

**Court of Common Pleas
Lucas County, Ohio**

RPM COMMERCIAL LLC	)	Case No. CI 2025-00249
	)	
plaintiff,	)	Judge Ken Walz
	)	
v.	)	Plaintiff's Reply to Defendant's
	)	Memorandum in Opposition
CITY OF MAUMEE	)	
	)	Andrew R. Mayle (0075622)
defendant.	)	Richard R. Gillum (0070227)
	)	Benjamin G. Padanilam (0101508)
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Maumee's memorandum in opposition to RPM Commercial's motion for a preliminary injunction attempts to re-cast this legislative scheme as something it is not. It attempts to frame the operation of the ordinances at issue as one in which property owners like RPM Commercial ("RPM") are allowed to utilize their non-conforming

structures and uses as they exist, losing that right after they voluntarily vacate, abandon, or discontinue the non-conformity.

But if that were the case, RPM would have successfully leased its property for the last two years without issue, and the need for this lawsuit and injunction would be non-existent.

What is really happening here is the attempted enforcement of a facially unconstitutional scheme that forcibly eliminates non-conformities. Laid out straightforwardly, the scheme actually works like this: A property owner like RPM rents out its non-conforming structure in a C-2 zoning district to a business tenant. That tenant leaves, and the owner now seeks another tenant. Despite significant interest from various tenants, each with a proposed use conforming with a C-2 zoning regulation, the owner is consistently denied occupancy permits and/or certificates for any new prospective tenant by Maumee. Maumee's justification? That the owner needs to spend at least \$150,000 to bring the structure into conformity—effectively giving up the very thing the non-conforming status provides protection for in the first place. And if they don't "voluntarily" give it up, the end result is that Maumee refuses to let a tenant set foot in the structure and then—by preventing the owner from making any use of the structure in doing this—unilaterally declares the property vacant and strips them of their non-conforming status protection anyways. The end result is a weaponized legislative scheme under which Maumee forcibly wipes out nonconformities one way

or another, presenting it as a “choice” that isn’t actually a choice, no matter how it’s framed.

Such a scheme is not only unconstitutional as applied to RPM, but also is unconstitutional on its face.

That’s just part of the reason why a preliminary injunction is justified. By identifying the flaws in the defendant’s attempt to reshape the analysis here, this court will see that all of the factors weigh in favor of issuing a preliminary injunction in this case.

I. There is a substantial likelihood that RPM will prevail on the merits.

Before diving into the weeds of Maumee’s analysis, it should be noted that the problems with defendant’s memorandum could stem from a more foundational issue—Maumee’s misapplication of the definitions surrounding non-conformities. Both structures—the buildings themselves—and uses—what the properties may be used for, such as residential or commercial uses—can have protected non-conformity status in Ohio, such as R.C. 713.15 lays out. Chapter 1130 of Maumee’s municipal code appears to similarly anticipate protections for both non-conforming structures and uses, but Maumee’s Code also seems to conflate the two as one, as Section 1130.01(d) combines them by categorizing a non-conforming structure and use as two types of “non-conforming uses.”

This conflation of the two types of non-conformities can create confusion like the sort we're dealing with here. This is because the way in which a property owner voluntarily vacates, abandons, or discontinues a non-conforming use is going to be materially different than the way that owner voluntarily vacates, abandons, or discontinues a non-conforming structure. Although—as pointed out on page 11 of plaintiff's motion—a change in occupancy cannot even constitute a “change in use” under Maumee's own scheme, the occupancy status plainly isn't even relevant to an analysis of whether RPM voluntarily abandoned its non-conforming structure. The relevant question would be what sort of attempts at upgrades or renovations RPM has made to the structure that could evidence an abandonment of the non-conformity. And because RPM has not sought to make such changes, and it is in fact Maumee who is driving any discussion of updates, it is clear that RPM has not voluntarily abandoned or discontinued the structure.

Rather, Maumee is the one conflating the issue and muddying up the straightforward issues at play here, and that messiness is evident throughout its analysis of the merits.

