

File # (official use only)

4-A-23-VA



# BOARD OF ZONING APPEALS APPLICATION

Please reach out to a City of Knoxville Zoning Examiner about your project before submitting a variance application.

APPLICANT INFORMATION		APPLICANT IS:	THIS PROPOSAL PERTAINS TO:
Name (Individual not company)	Bob Whetsel & Gordon Coker	Owner <input type="checkbox"/>	New Structure <input type="checkbox"/>
Street Address	1015 Luttrell St	Contractor <input type="checkbox"/>	Modification of Existing Structure <input checked="" type="checkbox"/>
City, State, Zip	Knoxville TN 37917	Tenant <input type="checkbox"/>	Off Street Parking <input type="checkbox"/>
Phone Number	865-740-2769	Other <input checked="" type="checkbox"/>	Signage <input type="checkbox"/>
Applicant Email	bobwhetsel@comcast.net		Other <input type="checkbox"/>

### THIS IS A REQUEST FOR:

- Zoning Variance (Building Permit Denied)
  Extension of Non-Conforming Use/or Structure  
 Appeal of Administrative Official's Decision
  Map Interpretation

### PROPERTY INFORMATION

Street Address 415-417 Lovenia Ave. City, State, Zip Knoxville TN 37917  
 See [KGIS.org](http://KGIS.org) for Parcel # 081MN017 City Council District # 4 and Zoning District RN2/HZ

### VARIANCE REQUIREMENTS

#### City of Knoxville Zoning Ordinance Article 16, Section 16.3

The City of Knoxville Board of Zoning Appeals shall have the power and authority to grant variances from terms of this ordinance according to the procedure and under the restrictions set out in this section.

The purpose of the variance is to modify the strict application of the specific requirements of this ordinance in the case of exceptionally irregular, narrow, shallow or steep lots, or other exceptional physical conditions, whereby such strict application would result in practical difficulty or unnecessary hardship which would deprive an owner of the reasonable use of his land. The variance shall be used only where necessary to overcome some obstacle which is preventing an owner from using his property as the zoning ordinance intended.

### DESCRIPTION OF APPEAL

#### Describe your project and why you need variances.

This is an application to overturn a decision of the Chief Building Official (CBO) regarding the number of units that should be permitted at the subject property. This long vacant property is currently zoned as RN2 which only allows for single family occupancy to be permitted. The CBO has ruled that six residential units could be permitted for this property based on a 1953 building permit which would qualify the property as a "legal pre-existing non-conforming use" and the subordinate clause regarding "actively marketed" in the current zoning code dealing with nonconforming properties.

We contend: 1.) The property lost its "legal pre-existing non conforming" status long ago under the rules of the previous zoning code. 2.) The "actively marketed" clause of the new code is neither relevant or accurate in determining current uses for this structure.

Please review the attached packet in which we support our position.

Please note that this appeal was unanimously requested by the members of the Fourth & Gill Neighborhood Organization.

#### Describe hardship conditions that apply to this variance.

This section is not relevant to this request appealing an official administrative decision of the Chief Building Official.

Site plans and any other relevant information associated with the hardship must accompany this application.

### APPLICANT AUTHORIZATION

I hereby certify that I am the authorized applicant, representing ALL property owners involved in this request and that all owners have been notified of this request in writing.

APPLICANT'S SIGNATURE Robert Whetsel DATE 2/17/2023

DocuSigned by:  
22BC942DA2A54B6...

