

**IN THE COURT OF COMMON PLEAS  
CUYAHOGA COUNTY, OHIO**

**BIG OAK, LLC**

**Plaintiff-Appellant,**

**v.**

**LAKWOOD BOARD OF ZONING  
APPEALS, et al.,**

**Defendant-Appellees.**

2010 JUN -1 P 5:49

GERALD E. DONNELLY  
CLERK OF COURT

**CASE NO. CV-09-709584**

**JUDGE MICHAEL P DONNELLY**

**DEFENDANT-APPELLEE'S BRIEF  
IN OPPOSITION**



**STATEMENT OF THE CASE**

On August 3, 2009, a Correction Notice was issued by the Lakewood Division of Housing and Building to property owner Carlos Molina c/o Big Oak, LLC citing that business uses are prohibited in a residentially zoned district and (1) the use must be discontinued at the property located at 1327 Bonnieview Avenue, Lakewood, Ohio (hereinafter "Oak Tree Manor") or (2) the property must be re-zoned to accommodate the business use. The Correction Notice further cited that that no change of occupancy is permitted to take place until a Certificate of Occupancy has been issued pursuant to Lakewood Zoning Code 1173.01.

The property owner appealed to the Board of Zoning Appeals. Notice was issued and a public hearing was held on October 15, 2009. Upon hearing testimony of Lakewood building officials, as well as the statements of the property owner and his counsel, the Lakewood Board of Zoning Appeals upheld the determination of the

Building Commissioner. This appeal followed.

### **STATEMENT OF FACTS**

On or about July 22, 2009 the City of Lakewood Division of Housing and Building received an anonymous complaint regarding Oak Tree Manor, a 4 story residential apartment building with approximately 72 units/suites located on Bonnieview Avenue, a residentially zoned street. The complainant indicated that Oak Tree Manor had made structural changes to the interior where they had combined two residential apartment units into one large office space and that they were operating a business with several employees on site. (Oct. 15, 2009 BZA Minutes p.3; Oct. 15, BZA Dig. Rec. 19:45) On July 23, 2009, City of Lakewood Building Inspector, Kevin Kelly, conducted an interior inspection of the property accompanied by the property manager. (Oct. 15, 2009 BZA Minutes p.3; Oct. 15, BZA Dig. Rec. 20:10) Upon inspection, Mr. Kelly observed that Suites 110 and 112 had, in fact, been combined by a constructive change. (Oct. 15, 2009 BZA Minutes p.3; Oct. 15, BZA Dig. Rec. 20:40) Mr. Kelly further noted that offices had been set up in each of the former four bedroom spaces. (Oct. 15, 2009 BZA Minutes p.3, Oct. 15, BZA Dig. Rec. 21:00) There were no beds present, only desks and other office equipment. (Oct. 15, 2009 BZA Minutes p.3; Oct. 15 BZA Dig. Rec. 21:00) Only office equipment was set up in the former living room areas. (Oct. 15, BZA Dig. Rec. 21:00) There was no evidence of anyone residing in this space.

The inspector was informed that Mental Health Services was leasing both suites from the property owner and that Mental Health Services has several employees working in these office spaces. (Oct. 15, BZA Dig. Rec. 20:40) Upon speaking with

Mental Health Services employees, Mr. Kelly learned that their employees were employed there on a 24-hour basis, 7 days per week, with a total of three different shifts. (Oct. 15, 2009 BZA Minutes p.3; Oct 15 BZA Dig. Rec. 21:00) All totaled, Mr. Kelly was informed that there are fourteen (14) employees employed in this office space within this residential apartment dwelling. The employees are present to provide 24 hour assistance to a group of independent living residents at the Oak Tree Manor Apartments, operated thru Mental Health Services. (Oct. 15, 2009 BZA Minutes p.3; Oct. 15 BZA Dig. Rec. 18:30; Oct. 15, 2009 BZA Minutes p.3; Oct. 15 BZA Dig. Rec. 18:30) The testimony indicated that the assistance provided by the employees is in the form of answering questions regarding where to catch a bus to how to cook a turkey. (Oct. 15, 2009 BZA Minutes p.3; Oct. 15 BZA Dig. Rec. 18:30) The employees of Mental Health Services do not dispense medications nor do they provide personal care services. (Oct. 15, 2009 BZA Minutes p.3; Oct. 15 BZA Dig. Rec. 14:40)

