. The Code Enforcement Officer testified that she mailed a Notice of Hearing on August 15, 2017 by both U.S. First Class Mail and U.S. Certified Mail to the Respondents at 601 N. McDonald Street #401, Mount Dora, Florida 32757, and to their counsel. Return receipts admitted into evidence at the hearing without objection showed that Nancy Nemhauser and the Respondents' counsel received the Notice of Hearing. Counsel for the Respondents stipulated that the Notice of Hearing had been received by the Respondents.

14. Photographs of the Subject Property taken by the Code Enforcement Officer on August 15, 2017 were admitted into evidence at the hearing without objection, and showed that the graphic designs were still painted on the walls at the Subject Property.

15. A memorandum from the City's Interim Planning Director on August 23, 2017 was admitted into evidence at the hearing without objection, which stated that the Subject Property is zoned R-3 multiple-family residential district.

16. Photographs of the Subject Property taken by the Code Enforcement Officer on September 13, 2017 were admitted into evidence at the hearing without objection, and showed that the graphic designs were still painted on the walls at the Subject Property.

17. At the hearing on September 14, 2017 for this case, counsel for the Respondents orally made a motion for continuance, which was granted by this Magistrate. The parties then stipulated to a new hearing date of September 29, 2017.

18. The Code Enforcement Officer testified that she mailed a Notice of Hearing on September 14, 2017 by both U.S. First Class Mail and U.S. Certified Mail to the Respondents at 601 N. McDonald Street #401, Mount Dora, Florida 32757, and to their counsel. Return receipts admitted into evidence at the hearing without objection showed that the Respondents and their counsel received the Notice of Hearing. Counsel for the Respondents stipulated that the Notice of Hearing had been received by the Respondents.

19. Photographs of the Subject Property taken by the Code Enforcement Officer on September 14, 2017 were admitted into evidence at the hearing without objection, and showed that the graphic designs were still painted on the exterior sides of the walls at the Subject Property, and that additional graphic designs had been painted on the interior side of the wall at the Subject Property facing Old Route 441.

20. The Code Enforcement Officer testified that she received telephone calls complaining that graphic designs were “horrendous,” and that they were now being painted on the house structure at the Subject Property, and she also testified that she again inspected the Subject Property on September 25, 2017.

21. Photographs of the Subject Property taken by the Code Enforcement Officer on September 25, 2017 were admitted into evidence at the hearing without objection, and showed that the graphic designs were still painted on the walls at the Subject Property, and that additional graphic designs had been painted on the house structure.

22. The Magistrate did not find the testimony of Nancy Nemhauser to be credible that she entered into an additional contract with the painter to also paint graphic designs on the house structure because she understood that the City wanted the house painted to match the walls.

23. Photographs of the Subject Property taken by the Code Enforcement Officer on September 28, 2017 were admitted into evidence at the hearing without objection, and showed that the graphic designs were still painted on the walls at the Subject Property, and that additional graphic designs had been painted on the side of the house structure facing Old Route 441.

24. The beginning of Section 6.7 entitled “Signs” in Chapter VI of the City’s Land Development Code states as follows:

The purpose and intent of this section is to establish regulations for the fabrication, erection and use of signs and outdoor advertising displays within the City. These regulations are hereby established in order to promote the overall economic well being of the businesses in the city, while at the same time providing for the health, safety and welfare of its citizens by reducing the adverse effects of signs and displays on highway safety, building safety, property value, and the enjoyment of the scenic beauty of the city.

25. The Code Enforcement Officer testified that the graphic designs painted on the

walls and house structure of the Subject Property and clearly visible from the adjacent streets distract the drivers of vehicles on Old Route 441, which is heavily traveled.

26. It was stipulated by the parties that the definition of "Signs" in Chapter VIII of the City's Land Development Code is as follows:

Any letter, figure, character, mark, plane, point, marquee sign design, poster, pictorial, picture, stroke, stripe, line, trademark, reading matter, inflatable device, or illuminated surface, which shall be so constructed, placed, attached, painted, erected, fastened, or manufactured in any manner whatsoever, so that the same shall be used for the attraction of the public to any place, subject, person, firm, corporation, public performance, article, machine, or merchandise, whatsoever, which is displayed in any manner whatsoever.