**INCOMPLETE APPLICATIONS WILL BE RETURNED FOR RESUBMISSION. ALL INFORMATION IS REQUIRED.**

rev 8/2022

File #



**BOARD OF ZONING APPEALS APPLICATION**

**\*\*\*\*\*OFFICE USE ONLY\*\*\*\*\***

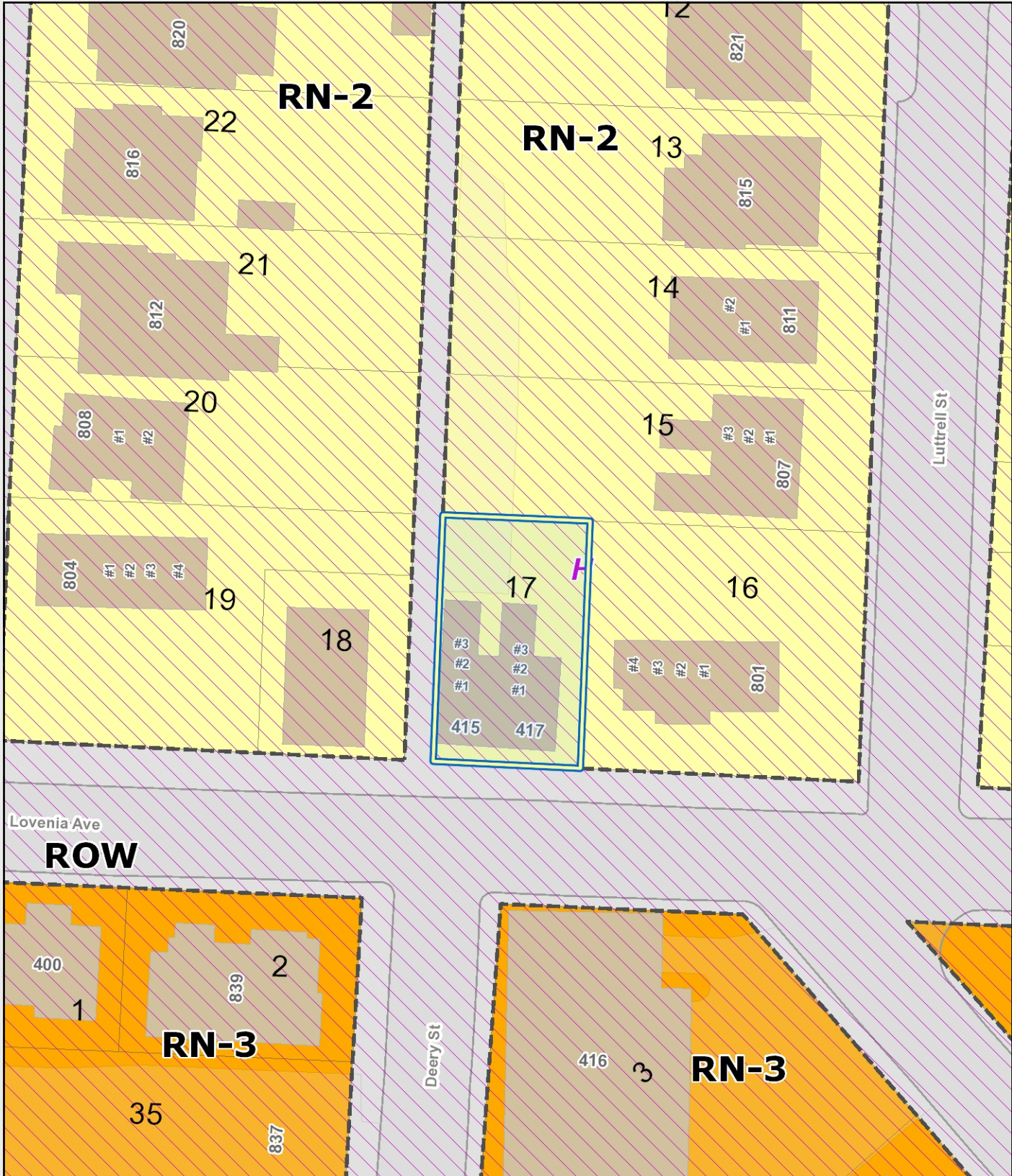
Is a plat required?    Yes  No

Small Lot of record?

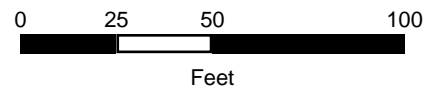
**VARIANCE REQUEST(S) WITH ORDINANCE CITATION(S):**

**PROJECT INFORMATION**

Date Filed	Fee Amount
Council District	BZA Meeting Date
<b>PLANS REVIEWER</b>	<b>DATE</b>



415-417 LOVENIA AVE  
 4-A-23-VA  
 BOB WHETSEL & GORDON COKER



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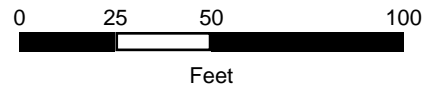
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415-417 LOVENIA AVE  
 4-A-23-VA  
 BOB WHETSEL & GORDON COKER