- a. Maumee misstates the analysis of *Sunset Estate*, and a correct understanding of that case illustrates why the same analysis would apply in this instance and why Maumee's scheme conflicts with Section 713.15 of the Revised Code.**

Throughout its analysis of whether its own scheme is constitutional or not, Maumee entirely takes for granted the protected status that non-conforming structures

and uses have under Ohio law. Yes, RPM acknowledges—and did so in its motion—that non-conformities are disfavored, which is why they can be gradually eroded over time through actions like voluntary abandonment. But what Maumee fails to recognize is that cases like *Sunset Estate* and laws like R.C. 713.15 stand for the proposition that in the absence of voluntary abandonment, non-conformities must be permitted to protect the constitutionally enshrined property rights of owners. That’s why courts have consistently held that a citizen’s right to continue to use one’s property in a manner which does not constitute a nuisance and was lawful at the time it was acquired—which is precisely what a non-conformity is—is constitutionally protected under Article I, Section 16 of the Ohio Constitution. *City of Akron v. Chapman*, 160 Ohio St. 382, 388 (1953).

Yet, Maumee would have this court believe that *Sunset Estate* somehow stands for the proposition that its ability to force the loss of these property rights as quickly as possible and without due process is permissible—that because Maumee codified its ability to unilaterally declare a non-conforming structure vacated or abandoned if the utilities are turned off for even a moment or some other vague and undefined action is determined by three officials to constitute intent, Maumee’s scheme is different than the one in *Sunset Estate* and the Supreme Court’s opinion in that case somehow rubber stamps this scheme.

But that's not at all what *Sunset Estate* says—not in the Ninth District's opinion, and not in the Supreme Court's opinion.

In *Sunset Estate*, Section 1280.05(a) of the Lodi Zoning Code read as follows:

Whenever a nonconforming use has been discontinued for a period of six months or more, such discontinuance shall be considered conclusive evidence of an intention to legally abandon the nonconforming use. At the end of the six-month period of abandonment, the nonconforming use shall not be re-established, and any further use shall be in conformity with the provisions of this Zoning Code. In the case of nonconforming mobile homes, their absence or removal from the lot shall constitute discontinuance from the time of absence or removal.

Sunset Estate Properties, L.L.C. v. Village of Lodi, 9th Dist. Medina No. 12CA0023-M, 2013-Ohio-4973, ¶3. The Ninth District analyzed the ordinance and held it to be facially unconstitutional because it (1) premised discontinuance of the nonconforming use on merely the absence or removal of the mobile home from the individual lot, (2) effected an arbitrary result, and (3) negatively impacted the park owners' substantive due process rights. *Id.*, at ¶¶22-26. In short, the portion of the ordinance dealing with motor homes imposed impermissible conditions on a substantive right by declaring certain actions to constitute an owner's intent to abandon a non-conformity without actually requiring proof that such intent existed when the owner took those actions. Maumee's Chapter 1130 runs into the same issues, as pointed out in RPM's motion and memorandum.

When the case reached the Supreme Court, the Court affirmed the Ninth District's decision—a fact which Maumee omits from its analysis because it seemingly

wants this court to interpret the procedural history to be one of reversal. But that was not the case, as the Court found the mobile home provision to be facially unconstitutional because it flew in the face of the property rights inherent in non-conforming structures and uses that *Chapman*, supra, highlighted—that the right to continue to use one’s property in a lawful business and in a manner which does not constitute a nuisance and which was lawful at the time such business was established is constitutionally protected, both by the Ohio and U.S. Constitutions. *State ex rel. Sunset Estate Properties, L.L.C. v. Lodi*, 142 Ohio St.3d 351 (2015), ¶¶11-12.

It is true that the Court ultimately severed the last sentence of the Lodi ordinance, but that is because it was only the last sentence which gave Lodi the power to unilaterally declare non-conformities like the mobile homes discontinued merely through the act of their removal from a lot. The remaining two sentences merely identified the period required for any discontinuance of a non-conforming use to qualify as the abandonment of that non-conforming use as six months—a recognition of the possibility that one can gradually lose the protection of non-conformity status by voluntarily discontinuing it, using language totally consistent with R.C. 713.15. *Id.*, at ¶¶9-10.

Maumee’s Chapter 1130—including Section 1130.07 specifically—doesn’t merely say a non-conformity can be abandoned or discontinued after six or nine months of voluntary non-use. Instead, it outlines conditions under which a property owner like

RPM can lose its protected non-conformity without any intent of voluntary non-use, such as a determination by three city officials that the structure requires complete replacement, the momentary disconnection of utilities, removing signs or equipment to replace them, or other actions in the opinion of city officials that constitute abandonment. This is exactly what the Ninth District and Supreme Court declared facially unconstitutional in *Sunset Estate*.