After inspection, Mr. Kelly noted that there had been no application for, nor had there been a permit issued for the structural alterations of the property. (Oct. 15, 2009 BZA Dig. Rec. 20:15) Moreover, there was no Certificate of Occupancy applied for or obtained for this business use in a residentially zoned property. (City of Lakewood Supp. Rec. p. 1-604; Oct. 15 BZA Dig. Rec. 20:15)

Upon review of the property file for the Oak Tree Manor, Mr. Kelly learned that in 1993, the City of Lakewood Division of Building received an almost identical, anonymous complaint regarding the Oak Tree Manor property. (City of Lakewood Supp. Rec. p.332-336) The complaint alleged that two (2) apartments (Suites 202 and 204)

had been converted to business offices to furnish office space for five (5) employees. (City of Lakewood Supp. Rec. p.332-33; Oct. 15 2009 Dig. Rec. 20:15) Upon inspection, it was learned that suites 202 and 204 were joined by a doorway being cut between them. (City of Lakewood Supp. Rec. p.332-33) The building inspector noted that all four of the bedrooms of the two (2) suites were being used as offices with desks, phones, and computers. (City of Lakewood Supp. Rec. p.332-33) The living room of suite 204 was observed to have a secretary, desk, computer and seven (7) five (5) drawer file cabinets. (City of Lakewood Supp. Rec. p.332-33) The living room of suite 202 had two desks, a computer, moveable partitions, and various other items. (City of Lakewood Supp. Rec. p.332-33) The property owners were issued a Correction Notice citing violation of the Zoning Code and notifying the property owners to discontinue the business use, as it is not a permitted use pursuant to Section 1109.03, Permitted Accessory Uses, of the Lakewood Zoning Code. (City of Lakewood Supp. Rec. p.332-336; Oct. 15 2009 Dig. Rec. 20:15)

The records indicate that Madison Development Corporation, the owner of the property in 1993, responded to the correction notice indicating that the office space was incidental to the residential use of the property and was merely used for the direct management of the 72 suite property, collection of rents, and maintenance. (City of Lakewood Supp. Rec. p.332-336; Oct. 15 2009 Dig. Rec. 23:00) Contrary to the property owners contentions, the Building Commissioner ruled that the only permitted business use was office space for the incidental management of the Oak Tree Manor property, not facilitation of a business with 5 employees. (City of Lakewood Supp. Rec.

p.332-336) The Division of Housing and Building's records are void of any evidence of a legal business use alleged by Appellant at this property.

The current Zoning Code of the City of Lakewood, and that which was in effect July, 2009 at the time that Oak Tree Manor was cited for the instant appeal, was adopted by Ordinance No. 91-95 on October 7, 1996. That Ordinance changed the zoning of the Oak Tree Manor Property to an R-2 Single and Two Family District, from an M1-Multiple Family, Low Density, regulated by Chapter 1109 of the Zoning Code. (City of Lakewood Supp. Rec. p.332-336)

## **LAW AND ARGUMENT**

I. The Lakewood Board of Zoning Appeals Properly Upheld the Decision of the Building Commissioner in Finding that the Use of Two Suites within the Property for Provision of Social Services to Tenants of the Building is a Business Use Prohibited by the Zoning Code of the City of Lakewood in an R-2, One and Two Family District.

A. Standard of Review.

Ohio Revised Code Section 2506.04 provides for the standard to be applied by a reviewing court in an administrative appeal is whether the "order, adjudication, or decision is unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence. . . ." It is well settled that the party challenging a decision of the Board of Zoning Appeals has the burden of proving that the decision of the Board was invalid. Calta v. City of Highland Heights, et al., (March 19, 1998) 8<sup>th</sup> Dist. No. 72469, 1998 Ohio App. LEXIS 1068. The Board's decision "is presumed to be valid and the burden of showing the claimed

invalidity rests upon the party contesting the determination. Calta at 5, quoting Kisil v. Sandusky (1984), 12 Ohio St.3d 30, Consolidated Management, Inc. v. Cleveland (1983), 6 Ohio St.3d 238. "A court of common pleas should not substitute its judgment for that of an administrative board, such as the board of zoning appeals, unless the court finds that there is not a preponderance of reliable, probative and substantial evidence to support the board's decision." Calta at 6.