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415-417 LOVENIA AVE

4-A-23-VA

BOB WHETSEL & GORDON COKER

0 25 50 100



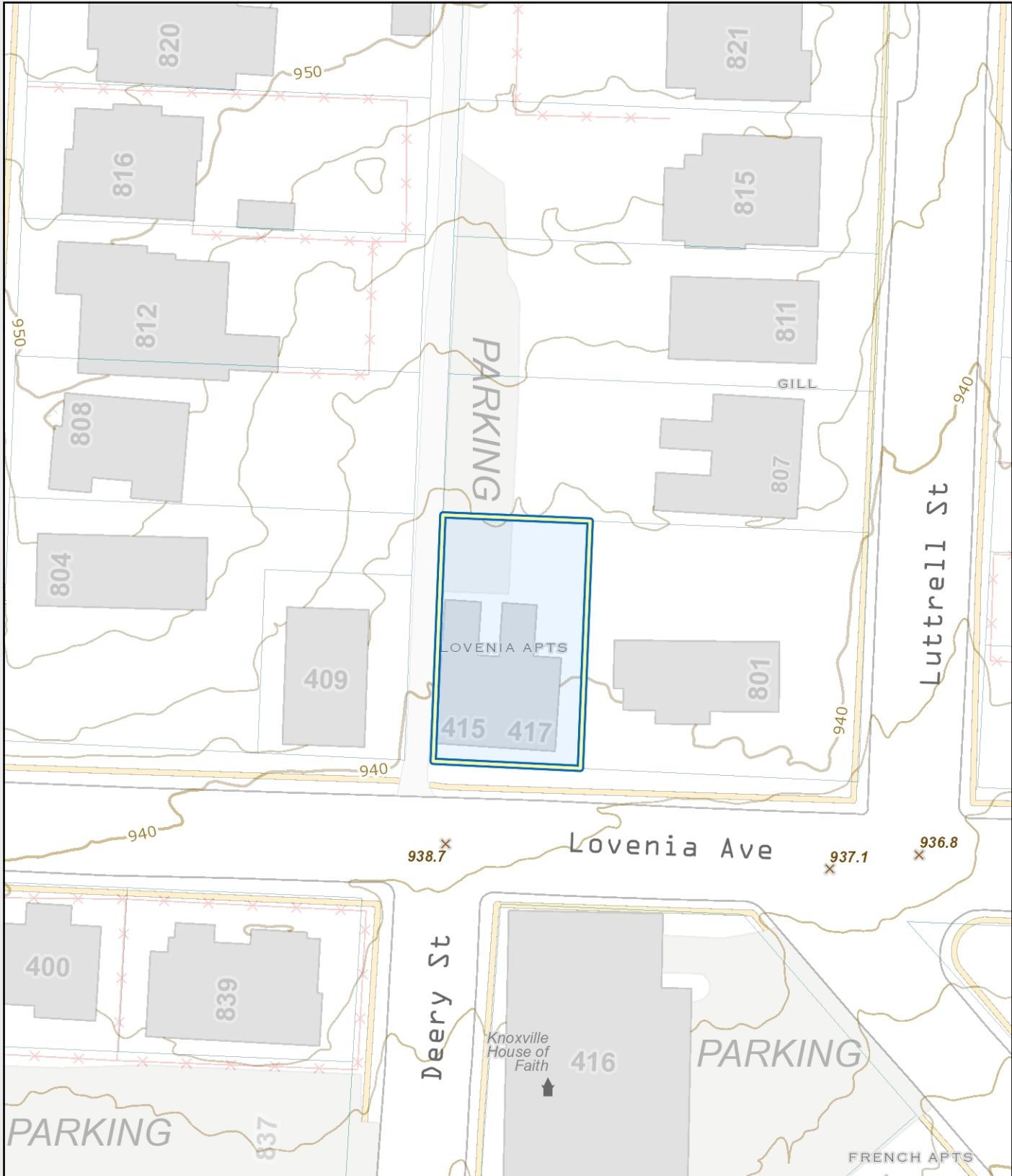
Feet

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**415-417 LOVENIA AVE**

**4-A-23-VA**

**BOB WHETSEL & GORDON COKER**

0 25 50 100



Feet

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<b>MONDAY, GENE</b>		<b>7029</b>	<b>LOVENIA AVENUE</b>	
Owner		Permit No.	Location	
<b>2/19/53</b>	<b>\$1,800.00</b>		<b>215-17</b>	
Date	Estimated Cost	Lot No.	House No.	Block No.
		<b>Owner</b>		<b>X</b>
Architect		Builder		New Rem.

DESCRIPTION

Remodel 2 duplexes into 6 apartments.

**PROPERTY ASSESSOR'S OFFICE - KNOX COUNTY, TENNESSEE**  
**MAP DEPARTMENT - OWNERSHIP CARD**

Source: KGIS

ACTIVE      NORMAL

04/03/2023

District	Map	Insert	Group	Parcel	Ward	Property Location	
	81	M	N	17	11	415 LOVENIA AVE	
Subdivision			Block	Lot	Plat	Dimensions ( shown in ft. )	Acreage
GILL PT 138,139			-	-	5-303	50 X 90	0.00 - A.C. Deeded 0.00 - A.C. Calculated
Owner		Sale Date	Book	Page	Sale Price	Mailing Address	
MONDAY WILLIAM E III		10/14/1952	1052	258		18 EMORY PLACE STE 100 KNOXVILLE, TN 37917	
FRIENDS TO PRESERVE 4TH & GILL LLC		3/1/2023	20230302	0047719	\$ 173,500	18 EMORY PLACE STE 100 KNOXVILLE, TN 37917	

Remarks	
ATTRIBUTES FROM NCR LOADER	
Parent Parcel	Parent Instrument Number
Previous Parcel ( Split From )	Next Parcel ( Merged Into )



Received the 16 day of July, 1957 at 8<sup>00</sup> o'clock a.m.

*Reiff White* Register

THIS INDENTURE, Made and entered into on this the 14th day of OCTOBER, 1952, by and between WILLIAM EUGENE MONDAY, JR., and wife, FLORENCE S. MONDAY, of Knoxville, Knox County, in the State of Tennessee, hereinafter referred to as PARTIES OF THE FIRST PART, and WILLIAM EUGENE MONDAY, III, of Knoxville, Knox County, in the State of Tennessee, hereinafter referred to as PARTY OF THE SECOND PART.