In other words, if Maumee's Section 1130.07(a), (b), and (c) hypothetically each consisted merely of their first sentence and 1130.07(d) did not exist, then perhaps that particular ordinance would be constitutional under *Sunset Estate* as consistent with R.C. 713.15's protection of non-conformities. But Maumee's scheme goes so much further than those first sentences, which is what makes it unconstitutional and brings it into direct conflict with R.C. 713.15. Maumee attempts in its memorandum to argue that it is the imposition of the further conditions in 1130.07(a), (b), (c), and (d) that saves the constitutionality of its scheme under that ordinance. But in reality, it is those very conditions which devastate it—and *Sunset Estate* spells out exactly why.

b. Even if Maumee could unilaterally declare a non-conformity to be abandoned, vacated, or discontinued, its scheme provides no due process to avoid that determination or appeal it after the fact.

The unconstitutionality of Maumee's scheme goes beyond the fact that it allows the city and/or its officials to unilaterally declare non-conformities to be abandoned, vacated, or discontinued. The scheme also suffers from its failure to provide any due

process to property owners whose non-conformities are declared to be abandoned — which effectively makes these “determinations” by Maumee condemnations in reality.

First of all, Maumee’s argument in its memorandum as to due process focuses entirely on what occurs after a determination of abandonment, vacancy, or discontinuance is made. It makes no attempt to argue that due process is provided to property owners on the front end of those determinations, and that’s because none is offered under the scheme. What happened in this case is exactly what all property owners could deal with in Maumee—their non-conforming structure or use is declared lost by a city official without any notice of that possibility or any hearing to fight it being given to the property owner. “Due process under the Ohio and United States Constitutions demand that the right to notice and an opportunity to be heard must be granted at a meaningful time and in a meaningful manner where the state seeks to infringe a protected liberty or property interest.” *State v. Hochhausler*, 76 Ohio St.3d 455, 459 (1996). And because a decision is made by letter, without notice or hearing, Maumee’s cries as to the need to exhaust administrative remedies should fall on deaf ears—as a remedy which is not provided is effectively exhausted.

As for Maumee’s arguments with respect to what due process is available after a vacancy, abandonment, or discontinuance determination is levied against a property owner, those fall short for multiple reasons as well. First, Maumee argues that Section 1130.06(d) does not apply because it is under a different section of the chapter

regulating non-conformities. But then Maumee immediately proceeds to argue that Section 1105.02—a section in an entirely different chapter having nothing to do with non-conformities—is controlling. That logical inconsistency alone demonstrates the futility of Maumee’s position.

Section 1130.06(d) plainly applies, as Section 1130.01(d) makes clear that Maumee sees a non-conforming structure as a subset of non-conforming uses for purposes of its headings and language, and its own text directs the reader to connect a determination under Section 1130.07 to the mandate contained in Section 1130.06(d). And that mandate is clearly stated: “The Board of Zoning Appeals shall have no authority to allow a nonconforming use to be re-established once it has become vacant, abandoned or a discontinued use under Section 1130.07 and no nonconforming accessory use shall continue after the principal use to which it is accessory has been discontinued.” If the plain language of Section 1130.06(d) is to have any force, then the only conclusion would be that a property owner is stripped of any meaningful appellate right with respect to determinations under Section 1130.07 after they are made—because if a property owner receives a letter declaring their non-conformity to be abandoned, vacated, or discontinued under Section 1130.07, and Maumee’s BZA has no authority to re-establish it once that determination is made, then an appeal to the BZA has no value to the property owner beyond being an exercise in futility. And that’s in addition to the fact that the BZA has no authority under Section 1105.02(c) or otherwise to hear appeals

based upon determinations of the Chief Building Official or the City Administrator, or some combination thereof, both of whom are empowered to make such determinations under Section 1130.07 and other provisions of Chapter 1130.

As such, it is clear that Maumee cannot defend the lack of due process it provides to property owners both before and after a determination under Section 1130.07 is issued, both facially and as applied to RPM. And exhaustion of administrative remedies is no defense for Maumee here, (1) as no such avenues were actually available to RPM with respect to its as applied challenge and (2) a facial constitutional challenge can be raised for the first time on appeal from the administrative agency, without exhausting administrative remedies, whether they actually exist or not. *Walker v. City of Toledo*, 6th Dist. Lucas No. L-15-1240, 84 N.E.3d 216, 2017-Ohio-416, ¶27.