Appellant has failed to show that the decision of the Lakewood Board of Zoning Appeals upholding the decision of the Building Commissioner, that the use of two (2) suites within the property was a business use prohibited by the Lakewood Planning and Zoning Code, was arbitrary, capricious, unreasonable or not supported by a preponderance of reliable, probative and substantial evidence.

#### B. Non-conforming Use

**The owner of a valid non-conforming apartment complex located within an R-2 Single and Two Family Zoning District, cannot legally lease space within the complex to a business for use as business offices where office or business use is not permitted by the Lakewood Planning and Zoning Code.**

Appellant contends that the City of Lakewood's Building Commissioner has found that the use of two units within the apartment building has changed the entire use of the property to a business use. The use of the Oak Tree Manor property as an apartment complex has never been disputed or cited by the Division of Housing and Building. The property owner was issued a correction notice for having a business establishment located within the property. The City of Lakewood is not questioning the

non-conforming use as an apartment building. Nor has the City of Lakewood, or the Division of Building and Housing, requested the property owner to cease using the property as an apartment complex. The record is also absent of any finding that the City of Lakewood or Division of Building & Housing that there has been a change in the principal use of the property. The record is very clear that it is the *business use* being conducted on the property, employing 14 employees on a 24/7 basis, that is the issue, not the properties use as a residential apartment complex.

The Board of Zoning Appeals upheld the finding of the Building Commissioner that the use of the property by Mental Health Services was a business use that is prohibited in an R-2 Single and Two Family district. At that hearing, Appellant's counsel argued that the use of the space as office space was a continuation of a valid non-conforming use of the property - as the prior owner had used space within the apartment complex for his own real estate business.

Appellant states in its brief "**during various times**, two suites located within the apartment complex have also been used for purposes incidental to or accessory to the operation of an apartment building. In particular, two suites in the building were used to operate a real estate office at **various periods of time.**" Merit Brief of Plaintiff-Appellant p.1, 2. (emphasis added)

When a property owner alleges that there is a continuation of a valid non-conforming use, the burden is on the property owner to prove by a preponderance of the evidence that the use existed on the effective date of the zoning change and that the use was **legal** at the time of the rezoning. Broogheir v. Wolfe (1990) 67 Ohio App.

3d 467, 473. (emphasis added) Appellant has failed to establish that the business use was a legal existing use on the effective date of the current Zoning Code.

The Oak Tree Manor property is zoned R2-Single and Two Family as designated by the Zoning Map of the City of Lakewood, Ohio, Zoning Code Section 1101.01, adopted October 7, 1996. Chapter 1123 of the Lakewood Planning and Zoning Code (hereinafter "Zoning Code") regulates uses within a Single and Two Family District. "Unless otherwise stated, all uses not specified as permitted in a district are prohibited." Zoning Code, Section 1105.01(b), Establishment of Districts. Uses by right within an R-2 district include single and two family dwellings, adult family homes, cluster house developments, or a planned development. Zoning Code Section 1123.02, Permitted Principal Uses.

Accessory uses permitted within an R-2 district are limited to garages, type A home occupations, unroofed patios or decks, family swimming pools, fences, gazebos, antennas and wireless telecommunication devices as regulated within the Code. Zoning Code Section 1123.03, Permitted Accessory Uses.

Uses that are permitted conditionally, upon approval of the Planning Commission, are limited to roomers, accessory parking, re-use of an existing non-conforming structure, type B home occupations, wireless telecommunication antennas, mixes use overlay districts, and wind generation facilities. Zoning Code Section 1123.04, Conditionally Permitted Uses.

Therefore, business uses are clearly prohibited under the Zoning Code in this residentially zoned area.

Appellant erroneously argues that the business offices used to provide supportive services to residents in the building are incidental to a residential use and contemplated by the code. In support of this argument, Appellant notes that Adult Family Homes are a permitted use in this zoning district. The record indicates that the offices provide supportive services residents of the building.