WITNESSETH:

That the said Parties of the First Part, for and in consideration of the sum of ONE HUNDRED AND NO/100 (\$100.00) DOLLARS, CASH, AND OTHER GOOD AND VALUABLE CONSIDERATION to them in hand paid by the said Party of the Second Part, the receipt of which is hereby acknowledged, have granted, bargained, sold, conveyed, and do hereby grant, bargain, sell and convey unto the said Party of the Second Part, subject to the conditions and restrictions hereinafter stated for and during the term of his natural life with remainder interest to William Eugene Monday, III, or his legal heirs, the following described property and premises, to-wit: -

SITUATED, LYING AND BEING in the THIRD (formerly SECOND) Civil District of Knoxville County, Tennessee, and within the ELEVENTH Ward of the City of Knoxville, and being more particularly bounded and described as follows, to-wit: -

BEING all of Lots Nos. 136, 139 and 140 in GILL'S ADDITION TO THE CITY OF KNOXVILLE, TENNESSEE, beginning at the Northwest corner of Luttrell and Lovenia Streets and running thence North on Luttrell Street 140 feet to a stake; thence Westwardly and parallel with Lovenia Street 150 feet to an alley; thence Southwardly 140 feet to Lovenia Street; thence Eastwardly with Lovenia Street 150 feet to the BEGINNING.

Said property is improved with two brick duplex apartment houses bearing Street Numbers 215 and 217 Lovenia Avenue, and 983 and 985 Luttrell Street, and also one frame dwelling house bearing Street Number 977 Luttrell Street, Knoxville, Tennessee, and

BEING the same property conveyed to WILLIAM EUGENE MONDAY, JR., and wife, FLORENCE S. MONDAY, Parties of the First Part herein, by ANDREW JONES and wife, ALLIE E. JONES, by Warranty Deed dated the 1st day of October, 1952, of record in Book of Deeds \_\_\_\_\_, at Page \_\_\_\_\_, of the Register's Office of Knoxville County, Tennessee, to which said Deed specific reference is hereby made.



1. The Parties of the First Part convey to Party of the Second Part the aforesaid property for and during the term of his natural life, and the remainder interest to any children he may have born in lawful wedlock, if no children, said remainder interest in said property shall vest in his legal heirs as provided by the statutes of descent and distribution in the State of Tennessee.

2. Said property is conveyed to Party of the Second Part herein by Parties of the First Part subject to Vendor's Lien retained in the Warranty Deed from Andrew Jones, and wife, Allie E. Jones, to William Eugene Monday, Jr., in Deed Book \_\_\_\_\_, at Page \_\_\_\_\_, of the Register's Office of Knox County, Tennessee, to secure the sum of SIXTEEN THOUSAND AND NO/100 (\$16,000.00) DOLLARS, which is also secured by Trust Deed dated the 1st day of October, 1952, executed by William Eugene Monday, Jr., and wife, Florence S. Monday, to Ben H. Testerman, Trustee.

3. Said property is conveyed to Party of the Second Part by Parties of the First Part, free from any debts, contracts or obligations which they have or may hereafter have.

4. As a further consideration of said conveyance said property shall not be sold, conveyed, mortgaged, or otherwise alienated during the lifetime of Party of the Second Part or for a period of twenty-one (21) years thereafter.

5. As a further consideration of this conveyance, the property is to be managed and operated by William Eugene Monday, Jr., one of the Parties of the First Part herein until the said William Eugene Monday, III, Party of the Second Part herein shall have attained his twenty-first (21st) birthday, and the said operator shall pay all expenses of operation and maintenance of said property, including taxes, insurance, and other expenses, from the income received from said property, and the balance to be turned over to Party of the Second Part, his heirs and assigns, and if at any time the said William Eugene Monday, Jr., shall not efficiently operate and manage said property, then a new operator therefor may be designated by the Chancery Court of Knox County, Tennessee, upon proper petition filed to obtain such results.



Instr: 185767160000007

Pages: 2 of 3

Back File Automation



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6. If for any reason said property shall be destroyed by fire, flood or otherwise, any and all insurance or other money arising as a result of said fire or flood shall be re-invested in this property, or other property of like character, and that such property shall at all times be protected by an adequate amount of insurance.

7. As a further consideration of this conveyance, it is understood that said property will at all times be maintained in a good state of repair, the costs of which shall be paid from the income of said property aforesaid.

This conveyance is made with the hereditaments and appurtenances thereto appertaining hereby releasing all claims to Homestead and Dower therein.

TO HAVE AND TO HOLD said premises to the said Party of the Second Part, his Heirs and Assigns, SUBJECT to the conditions hereinbefore specifically enumerated.

IN WITNESS WHEREOF, The said Parties of the First Part have hereunto set their hands on the day and year first above written.

*William Eugene Monday, Jr.*  
WILLIAM EUGENE MONDAY, JR.

*Florence S. Monday*  
FLORENCE S. MONDAY

STATE OF TENNESSEE)  
                                  : SS  
COUNTY OF KNOX        (

Personally appeared before me, \_\_\_\_\_, Notary Public in and for said State and County aforesaid, the within named bargainors, WILLIAM EUGENE MONDAY, JR., and wife, FLORENCE S. MONDAY, with both of whom I am personally acquainted, and who acknowledged that they executed the within instrument for the purposes therein contained.