Moreover, the deposition transcripts will confirm that the City's own officials did not follow the procedure contemplated by Maumee Code § 1130.07. The Chief Building Official testified that he was never consulted regarding the alleged vacancy or abandonment of the property at 318 Illinois Avenue and that he has "no opinion" as to whether the structure was "abandoned" or "vacant" within the meaning of § 1130.07. The Zoning Administrator—now serving as Urban Planning Manager—testified similarly, acknowledging that no discussion occurred between him and the Chief Building Official and City Administrator regarding the status of the property. Instead, he stated that the City's Law Director drafted the determination letter, which he merely signed

and sent out. This confirms that the City took no steps to make a good-faith factual determination under the ordinance and instead acted unilaterally and arbitrarily, further compounding the constitutional and statutory infirmities in the City's enforcement scheme, and violating any semblance of due process afforded to RPM in coming to this determination.

Because Maumee put RPM in a zero-sum game which directly implicated the other provisions of Maumee's Chapter 1130, RPM has standing to challenge each of those provisions.

As for RPM's facial constitutional challenge of other Chapter 1130 provisions of Maumee's code—such as 1130.06, 1130.08, 1130.09 and 1143.21—Maumee relies exclusively on its standing argument to rebut RPM's challenge. But because RPM does have standing to bring its challenge to those provisions as well, the merits arguments RPM brought forth in its memorandum should carry the day.

"In order to have standing to attack the constitutionality of a legislative enactment, the private litigant must generally show that he or she has suffered or is threatened with direct and concrete injury in a manner or degree different from that suffered by the public in general, that the law in question has caused the injury, and that the relief requested will redress the injury." *Ohio Trucking Assn. v. Charles*, 134 Ohio St.3d 502, 503 (2012). Here, RPM is most certainly threatened with direct and concrete injury to a different degree than that suffered by the public in general, the laws in

question threaten to cause that injury, and the relief requested would undoubtedly redress that threat.

First, RPM has been threatened by the imposition of the attacked ordinances to a greater degree than the general public, as RPM has been threatened by Maumee with a lengthy list of repairs and changes that must be made to the structure at 318 Illinois Avenue in order for its occupancy certificate to no longer be held hostage by the city. As has already been detailed above, Maumee put RPM in a zero-sum game by presenting it with a choice that is no choice at all: Make the changes to your non-conforming structure that we are requesting or have your occupancy certificate withheld until we can declare your non-conformity vacated by virtue of its emptiness. Of course, RPM effectively forfeited its non-conformity by not making the requested changes, as Maumee has already declared its non-conforming structure abandoned. But if RPM had relented and made the changes, the threat of RPM losing its non-conforming structure protection would have still remained. This is because making those changes, even at the behest of Maumee, would bring it into conflict with Sections 1130.04, 1130.06, 1130.08, 1130.09 and other provisions by making changes to the non-conformity, which would entitle Maumee to take RPM's non-conforming status anyway and force upon RPM many more changes to the property thereafter.

So the zero-sum game ensues: RPM is left to pick its poison and lose its protected non-conforming status either way, making a threat that is theoretical to the general

public a very real and concrete one to RPM. The unconstitutional nature of Chapter 1130 and its various provisions have undoubtedly caused that direct and concrete harm to RPM. RPM can make no meaningful use of their property because of amortization periods and an utter failure due process. And the requested injunction would unquestionably eliminate the zero-sum game for RPM and protect its non-conformity in a way it cannot under this unconstitutional scheme Maumee has imposed on RPM. As such, there can be little doubt that RPM has standing to challenge each of the provisions in Chapter 1130 of the municipal code that it is challenging.

d. Maumee's Attempt to Treat Nonconforming Signs as Public Nuisances Is Unsupported by Its Code and Contrary to Ohio Law.

Defendant's effort to analogize Maumee's treatment of nonconforming signs to nuisance abatement fails both factually and legally. Nowhere in the Maumee Zoning Code are nonconforming signs expressly declared to be a public nuisance, nor has the city adopted legislative findings establishing that such signs constitute a health or safety hazard warranting abatement under its police power. This stands in stark contrast to the ordinance upheld in *City of Lakewood v. Northern Ohio Sign Contractors Ass'n*, 32 Ohio St.3d 316 (1987), where the Supreme Court of Ohio emphasized that the challenged ordinance was valid only because the City of Lakewood had amended its code to expressly declare all nonconforming signs to be a public nuisance, supported by findings concerning traffic hazards and visual blight. Maumee's Code does not contain

any such declaration, nor does it include findings that would justify circumventing the protections for nonconforming uses set forth in R.C. 713.15.

