



INSTITUTE FOR JUSTICE

February 6, 2023

VIA EMAIL

Alissa Farol
Assistant City Attorney and City Prosecutor
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RE: City's Illegal and Unconstitutional Attempt to Shut Down Small Business

Ms. Farol:

This letter regards the City of Fargo's order for John Bultman to shut down his auto repair shop, John's Repair, by March 30th. The City's order states that failure to shut down the auto repair will result in Mr. Bultman's landlord suffering fines of up to \$1,000 per day. The City's order contravenes the City's own ordinances. It also likely violates the state and federal constitutional protections for substantive and procedural due process. Mr. Bultman is a 69-year-old citizen who has been operating his auto repair business for 42 years. He is the business's only employee, and should be allowed to continue operating until he wishes to retire in two years. We ask that the City allow Mr. Bultman to operate his business in peace, and immediately rescind its illegal and unconstitutional order.

The Institute for Justice (IJ) is a national nonprofit law firm that has fought to protect individuals' constitutional rights for over 30 years. We have litigated our cases at the U.S. Supreme Court ten times, as well as at state courts across the country. One of our areas of expertise is property rights. We have sued dozens of local governments for infringing on individuals' property rights, including through unreasonable and unfair zoning regulations. We have a particular interest in preventing local governments from unfairly shutting down businesses. *See, e.g., Sepulveda v. City of Pasadena*, No. 2021-80180, 2022 WL 952888 (Tex. Dist. Ct. Mar. 21, 2022) (granting a TRO against the City of Pasadena after the City tried to prevent the opening of an auto repair shop in violation of its constitutional rights).¹

We have also brought successful suits against government bodies for acting outside their authority. *Mickleton v. N.D. Dep't of Health*, No. 2020-CV-01179, 2020 WL 9423187 (N.D. Dist. Ct. Dec. 10, 2020) (holding that the North Dakota Department of Health's rules were ultra vires when they tried to stop home businesses from operating in contravention of state law).²

Here, we are concerned that the City's actions are both ultra vires and unconstitutional. John Bultman has been operating his auto repair business in a residential zone, at 1142 and 1146 11th Street North, for 42 years. He received permits to do so decades ago, a fact we believe is undisputed by the City. When the City's zoning ordinance later changed to prohibit auto repair businesses in residential zones, Mr. Bultman's business was grandfathered in at these properties

¹ *See* <https://ij.org/press-release/mechanic-to-open-shop-after-parking-fight/>

² *See* <https://ij.org/case/north-dakota-food-freedom/>

as a non-conforming use—a fact we believe is also undisputed. The dispute seems to be whether these properties lost their grandfathered status when Mr. Bultman sold his properties to a third party in May 2021, even though Mr. Bultman continued to operate the exact same business on those properties as a tenant. We understand that the City is taking the position, according to statements by Code Enforcement Officer Greg Conlin to Mr. Bultman, that the transfer of ownership terminated the properties' grandfathered status. This is incorrect.

Transferring ownership of a property does not affect that property's grandfathered status; instead, grandfathering rights run with the land. This is true as a matter of black letter law. *See, e.g.*, 4 Edward H. Ziegler, Jr., Rathkopf's *The Law of Zoning and Planning* § 72:20 (4th ed. 2022 update) (stating "[i]t is obvious" that "the right to continue a nonconforming use" continues after the property's sale); *id.* ("A mere change in ownership does not destroy the right to continue a nonconforming use" . . . "If this wasn't the case, the "inability to sell and convey the rights . . . would result in the uncompensated loss of the right to use the land in nonconformity with the current ordinance and, in appropriate cases, the extent of the loss may be held an unconstitutional 'taking' of property."); Kenneth H. Young, Anderson's *American Law of Zoning* § 6:40 (4th ed. 1996) ("The right [to maintain a nonconforming use] attaches to the land itself . . . [and] can be exercised equally by the purchaser.").

This is also true under the City's own ordinances. Section 20-1001(F) of the City's Zoning Code states, "Changes of tenancy, ownership or management of an existing nonconformity are permitted, provided that no changes in the nature or character, extent or intensity of such nonconformity may occur except those allowed by this Article." For the City to declare otherwise would violate the City's ordinance, thus exceeding the City's authority and resulting in an illegal and ultra vires action.

Even if the City's ordinances did not state that grandfathered status runs with the land, the state and federal constitutions require such. Grandfathered rights are protected under the North Dakota Constitution's Substantive Due Process Clause in Article I, Section 1 of its Constitution (protecting the right to "possess[] and protect[] property."); *see also* N.D. Const. art. 1, § 12. Indeed, other courts, including state supreme courts, have already held that terminating a property's grandfathered status with a transfer of ownership violates substantive due process.³

³ *See, e.g., Budget Inn of Daphne, Inc. v. City of Daphne*, 789 So.2d 154, 159-60 (Ala. 2000) (finding ordinance which stated a nonconforming sign will lose that status upon a change in ownership to be arbitrary and capricious; "[a] change in the ownership, occupancy, or name of an operating business facility does not eliminate its status as a legal-nonconforming use." The court also stated that "a municipality may not simply divest a property owner of a vested right, without compensation, and any attempt to do so violates the most fundamental principles of due process" since "our system favors the free alienability of property" and "legal nonconforming use" "run with the land"); *Gibbons & Reed CO. v. North Salt Lake City*, 19 Utah 2d 329, 336 (1967) (finding zoning ordinance which proscribed excavation of sand and gravel to be an invalid exercise of police power as enforced against plaintiffs' property used for excavation of sand and gravel before the ordinance was enacted and noting that "[d]efendant seems disturbed over the fact that plaintiffs acquired the parcel after the 1957 ordinance went into effect. We are not sympathetic to that position since use, not ownership, of the land is the concern of the zoning authorities. Lawful existing nonconforming uses are not eradicated by a mere change in ownership.").

Other states have also found that unlawfully terminating a non-conforming use without compensation constitutes an illegal taking.⁴ The U.S. Constitution's Substantive Due Process Clause and Takings Clause provides similar protections.

In addition, the City's order for Mr. Bultman to cease his decades-old business without an opportunity for a hearing creates serious procedural due process issues. *See* N.D. Const. art. 1, § 12 ("No person" shall "be deprived of life, liberty or property without due process of law."). For example, the final notice the City sent on December 20, 2022 states nothing about Mr. Bultman or the property owners having an opportunity to contest the City's order by a hearing or other due process. Instead, it states that if Mr. Bultman does not shut down his business by March, the property owners will face criminal prosecution and up to \$1,000 in fines per day. The state and federal constitutions do not give the City the power to shut down a business with a simple letter and no opportunity to be heard.

We thus urge the City to rescind its order and allow Mr. Bultman to continue operating. I am happy to discuss further. My number is 631-383-5302 and my email is esmith@ij.org.

Sincerely,



Erica Smith Ewing
Senior Attorney
Institute for Justice

CC: Greg Conlin, City of Fargo Code Enforcement, *via* GConlin@FargoND.gov
Dr. Tim Mahoney, City Mayor, *via* online email form

⁴ *See, e.g., Hooper v. City of St. Paul*, 353 N.W.2d 138, 139, 140-41 (Minn. 1984) (finding that the continuous use of property as dual family residence for approximately five years prior to zoning change entitled owner to lawful conforming use status under the zoning code; "[i]t is a fundamental principle of the law of real property that uses lawfully existing at the time of an adverse zoning change may continue to exist until they are removed or otherwise discontinued" and that "existing nonconforming uses must either be permitted to remain or be eliminated by the use of eminent domain," since they are "entitled to due process protection").