WITNESS MY HAND AND OFFICIAL SEAL AT OFFICE, in Knoxville, this the 14<sup>th</sup> day of October, 1952.

*A. J. Wilson*  
Notary Public

My commission expires: April 7 1955



## Affordable Housing for Rent

Free Housing Resources of Section 8 Waiting L  
Affordable Apartments

USLowCostHousing

O

## Monday Apartments

### BUSINESS CONTACT



**William Monday**

Owner

### CONTACT INFORMATION

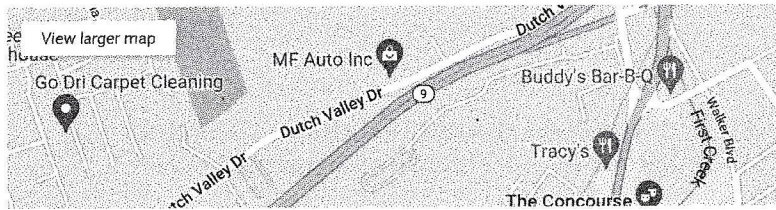
#### Monday Apartments

417 Lovenia Ave, Knoxville, TN 37917

[Get Directions](#)

**Phone:** (865) 525-5191

**Edit:** Edit or Remove



### BUSINESS DESCRIPTION

Monday Apartments is located in Knoxville, Tennessee. This business is working in the following industry: Real estate. Annual sales for Monday Apartments are around USD 500,000 - 1,000,000.

**Employees:** 1-4



## **Background for Appeal of Chief Building Officials(CBO) ruling for 415-417 Luttrell St.**

On February 2<sup>nd</sup> Peter Aherns the Chief Building Official (CBO)for the City of Knoxville responded to an email request from me stating that his office was prepared to issue a permit for 6 units to be built and occupied at 415-417 Lovenia Ave. based on a 1953 permit.

I challenged that response by identifying the long-standing vacancy of the property. The CBO responded that the pre-existing clause of the current zoning code was the relevant law and that the “actively marketed” clause was decisive in making his decision. He sent a link from Allbiz.com to document that “active marketing” of the property.

When I then raised questions on the relevance and accuracy of the “actively marketed” proof he suggested that I submit an official appeal of his decision. That is what is in front of you today.

### **Argument 1. The property lost its pre-existing nonconforming ” status long ago under the rules of the previous zoning code.**

- In 1903 the building was built and occupied as a duplex . It was addressed as 215-217 Lovenia. (Source-City directory for 1903 and Sanborn Insurance Maps)
- In 1953 a permit was issued to convert the building to 6 units. Which was a legal use at that time. (Source—Chief Building Official)
- In the 1980s the city Zoning ordinance was amended. This property was zoned R1a. At that time the 6 units at 415-417 Lovenia became a legal “pre-existing non-conforming” use.
- By 2005 all but 2 units in the structure went vacant and have stayed vacant for the past 18 years. We contend that the building lost its non-conforming use protection as 6 units during this long period of vacancy.
- By 2019 all units in the building were vacant and are that way today.

- This occupancy information is documented by using KUB records for the property. A spread sheet detailing that information is included in this package as Appendix 1
- Here is a summary of those KUB records.
  - By 2004, 19 years ago, all utility meters at 4 of the units were removed so there would have been no legal occupants in the following units: 415 Lovenia ,Units 1&3. 417 Lovenia, Units 1&3 since that time.
  - There is an active house water meter attached to 417 Lovenia which apparently provided water to all units. There has been no water consumption from that meter since at least 2018. KUB consumption records only go back 5 years so it could have been a longer period that no unit in this building had water service. Once again there could be no legal occupant in the units without water service.
  - The only KUB service for the property since 2018 has been on the House electric meter attached to 417 Lovenia and electric meters attached to Apartment 2 in both 415 & 417 Lovenia. All these meters show minimum consumption of \$2-\$3 per month after the base fee. Clearly no one has legally occupied the units in the last 5 years.
- The relevant code for this property under the prior code states the following.
  - **Article VI, Paragraph C. Building vacancy, nonconforming.**
    - **“With the exception of houses or duplexes, a nonconforming building, structure or portion thereof, which is or hereafter becomes vacant and remains unoccupied building for a continuous period of six (6) months, shall not thereafter be occupied except by the uses which conform to the use regulations of the district in which it is located.”**
- It is our firm belief that this code section applied to the history of this property shows beyond a shadow of a doubt that 415-417 Lovenia lost its legal “pre-existing non-conforming” status long ago.
- We believe the use requirements of the current zoning classification for the property should be the controlling portion of the code as plans are made to renovate and occupy this long vacant property.

**Argument 2. The "actively marketed" clause of the new code is not relevant in this situation and even if it was the threshold to document "active marketing" has not been cleared by the evidence given.**

- As clearly shown in the preceding argument, this property lost its non-conforming status before Recode was adopted. Therefore, provisions for non-conforming structures in the current code are irrelevant regarding this property.
- The current code is only relevant in determining what uses are appropriate for this property going forward.
- The property is zoned as RN2 which only allows by right single-family occupancy on a lot of this size. The lot is 4,500 sq ft.
- However, since the non-conformity clause of the current code has been brought into the discussion on this property it needs to be explored. The current code states the following.