While Maumee Code Section 1143.21 articulates an aspirational goal of “eliminating” nonconforming signs “as expeditiously as is reasonable,” this policy language falls far short of a formal nuisance declaration and cannot supply the constitutional predicate for extinguishing vested property rights. Courts have made clear that aesthetic concerns or regulatory uniformity alone do not convert a lawful nonconforming use into a nuisance. As reaffirmed in *State ex rel. Sunset Estate Props. v. Lodi* and *Akron v. Chapman*, the right to continue a lawful nonconforming use—unless voluntarily abandoned or found to be a nuisance through proper legislative action—is constitutionally protected. Maumee’s assertion that these uses may be eliminated based solely on administrative determinations or conformity preferences is directly at odds with that settled law.

II. RPM will suffer irreparable harm if the relief isn’t granted.

The irreparable harm that RPM will suffer without the preliminary injunction is obvious. While it is true that there has been monetary damage caused by Maumee’s conduct, to characterize the damage as exclusively such is to minimize what’s at issue in this case. At the risk of belaboring the point, the zero-sum game Maumee has created puts RPM at risk of losing its non-conforming property rights regardless of whether RPM wants to rent the property out or utilize the structure for itself. This game can and

will continue to go on in perpetuity, unless and until injunctive relief is granted. And to say there is no urgency because RPM has filed for this relief now is to ignore that RPM was caught in limbo and left without anywhere to turn because of Maumee's own conduct. RPM has sought any way out of what has been Maumee's version of a Kobayashi Maru, and it now seeks this relief because it now realizes that only this court can change the conditions of the test. Without this Court's intervention, either path results in losing constitutionally protected rights and financial loss. Like the simulation, it's designed so that there's no lawful or fair path to preservation—only an illusion of choice.

Beyond RPM's predicament, any irreparable harm element is satisfied because it well settled through this country that the enforcement of an unconstitutional law—particularly one that violates due process—inflicts a harm that cannot be remedied through monetary damages or other legal relief. As the United States Supreme Court held in *Elrod v. Burns*, 427 U.S. 347, 373 (1976), the loss of constitutional rights, “for even minimal periods of time, unquestionably constitutes irreparable injury.” Ohio courts apply the same principle: In *Olds v. Klotz*, 131 Ohio St. 447 (1936), the Ohio Supreme Court affirmed that equity will enjoin the enforcement of a facially invalid ordinance where its application threatens to infringe upon property rights and cause irreparable harm to one's business. Here, Maumee's deprivation of RPM's vested property rights through an unconstitutional legislative scheme—without due process and in violation

of both federal and state constitutional protections—constitutes precisely the type of irreparable injury that warrants injunctive relief.

III. No third parties will be harmed if the injunction is granted.

It is absurd for Maumee to suggest that granting the injunction will cause substantial harm to the public and third parties, and that is exactly why its point on this prong in its memorandum is reduced to the naked assertion that some undefined harm would ensue. If such a naked assertion is insufficient to survive a Civ. R. 12(B)(6) motion to dismiss, then it should likewise be insufficient to hold any sway as to this factor of the preliminary injunction analysis. See *Randall v. JM Smucker Company*, 6th Dist. Lucas No. L-23-1250, 2024-Ohio-4725, ¶15. With no evidence or argument provided that any third parties will actually be harmed by granting this relief, this factor certainly weighs in favor of granting the relief RPM seeks.

IV. The public interest is served by the injunction.

As previously stated in RPM’s memorandum, the public interest is undoubtedly served by granting the injunction. The scheme RPM has fallen victim to—one intentionally devised to systematically wipe away citizens’ property rights regardless of whether they have any intent to abandon those rights—cannot possibly be in the public’s interest. The public is served when individual property interests and a city’s zoning interests are properly balanced, as they are under a system where a property owner has to voluntarily stop exercising its right to its non-conformity to lose it—where

the right is understood to be valuable but not indestructible. That is the sort of system envisioned in Ohio under R.C. 713.15 and the precedent set by *Sunset Estate*, but it is very plainly not the system Maumee is imposing on its citizens. This injunction—the enjoinder of Maumee’s unconstitutional scheme—would send a clear message to the citizens of Maumee that the city cannot systematically strip them of their rights.

CONCLUSION

While no one factor is dispositive, it is plain that all four factors of the preliminary injunction analysis weigh in favor of RPM. As such, this court should grant RPM’s motion and prevent Maumee from forcibly taking its property rights through an unlawful legislative scheme.

Respectfully submitted,

/s/ Richard R. Gillum

/s/ Benjamin G. Padanilam

Certificate of Service

A copy of the forgoing was sent via electronic mail to each of the following in accordance with the Ohio Civil Rules:

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