

City of Mission, Kansas

# Board of Zoning Appeals

Tuesday, April 2, 2024, 6:30 P.M.

Powell Community Center, Room E

6200 Martway, Mission, Kansas 66202

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## AGENDA

- I. Call to Order
- II. Roll Call
- III. New Business
  - A. Public Hearing - BZA Case #23-01 – Appeal of Administrative Decision that Property Lost Legal Non-Conforming Status – 5500 Johnson Drive – Appellant, Mid KC Petroleum 4, LLC.
- IV. Other Business
- V. Adjournment

Staff Contact – Brian Scott, Deputy City Administrator for Planning and Development Services, [bscott@missionks.org](mailto:bscott@missionks.org) or (913) 6767-8353

**STAFF REPORT**  
**Mission Board of Zoning Appeals**  
**Tuesday, April 2, 2024**

**AGENDA ITEM NO:** New Business – Item A

**CASE # / SUBJECT:** BZA #23-01 / Appeal of Administrative Decision that Property Lost Legal Non-Conforming Status

**PROPERTY:** 5500 Johnson Drive (Property ID KP27500000 0020)  
5512 Johnson Drive (Property ID KP27500000 0042B)  
5540 Johnson Drive (Property ID KP27500000 0042A)

**OWNER / APPLICANT:** Mid KC Petroleum 4, LLC

**PUBLIC HEARING:** Tuesday, April 2, 2024, 6:30 P.M.,  
Powell Community Center, Room E  
6200 Martway, Mission, KS 66202

**PUBLICATION:** Tuesday, March 12, 2024 in *The Legal Record*

**STAFF CONTACT:** Brian Scott, Deputy City Administrator

**BACKGROUND INFORMATION:**

The subject property is generally known as 5500 Johnson Drive, but actually comprises three separate parcels – 5500, 5512, and 5540 Johnson Drive. The property is located at the northwest corner of Nall Avenue and Johnson Drive within Mission’s Downtown District, generally defined as the commercial area along Johnson Drive between Nall and Lamar Avenues.



The property has been continuously used as a gas station, convenience store, and car wash since it was built in 1988. New zoning district and zoning regulations adopted in 2003 made these operations a legal non-conforming use.

In the spring of 2023, City staff learned from the then-current operator that the use had ceased operations and was closed. Later in the summer, staff noticed a “For Lease or Sale” sign in front of the property. Staff met with a prospective buyer in August 2023 to discuss an entirely different use for the property. In the fall of 2023, staff learned that a new buyer or operator intended to continue the existing use of the property.

On November 22, 2023, staff sent a letter to inform the new owner that the legal non-conforming use expired and the prior use as a gas station, convenience store and car wash was no longer permitted. The letter further informed the owner that the sale of tobacco products and electronic cigarettes would be prohibited on the property due to the distance restrictions established by Ordinance 1589, passed by the City in August 2023.

On December 22, 2023, owner's counsel sent a notice of appeal to the City, pursuant to Section 440.290 of the Code of the City of Mission, Kansas (the "Code").

## **APPLICABLE CODE PROVISIONS:**

### **Zoning**

The property is currently zoned as Main Street District 1 or “MS-1”. Section 410.160 of the Code describes the intent of the “MS-1” zoning district (emphasis added):

*The zoning of property as "MS1" Main Street District 1 is intended to provide development opportunities consistent with the existing character within the core of Downtown Mission. Downtown Mission is the original commercial district within the City. The majority of buildings in the core of downtown have been constructed to the public right-of-way. Public parking lots are available and on-street parking is present to serve the downtown businesses. The result is a character unique to downtown that is not found elsewhere in the City. The "MS1" District provides for the majority of retail uses, while encouraging an active streetscape with a pedestrian friendly shopping environment. This district restricts automobile oriented uses and does not allow offices on the ground floor level. The district is also intended to allow multi-story buildings with office and residential uses above the ground floor level. Multi-story buildings with top-floor setbacks are encouraged within this district as described in the Mission/Rock Creek Redevelopment Masterplan. In addition, the district is intended to allow flexibility from the normal development standards found elsewhere in the City.*

Section 410.170 identifies the permitted uses in the “MS-1” zoning district:

- A. **Prepared Food.** Restaurants (excluding those with drive-through facilities), sandwich shops, bistros, coffee houses, delis, bakeries, candy/ice cream/yogurt shops, and other establishments of similar character.
- B. **Food For Home.** Convenience store, green grocer, gourmet grocer, health foods, meat/fish market and wine/liquor shops and other establishments of similar character.
- C. **Entertainment.** Entertainment in restaurants (i.e., piano player, guitarist, small combos, dancing, etc.), movie theater and other establishments of similar character.
- D. **Specialty Retail.** Antiques; appliances; art galleries, framing and supplies; bike shop; books; camera and photo supplies; casual apparel and accessories;