**Article 17-NONCONFORMATIES-Paragraph C Discontinuation or Abandonment.**

- **If a nonconforming use is discontinued for a continuous period of 24 months, and is not actively marketed, the nonconforming use terminates automatically. Any subsequent use of such land or structure must comply with all regulations of the zoning district in which the structure or land is located.**
- The subordinate clause of "not actively marketed" in conjunction with the 1953 permit has been used by the CBO to come to the decision which we are challenging.



Mr. Ahrens cites a listing for the property in Allbiz.com as proof of “active marketing.” A copy of that listing is attached as appendix 2 to this document. Please review it. The actual link as provided by the CBO is [https://www.allbiz.com/business/monday-apartments\\_4l-865-525-5191](https://www.allbiz.com/business/monday-apartments_4l-865-525-5191)

- The question is what do have here?
  - It is certainly not an add to sell a piece property.
  - It might be an ad to rent a property but there are no rentable properties at this address at this time.
  - It certainly does not advertise 6 units for sale or rent.
  - It is just an address and a phone number that gives info on the Monday Apartments. Hardly the stuff to overthrow the evidence of many years of vacancy.
- This property has not been listed by any local realtor, it has not appeared in any MLS publication , it is not shown as an active listing on Zillow and there have been no signs in the yard. Plus everyone who has asked about the property over the last decade has been told they weren’t for sale.
- The allbiz.com listing is an insufficient basis to affirm that this property has been actively marketed.
- Clearly this clause in the new code was meant to protect owners’ rights who were actively marketing their properties with a pre-existing non-conforming use that might become vacant during the marketing period. It was not intended as a loophole to bring back long abandoned uses.

## **Our Conclusion**

The Board of Zoning Appeals should overturn the CBO’s ruling that 6 units can legally operate at 415-417 Lovenia. It should confirm that its legal nonconforming status was relinquished years ago and that the use requirements of the current code should be applied to this property.

It should further recognize that the “actively marketing” clause in the non-conforming section of the current zoning ordinance is not relevant to this case nor would the allbiz.com listing be sufficient proof of marketing in any case.

This appeal was supported by a unanimous vote of our neighborhood membership at it’s annual meeting on February 15<sup>th</sup> 2023.

Appendix 1 to Appeal

KUB Meter and Consumption Records for 415- 417 Lovenia

417 Lovenia				
		Water	Gas	Electric
	House	Meter Active No consumption since 2018	No Meter	Meter Active Minimum consumption since 2018. \$2 to \$3 per month
	Unit 1	No Meter	Meter Inactive since 2003	No Meter
	Unit2	No Meter	Meter Active No Consumption since 2018	Meter Active Minimum consumption since 2018. \$2 to \$3 per month
	Unit 3	No Meter	No Meter	Meter inactive since 2003
415 Lovenia				
		Water	Gas	Electric
	Unit 1	No Meter	Meter inactive since 2004	Meter inactive since 2004
	Unit 2	No Meter	Meter Inactive since 2021	Meter Active-No consumption the last 3 years
	Unit 3	No Meter	No Meter	Meter inactive since 2004

If there is an active meter on a property, consumption information only goes back 5 years. This information clearly shows there that 4 of the 6 units have had no occupancy since 2004. It further shows that no unit as been occupied since 2018 at the latest.

This information was generated through a phone call between Bob Whetsel and a KUB Commercial Services account representative. It can be verified by calling KUB at 865-524-2911.



April 10, 2023

Mr. Grant Rosenberg  
Chairman  
Knoxville Board of Zoning Appeals

Dear Mr. Rosenberg,

Please be advised that the Board of Directors of the Fourth & Gill Neighborhood Organization supports the appeal request of Bob Whetsel and Gordon Coker that will appear on your April 18<sup>th</sup> agenda as item 4-A-23-VA. Also, please be aware that this appeal was endorsed unanimously by the full membership of the organization at the Annual meeting held on February 15<sup>th</sup> of this year.

This is an appeal of a decision made by the Chief Building Official, Peter Ahrens, to allow for 6 units to be permitted on a property that is currently zoned for single family use on a 4,500 sq ft lot. While this property was once a 6 plex it has been vacant for many years and has not been marketed for rent or sale during this time. Details of the appeal are in your packet which we hope you and your colleagues will read and review closely.

At the crux of the issue is Article 17, Paragraph C of the current zoning ordinance which deals with legally pre-existing non-conforming properties. Interpretation of this ordinance is vitally important to all neighborhoods in our city that are working hard to build a great future based on the current codes.

Thank You for your service and attention to this matter of great importance to us and to the rest of Knoxville's neighborhoods.

Sincerely,

A handwritten signature in blue ink that reads "Gabrielle Boudreau". The signature is written in a cursive style.