“Adult Family Home’ means a residence or facility that provides accommodations to three (3) to five (5) unrelated adults and provides supervision and personal care service to at least three (3) of the unrelated adults.” Lakewood Planning and Zoning Code Section 1103.02(e), Ohio Revised Code 3722.01(A)(7). Section 3722.01(A)(6) of the Ohio Revised Code states:

"Personal care services" means services including, but not limited to, the following:

- (i) Assistance with activities of daily living;
- (ii) Assistance with self-administration of medication, in accordance with rules adopted by the public health council pursuant to this chapter;
- (iii) Preparation of special diets, other than complex therapeutic diets, for residents pursuant to the instructions of a physician or a licensed dietitian, in accordance with rules adopted by the public health council pursuant to this chapter.

(b) "Personal care services" does not include "skilled nursing care" as defined in section 3721.01 of the Revised Code. A facility need not provide more than one of the services listed in division (A)(6)(a) of this section for the facility to be considered to be providing personal care services.

Adult Family Homes are licensed by the State of Ohio and regulated pursuant to Chapter 3722 of the Ohio Revised Code. Appellant has not alleged that the services actually rendered to the residents of the Oak Tree Manor property include supervision and personal care service (as those services are defined within Chapter 3722 of the O.R.C.), nor has Appellant alleged that the combination of the services provided, along

with the tenant's individual leases of suites at this property meets the statutory definition of an Adult Family Home or that it is licensed as an Adult Family Home. In addition, Appellant has not presented any facts supporting that there is a license Adult Family Home located on the premises.

Lakewood Zoning Code Section 1149.01, Purpose, within Chapter 1149, Non-Conformities, of the Lakewood Planning and Zoning Code, provides:

Within the districts established by this Code or amendments that may later be adopted there exists lots, structures, and uses of land and structures which were lawful prior to adoption of this Code but which would be prohibited, regulated, or restricted under the terms of this Code or amendments thereto. The legitimate interests of those who lawfully establish these non-conformities are herein recognized by providing for their continuance, subject to regulations limiting their completion, restoration, reconstruction, extension, and substitution. Nevertheless, while it is the intent of this Code that such non-conformities be allowed to continue until removed, they should not be encouraged to survive.

Prior to the enactment of the 1996 Zoning Code, the Oak Tree Manor Property was zoned M1, Multiple Family and regulated by Chapter 1109 of the Zoning Code, then in effect. In 1993, the prior property owners were issued a violation notice for combining and using two suites for offices for a business use. The correction notice cites Lakewood Zoning Code Section 1109.03 (b), Permitted Accessory Uses. It appears that there was a typographical error in the correction notice as the notice clearly states "[d]iscontinue the business which is not a permitted use. (1109.03(b))" and that section pertains to real estate signs advertising the sale or rent of the property. It appears that the drafter of the correction notice intended to reference Section 1109.03(c) of the Zoning Code as it stated that "[c]ustomary accessory uses and buildings, provided such

uses and buildings are clearly incidental to the principal building and use.” In addition, the records pertaining to this correction notice repeatedly reference “incidental use” of the property. This correction notice was resolved with the Building Commissioner advising the property owner that only a single, two (2) bedroom suite would be permitted for use as an office for the incidental use to the renting and maintaining the apartment building.

The wrecked vehicles as an incidental use to the fuel station was not entitled to expand that use to auto repair and storage. State ex rel City of Twinsburg v. Essel (February 13, 1980), 9<sup>th</sup> Dist. No. 9416, 1980 Ohio App. LEXIS 14186. The Court in Essel found that the City on two separate occasions had cited the property owner for the excessive debris on the property in violation of the local zoning ordinances and that the property owner had not established a valid non-conforming use. Id at 4.

Appellant has failed to offer any real evidence of the existence of any prior **legal** business office use at the Oak Tree Manor property beyond an office used for the rental and maintenance of the units contained within the building. The business use which Appellant alleges occurred “during various times” and at “various periods of time” clearly does not establish by a preponderance of the evidence that there was a legal existing business office use prior to the enactment of the 1996 Zoning Code. Even if Appellant has some evidence that the business use was present at some time prior to the effective date of the current Code, the Correction Notice issued by the Division of Housing and Building in 1993 clearly shows that any such use was illegal. Furthermore,

Appellants valid non-conforming use as an apartment complex does not allow for the use of suites located within the structure as business offices. If the use is not expressly permitted, it is prohibited regardless of whether the use is a principal, accessory or conditional use pursuant to Section 1105.01(b) of the Zoning Code.