27. At the hearing, Nancy Nemhauser testified that the painter has an internet website which shows two photographs of the graphic designs painted on the walls of the Subject Property, and which advertises for sale smaller paintings with designs similar to those on the walls of the Subject Property, one of which is marked "Sold."

28. At the hearing, the Respondents introduced photographs of graphic designs on walls, windows, sidewalks, and mailboxes in other areas of the City.

29. The evidence of graphic designs on walls, windows, sidewalks, and mailboxes in other areas of the City are not relevant to the Subject Property in the R-3 residential zone because those areas are not similarly situated conditions, and do not support the Respondents' argument that the City has practiced selective enforcement against the Subject Property.

30. The City's counsel stated at the hearing that the City does not wish to further pursue the allegation that the painting on the walls and house structure at the Subject Property are disallowed "graffiti" under Section 22.960(b) of the City's Code of Ordinances.

31. The City requested the Magistrate to find that the Respondents are in violation of Section 6.7 of Chapter VIII of the City's Land Development Code because the graphic designs

painted on the walls and the house structure at the Subject Property are "signs" as defined in the Code and are not a type of signs which are permitted in an R-3 residential zone, and to order the Respondents to cover all of the graphic designs with solid color paint within 10 days.

32. The graphic designs painted on the walls and house structure at the Subject Property are "signs" within the definition in Chapter VIII of the City's Land Development Code because they include the following: figures, a character, pictorials, and pictures, which are painted and displayed so that the same are used for the attraction of the public to a place.

33. The graphic designs painted on the walls and house structure at the Subject Property are "signs" which actually have and continue to attract the attention of the public to the Subject Property and to the painter's advertisement of his commercial services.

34. The graphic designs painted on the walls and house structure of the Subject Property have an adverse effect on roadway safety by distracting drivers of vehicles on Old Route 441.

35. The City's Code regulations of signs are not vague or overbroad, but are specific and clear as to what signs are permitted and are not permitted.

36. The City has a legitimate and significant governmental interest in the preservation..... of roadway safety within the City.

37. The City's Code regulations of painted signs are neutral regarding the intent, content and viewpoint of such signs and paintings.

38. The painter advertises his professional services by using photographs of the graphic designs he painted on the walls of the Subject Property on his internet website, which also advertises for sale his paintings with designs similar to those on the walls of the Subject Property.

39. The graphic designs on the walls and house structure of the Subject Property are intended to benefit the economic interests of the painter, and therefore constitute commercial speech which is permissible to be regulated by the City.

40. The undersigned Magistrate finds that competent, substantial evidence was received at the hearing to prove that that the Respondents are in violation of Section 6.7 of Chapter VIII of the City's Land Development Code because the graphic designs painted on the walls and the house structure at the Subject Property are nonconforming "signs" as defined in the Code and are not a type of sign which are permitted in an R-3 zone,

41. The City presented competent substantial evidence at the hearing showing that as of September 13, 2017, the Respondent had not cured the established violations of Section 6.7 at the Subject Property.

42. At the conclusion of the hearing on September 29, 2017 for this case, counsel for the Respondents orally made a motion to stay a written order by the Magistrate, which was denied by this Magistrate.

BASED ON THE FOREGOING, THE MAGISTRATE ANNOUNCED AT THE HEARING THAT IT IS ORDERED that:

43. Within thirty (30) days of the date of this Order, the Respondents shall correct said violations of Section 6.7 of Chapter VIII of the City's Land Development Code by covering all of the graphic designs with solid color paint.

44. Any violations by the Respondents of Section 6.7 at the Subject Property within five (5) years from the date of this Order may be prosecuted as a repeat violation in accordance with Chapter 162, Florida Statutes.

SIGNED on the 6th day of October, 2017.


David F. Tegeler
Code Enforcement Magistrate.....

CERTIFICATE OF SERVICE

I certify that a true and correct copy of this Order has been mailed via first class mail and certified mail this ____ day of _____, 2017, to Nancy Nemhauser and Lubomir Jastrzebski, 601 N. McDonald Street #401, Mount Dora, Florida 32757; and to James L. Homich, Esquire, 621 East Fifth Avenue, Mount Dora, Florida 32757.

Mount Dora Police Department
Code Enforcement
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Mount Dora, Florida 32757
(352) 735-7177