Gabrielle Boudreau  
President  
Fourth & Gill Neighborhood Organization





VARIANCE  
4-A-23-VA  
Knoxville BZA  
PUBLIC HEARING  
215-4244



**From:** [Steve Borden](#)  
**To:** [Jennifer Scobee](#)  
**Subject:** RE: April BZA applications  
**Date:** Thursday, April 6, 2023 1:35:32 PM

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Jennifer,

Please find the following responses to the April BZA applications:

4-A-23-VA 415-417 Lovenia Ave: Operations has no comment.  
4-C-23-VA 4101 Westgate Dr: Operations has no comment.  
4-D-23-VA 313 Tedlo Ln: Not posted online  
4-E-23-VA 4800 N. Broadway St: Operations has no comment.  
4-F-23-VA 2218 Cumberland Ave: Operations has no comment.

Sincerely,

Steven M. Borden, P.E.  
Director/Assistant Chief Engineer  
TDOT – Region 1

as

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**From:** Jennifer Scobee <jscobee@knoxvilletn.gov>  
**Sent:** Tuesday, March 28, 2023 1:32 PM  
**To:** Steve Borden <Steve.Borden@tn.gov>; 'Christian.Wiberley@kub.org' <Christian.Wiberley@kub.org>  
**Subject:** [EXTERNAL] April BZA applications

**\*\*\* This is an EXTERNAL email. Please exercise caution. DO NOT open attachments or click links from unknown senders or unexpected email - STS-Security. \*\*\***

Good afternoon gentlemen,

Please have your staff review the following applications and provide your responses by Monday, April 10, 2023. You may access the applications [here](#).

We are waiting for some more information from the applicant for 4-D-23-VA so I haven't posted that on the web yet, but I've attached it to this email.

[4-A-23-VA 415-417 Lovenia Ave \[PDF\]](#)  
[4-C-23-VA 4101 Westgate Dr \[PDF\]](#)  
[4-D-23-VA 313 Tedlo Ln \[PDF\]](#) (*waiting on info, not posted on web yet*)  
[4-E-23-VA 4800 N. Broadway St \[PDF\]](#)  
[4-F-23-VA 2218 Cumberland Ave \[PDF\]](#)

Thanks,





April 10, 2023

Mr. Bryan Berry, Deputy Director  
Board of Zoning Appeals  
Room 475, City-County Building  
P. O. Box 1631  
Knoxville, Tennessee 37901

Dear Mr. Berry:

**Re: Variance Requests 4-A-23-VA, 4-C-23-VA, 4-D-23-VA, 4-E-23-VA, and 4-F-23-VA**

We have reviewed our records and, as far as we have been able to determine, KUB has no existing utility facilities located within the variance areas and we have no objection to the requested variances. However, KUB does not release and hereby retains all easements and rights for existing facilities, whether or not identified in our research.

If you have any questions regarding this matter, please call me at (865) 558-2483.

Sincerely,

A handwritten signature in black ink, appearing to read "C. Wiberley". The signature is written in a cursive style.

Christian Wiberley, P.E.  
Engineering

CGW

ROBERT L. KAHN  
REGGIE E. KEATON  
DONALD D. HOWELL  
DEBRA L. FULTON  
MICHAEL W. EWELL  
JOHN M. LAWHORN  
JAMES E. WAGNER  
BEVERLY D. NELMS  
MARY ELIZABETH MADDOX  
BENJAMIN C. MULLINS  
RICHARD T. SCRUGHAM, JR.  
MATTHEW A. GROSSMAN  
KEVIN A. DEAN  
SHARON H. KIM  
RICHARD E. GRAVES  
REBEKAH P. HARBIN  
MICHAEL A. C. LEE  
NIKOL D. PLUESS



*client-centric & committed to success*

Email: [bmullins@fmsllp.com](mailto:bmullins@fmsllp.com)

Direct Fax: 865-541-4609

April 14, 2023

550 W. Main Street  
Suite 500  
Knoxville, Tennessee  
37902

phone 865.546.9321

fax 865.637.5249

web [fmsllp.com](http://fmsllp.com)

ARTHUR G. SEYMOUR, JR.  
(1945 - 2019)

**City of Knoxville Board of Zoning Appeals**  
City County Building  
400 Main Street, Room 475  
Knoxville, TN 37902

**CC: via e-mail:**  
[jscobee@knoxvilletn.gov](mailto:jscobee@knoxvilletn.gov)

Re: Opposition to 4-A-23-VA

Dear Board of Zoning Appeals:

I write in response to the appeal of Bob Whetsel and Gordan Coker (“Applicants”) relating to whether 415-417 Lovenia Avenue (the “Subject Property”) is entitled to maintain up to six (6) residential units at such property as a protected non-conforming use.

The Subject Property received a building permit in 1953 to remodel a duplex building into six (6) residential apartments. The tax card for the Subject Property shows that it is assessed at a commercial tax rate (40%) and has the following “Property Type” designation: “303 5-10-Family.”

Applicants contend that the Chief Building Official (“CBO”) has incorrectly determined that the Subject Property currently is a protected non-conforming use. More specifically, Applicants contend that the Subject Property protected non-conforming use status for six (6) residential dwelling units has been lost by way of abandonment due to a prolonged duration of time in which not all units were being occupied by residents. For the reasons set forth below, Applicants’ position lacks merit.