C. Expansion of Non-Conforming Use.

**If the Court finds that Appellant has established a non-conforming use under the current Zoning Code, Appellant has expanded the use in such a manner as to render the use invalid.**

Evidence was submitted at the hearing that the space that is being used as office space is staffed by fourteen (14) employees, 24 hours per day, seven (7) days per week. The current 24 hour use is prohibited by the Code, which in and of itself constitutes an expansion of a non-conforming use. The undisputed facts are that the business offices located within Oak Tree Manor are staffed by fourteen (14) employees who conduct a 24-hour operation on the property in three shifts. The correction notice issued in 1993 indicates that there were five (5) employees of the real estate office. That notice also indicates that the office space was located within suites 202 and 204. The correction notice issued to the current property owner indicates that the business offices are located in suites 110 and 112.

Section 1149.03(b), Non-Conforming Use of Structures or Structures and Land in Combination, of the Zoning Code, provides that a lawful non-conforming use may be "extended throughout any part of a building, **which was manifestly arranged or designed for such use at the time of adoption**, or amendment of this Code, but no

such use shall be extended to occupy any land outside the building.” (emphasis added) In addition, the Zoning Code provides for the change of a non-conforming use, **if no structural alterations are made**, with the approval of the Planning Commission, provided that the proposed use is more appropriate and compatible with the neighborhood and that there will be a reduction in traffic if the use created a traffic problem. Zoning Code Section 1149.03(c).

There is no guaranteed right to expand a valid non-conforming use. Brown v. City of Cleveland et al., (1981), 66 Ohio St. 2d 93; Aluminum Smelting & Refinign Co., Inc. v. Denmark Twp. Zoning Board of Appeals (December 6, 2002) 11<sup>th</sup> Dist No. 2001-A-0050, 2002 Ohio App. LEXIS 6462; The Bd. of Trustees of Jefferson Twp. v. Sunset Ramblers Motorcycles Club, Inc. (February 11, 1993), 3<sup>rd</sup> Dist. No. 3-92-42, 1993 Ohio App. LEXIS 861. The non-conforming use of a tractor repair facility servicing, repairing and selling a few tractors per year did not entitle the owner to open a full service new tractor dealership. Carver v. Deerfield Board of Zoning Appeals (August 27, 1999), 11<sup>th</sup> Dist. No. 98-P-0062, 1999 Ohio App. LEXIS 3988.

Further, uses that are incidental to the principal use do not always establish valid non-conforming uses. The 11<sup>th</sup> District Court of Appeals found that an auto repair shop that performed sandblasting incidentally to the auto gas tank repair services, was not entitled to expand and perform more extensive sandblasting services on the premises. Rootstown Twp. Trustees v. Morgan 1991 WL 70113 (11<sup>th</sup> Dist. App.) Courts are clear that non-conforming uses are to be discouraged. Curtiss v. City of Cleveland (1959), 170 Ohio St. 127.

Here, two apartments clearly were not intended to be business offices. The interior inspection, and the records contained in the street file, clearly show that these suites were intended to be used as residential living space. Each suite contains two (2) bedrooms, a bathroom, kitchen and living room. Therefore, expansion of the office space from the second floor suites to the first floor suites is clearly prohibited by Zoning Code Section 1149.03(c).

In addition, Appellant apartment complex is being leased to an organization for the provision of services to tenants on a 24-hour basis. 24-Hour Operations are only permitted as Conditional Uses, when approved by the Lakewood Planning Commission, in C1 Office, C2 Retail, and C3 General Business Districts. Zoning Code Section 1161.03(u). Chapter 1161, Conditional Uses, Section 1161.01, Purpose of the Zoning Code indicates:

. . . unique uses require regulations intended to accommodate such uses in a reasonable and equitable manner while safeguarding the property rights of all individuals. . . . Toward these ends, this Chapter provides for a more detailed evaluation of each use conditionally permitted in a specific zoning district with respect to such considerations as location, design, size, method(s) of operation, intensity of use, public facility requirements and traffic generation to ensure that each proposal is consistent with the intent and objectives of the particular district in which it is located.