*children's apparel; computers/software; florist; gifts, stationary and cards; hardware; home decorating products and design services; men's apparel; music (recorded and sheet); newsstand; office and school supplies; optical products; radio/TV/electronics; sewing supplies; shoes, dress and casual; small variety store; sporting goods; tobacco shop; toys, games and crafts; traditional and costume jewelry; wall coverings and paint; women's casual apparel and accessories and other establishments of similar character.*

- E. **Convenience Retail/Select Services.** Barbershops; cosmetologists, beauty shops; dance studio; dry cleaners and tailor shop; coin-operated laundry, locksmith service, pharmacy; physical fitness facility; shoe repair/shine; video rental, computer services and other establishments of similar character.*
- F. Clubs and drinking establishments shall be allowed.*
- G. Arcades, operated in conjunction with clubs or drinking establishments, shall be allowed.*
- H. Entertainment or recreational uses.*
- I. Publicly owned parking lots.*
- J. Public parks and playgrounds, including public recreation or service buildings and publicly owned swimming pools.*
- K. Publicly owned and operated community buildings, museums and libraries.*
- L. Services limited to the practice of medicine, law, engineering, architecture, medical arts licensed by the State of Kansas, financial services, brokers, insurance and similar agents, consultants, counseling, photographers, printers and publishers, governmental activities, portal and parcel services, interior decorator, travel agencies and offices of all types are prohibited except under the following circumstances:*
  - 1. Where the prior use of any building or tenant space was for an office use as indicated above, then the same building or tenant space may continue to be used for an office use regardless of the time the space was vacant.*
  - 2. Where the prior use of the building or tenant space was for any permitted use in this Section except for offices or services, as outlined in Chapter 410.170(L), then a new office use shall only be permitted if the building or tenant space has been vacant for a minimum of three (3) months, and an administrative extension use permit has been approved by the Public Works Department. An application for an administrative extension use permit shall include a letter from the building owner indicating a desire to lease a tenant space to an office user, documentation including newspaper clippings of advertisements and evidence that signs were posted in the windows of the tenant space for at least three (3) months prior to the application for the administrative extension use permit. The Public Works Department shall approve an administrative extension use permit if the submittal requirements outlined above have been satisfied, and it is determined that a good faith effort has been made to lease the tenant space to a retail tenant for at least three (3) months. Any denial of an application for an administrative extension use permit may be appealed by the building owner to the City Council.*

M. *In addition to the uses listed above, the following uses are permitted above and below the ground floor level:*

1. *Any use permitted in "C-O" with the exception of mortuaries.*
2. *Residential units.*

N. *Accessory uses customarily incident to the normal operation of these uses.*

Section 410.340(A) prohibits certain uses (emphasis added):

A. *The following uses are prohibited in the Downtown District and East Gateway District on any property that is residentially zoned ("R" or "DND" Districts), or is within one hundred (100) feet of any residentially zoned ("R" or "DND" Districts), or is wholly or partially within one hundred (100) feet of Johnson Drive:*

1. *Gasoline service stations and convenience service stores.*
2. *Body shops, auto glass installation shops, tire stores, transmission repair and similar auto service establishments.*
3. *Establishments where new or used vehicles are sold.*
4. *Car washes.*
5. *Any development or redevelopment that does not conform with the City's Master Plan and Design Guidelines.*

### **Non-Conforming Uses**

Section 420.200 addresses abandonment and discontinuance of non-conforming situations (emphasis added):

A. *When a non-conforming use is discontinued for a consecutive period of one hundred eighty (180) days or discontinued for any period of time without a present intention to reinstate the non-conforming use, the property involved may thereafter be used only for conforming purposes.*

B. *If the principal activity on property where a non-conforming situation other than a non-conforming use exists is discontinued for a consecutive period of one hundred eighty (180) days or discontinued for any period of time without a present intention of resuming that activity, then the property may thereafter be used only in conformity with all of the regulations applicable to the pre-existing use unless the Board of Zoning Appeals (in the case of a conventional zoning district) or the Planning Commission (in the case of a planned zoning district) issues a permit to allow the property to be used for this purpose without correcting the non-conforming situations. Such permit may be issued if the permit-issuing authority finds that eliminating a particular non-conformity is not reasonably possible (i.e., cannot be accomplished without adding additional land to the lot where the non-conforming situation is maintained or without moving a substantial structure that is on a permanent foundation). The permit shall specify which non-conformities need not be corrected.*

C. *For purposes of determining whether a right to continue a non-conforming situation is lost pursuant to this Section, all of the buildings, activities and operations maintained on a lot are generally to be considered as a whole. For example, the failure to rent one (1) apartment in a non-conforming apartment building for one*