Initially, it is important to note that pre-existing non-nonconforming uses are protected by state statute; specifically, T.C.A. § 13-7-208. The Court of Appeals has considered and rejected a remarkably similar contention that a prolonged lack of use alone constitutes abandonment of non-conforming use protections.



In *Lamar Advertising Co. v. Town of Farragut*, 1986 Tenn. App. Lexis 2810 (Tenn. Ct. App. Feb. 28, 1986)<sup>1</sup>, the Court of Appeals held that certain billboards continued to enjoy non-conforming use protections even though such billboards had not display messages for “several years.” There, the Town of Farragut (the “Town”) attempted to force removal of such billboards, relying on a Town zoning ordinance provision providing that lack of use of a structure for 365 consecutive days constitutes abandonment of non-conforming use protections. The trial court held that the Town failed to show abandonment of the billboard’s non-conforming use protections and that the Town could not rely on the zoning ordinance’s 365-day provision to show abandonment. *Id.* at \*2. The Court of Appeals affirmed.

The Court of Appeals held that the law with respect to abandonment of nonconforming use protections is “clear.” *Id.* at \*7. The Court continued: “The primary elements of abandonment are the intention to abandon *and the external act by which the intention is carried into effect.* To constitute an abandonment, or waiver, there must be a clear, unequivocal, and decisive act of the party, showing a determination not to have the benefit in question, with a full knowledge of his rights in the premises.” *Id.* (citations omitted) (*emphasis added*). The Court quoted prior caselaw at length with respect to intent:

“The intention to abandon is considered the first and paramount inquiry. Abandonment may arise from a single act or from a series of acts. Time is not an essential element of abandonment, and is of no importance except as indicative of intention.”

“The Supreme Court of this State speaking on this question said: ‘Indeed, in order to justify the conclusion that there has been an abandonment, there must be some clear and unmistakable affirmative act indicating a purpose to repudiate the ownership. This was the substance of the decision of the court upon this point in *Woods v. Bonner*, 89 Tenn. 411, 414, 415, 18 S.W. 67....’

“And it has been repeatedly held that a mere nonuser will not amount to abandonment of an easement, but that there must be some positive showing of an intention to abandon. *Boyd v. Hunt*, 102 Tenn. 495, 52 S.W. 131.”

....

“The burden of proving abandonment is upon the party asserting it. Moreover, the abandonment must be established by clear and unequivocal evidence of decisive and conclusive acts.”

*Id.* at \*7-9 (quoting *Cottrell v. Daniel*, 205 S.W.2d 973, 975 (Tenn. Ct. App. 1947)) (citations omitted) (alteration in original) (emphases added). The Court went on to affirm the trial court’s ruling that no abandonment occurred in that case.

The *Lamar Advertising* decision is highly instructive. First, it demonstrates that Applicants have the burden to show an abandonment of the Subject Property’s non-conforming

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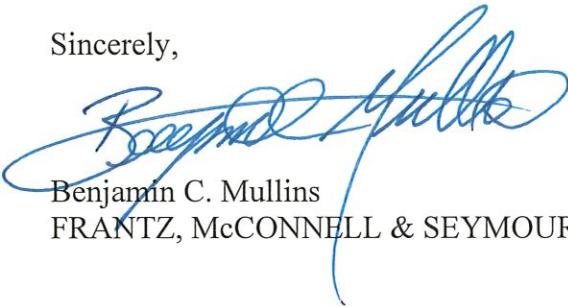
<sup>1</sup> The Tennessee Supreme Court approvingly cited this case in its 2012 decision in *Ready Mix, USA, LLC v. Jefferson County*, 280 S.W.3d 52, 62, 69 (Tenn. 2012).

use protections by clear and convincing evidence.<sup>2</sup> Second, it demonstrates that time “is of no importance except as indicative of intention.” Here, Applicants hang their hat on the mere duration of occupancy of some of the unit at the Subject Property. As a matter of law, this is insufficient to show abandonment.

No facts here show any intent to abandon non-conforming use protections, much less by clear and convincing evidence. The Subject Property’s prior owner has regularly paid the assessed 40% tax rate based on the “5-10 Family” tax use classification. If there was ever an intention to abandon the Subject Property’s non-conforming multi-family use, this at a minimum would have to be accompanied by a reclassification of the Subject Property’s tax status to single-family residential, which would result in a 25% tax rate.<sup>3</sup> The voluntarily continuation of a higher tax rate belies any intent to abandon the Subject Property’s uses as a multi-family structure.

As set forth above, the Applicants’ appeal should be denied.

Sincerely,



Benjamin C. Mullins  
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<sup>2</sup> “Clear and convincing evidence means evidence in which there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence.” *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 901 n.3 (Tenn. 1992). This is a higher evidentiary burden than the typical civil standard of “preponderance of the evidence.”

<sup>3</sup> Under the State Constitution, property that contains multiple residential units must be assessed at the commercial/industrial 40% property tax rate.