Appellant argues that the business office use located on the property is an accessory use to the apartment complex. As stated above, office space is not a permitted accessory use in an R-2 One and Two Family District. In addition, Accessory Use is defined as "a subordinate use which is wholly related by clearly incidental to that of the principal permitted use in a given district, located on the same lot or within the same

structure as the principal use.” Zoning Code Section 1103.02(c). Here, the principal use and structure is a non-conforming multi-family structure located within a Single and Two Family Zoning District. 24-Hour Operation of a business office within a non-conforming structure in a Single and Two Family District would clearly is not an accessory use that is subordinate and wholly related and incidental to that of the principal permitted use. In Brown, the Ohio Supreme Court found that the current zoning ordinances of the City of Cleveland were applicable to the newly proposed use of the property. Id at 96. Therefore, the 24-hour use and reporting of 14 employees to the premises for work constitutes an expansion of a non-conforming use under the decisions in Brown, supra.

The prior use of one or two suites within the building as a rental office or real estate office, if this court finds that use, does not allow the property owner to expand that use to allow for a 24-hour operation on the premises with fourteen (14) employees reporting to the property to work.

D. Certificate of Occupancy.

**Appellant was required to obtain a Certificate of Occupancy based upon the structural alteration of the property, a change in use of the property, and a change in use of the non-conforming use.**

Zoning Code Section 1173.01 provides that “[a] Certificate of use and occupancy shall be obtained from the Commissioner for any of the following:

- (a) Use and occupancy of a building hereafter erected or structurally altered.
- (b) A change in use of an existing building to a use of a different district

classification under this code.

(c) . . .

(d) Any change in the use of a non-conforming use. . . .”

Appellant argues that a Certificate of Occupancy was obtained in 2007 and that the office use existed prior to the change in the zoning code in 1996. However, the structural changes alone to suites 110 and 112 require that a new Certificate of Occupancy be obtained. Therefore, even if this court were inclined to overturn the decision of the Lakewood Board of Zoning Appeals regarding the business use of the property, the Certificate would still be required.

E. Decision of the BZA.

**The decision of the Board of Zoning Appeals was not contrary to the intent of the Zoning Code.**

Appellants properly quote the purpose of the Zoning Code and being adopted to promote and protect the general welfare of the Citizens of the City of Lakewood. However, Appellant improperly applies that intent to the case at bar. The intent of the Code isn't to guarantee the welfare of the residents of Oak Tree Manor by ensuring that they receive on-site supportive services. The intent of the Code is to protect the Citizens, as a whole, by permitting and regulating uses within zoning districts, “thereby assuring the compatibility of uses and practices within districts.” Zoning Code Section 1101.03. In addition, the intent of the Code is to “protect the character and value of residential, business, industrial, institutional, and public uses and to insure the orderly and beneficial development of same.” Zoning Code Section 1101.04(e), Intent.

In this case, a business office use, within an apartment complex, located within a Single and Two Family District, which employs fourteen (14) people to cover a 24-hour operation, seven (7) days a week is not a use that is consistent with single and two family homes.

### **CONCLUSION**

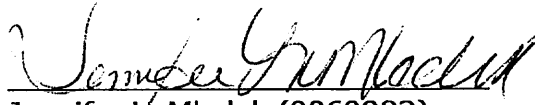
Appellant has failed to establish that the decision of the Lakewood Board of Zoning Appeals was unconstitutional, illegal, arbitrary, capricious, or unreasonable. The record established before the Board of Zoning Appeals indicates that the Board's decision is supported by a preponderance of substantial, reliable and probative evidence. Appellant failed to establish that the office use in question was a valid existing non-conforming use.

Moreover, even if this Court were inclined to find an existing valid non-conforming use at the time of the re-zoning of the property, Appellant's have expanded that use, and therefore, said business use is prohibited.

For these reasons, the Lakewood Board of Zoning Appeal's decision upholding the determination of the Building Commissioner must be affirmed.

Respectfully submitted,

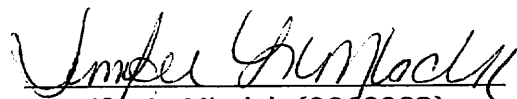
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### **CERTIFICATE OF SERVICE**

This is to certify that a copy of the foregoing Appellee's brief in Opposition was sent regular U.S. Mail to attorney for Appellant, Sean Allan, Allan & Gallagher, LLP, 1300 Rockefeller Building, 614 W. Superior Avenue, Cleveland, Ohio 44113 this 1<sup>st</sup> day of June, 2010.



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