*hundred eighty (180) days shall not result in a loss of the right to rent the apartment or space thereafter so long as the apartment building as a whole is continuously maintained. But if a non-conforming use is maintained in conjunction with a conforming use, discontinuance of a non-conforming use for the required period shall terminate the right to maintain it thereafter.*

- D. When a structure or operation made non-conforming by this Article is vacant or discontinued on the effective date of this Article, the one hundred eighty (180) day period for purposes of this Section begins to run on the effective date of this Article.*

### **Tobacco Retailers and Electronic Cigarette Retail Establishments**

Ordinance 1589 was codified in Sections 415.140 through 415.160 of the Code. Section 415.160 establishes the following distance requirements:

- A. No tobacco retailer or electronic cigarette retail establishment shall be located within one thousand (1,000) feet of any other tobacco retailer or electronic cigarette retail establishment within Mission City limits or outside City limits, or within one thousand (1,000) feet of any property used or zoned for parks, school, college, or church. The separation distances shall be measured from or to the outer wall of the tobacco retailer or electronic cigarette retail establishment to the property line of the property containing the park, school, college or church.*
- 1. Exception: If such park, school, college or church is established within one thousand (1,000) feet of any tobacco retailer or electronic cigarette retail establishment after the premises has been licensed for such, the premises shall remain an eligible location for said licensing as long as the premises remains in compliance with Subsection (B) below.*
- B. In the event any tobacco retailer or electronic cigarette retail establishment abandons or discontinues as a tobacco retailer or an electronic cigarette retail establishment in operation prior to the effective date of this Section, any future tobacco retailer or electronic cigarette retail establishment operated at the same location shall be required to comply with the distance requirements set forth in this Section. This provision shall not apply to a change in ownership which may occur by operation of law, including a court order, divorce, death, mortgage foreclosure, bankruptcy or transfer by contract, provided there is a continuous occupancy or operation of the tobacco retailer or electronic cigarette retail establishment at the licensed location.*
- C. Each tobacco retailer or electronic cigarette retail establishment shall retain the records of purchases and sales for a period of one (1) year. These records are subject to inspection by the City and shall be provided within a reasonable time upon request. The records may be in electronic or paper format. If electronic, the records must be available to print upon request by the City.*

### **FACTS PRESENTED:**

The "MS-1" zoning district and regulations were adopted in 2003 after an extensive visioning process for the downtown core area and in an effort to preserve the traditional downtown retail atmosphere of shops and restaurants. Because the subject property was already developed as a gas station, convenience store and car wash (built in 1998, prior

to the adoption of the above-referenced Code provisions), it has been considered a legal non-conforming use.

The property was previously owned by Carter Acquisition, L.L.C. (a subsidiary of Carter Energy) since 2002. Carter continually operated a gas station, convenience store, and car wash on the property through operators that leased the property for this purpose. The most recent operator was Another Level, LLC.

According to the Kansas Secretary of State's website, Another Level, LLC was formed in March 2019 with 5500 Johnson Drive as the primary address. The LLC registration was forfeited on July 15, 2022 for failure to timely file an information report.

A review of sales tax returns from the Kansas Department of Revenue indicates that the last collection of sales tax associated with the property was July 2022.<sup>1</sup>

The most recent business license issued by the City for the property expired on July 1, 2023.

On August 15, 2023, City staff met with a prospective buyer of the property, who was interested in redeveloping it for a drive-thru coffee shop. Staff informed the prospective buyer that drive-thru uses are not permitted in the "MS-1" zoning district. Staff had no further contact with the prospective buyer after this meeting.

A warranty deed transferring ownership of the property to the new owner was executed on October 23, 2023. The owner did not contact anyone at the City prior to acquiring the property to inquire about zoning, business licensing, or other City requirements.

In November 2023, City staff noticed a "Coming Soon" sign at the property. On November 22, 2023, staff sent a letter to inform the new owner of the Code provisions regarding the legal non-conforming status of the property and distance restrictions for tobacco retailers and electronic cigarette retail establishments.

#### **APPLICATION OF CODE TO FACTS PRESENTED:**

The gas station, convenience store, and car wash operated as a legal non-conforming use since the "MS-1" zoning district and other provisions of the zoning code were adopted in 2003.

Staff contends that the use ceased operations long before expiration of the business license on July 1, 2023, most likely in July 2022 when the registration of the prior operator's LLC expired and the last sales tax was collected. Thus, the property has not been used as a gas station, convenience store, and car wash for far longer than the 180 days specified in Section 420.200(A) of the Code.

Furthermore, Section 420.200(A) specifies "*or discontinued for any period of time without a present intention to reinstate the non-conforming use.*" The facts that a "For Sale or Lease" sign was on the site during the summer of 2023, and staff met with a prospective buyer in August 2023 to discuss an entirely different use of the property, indicate that the prior owner of the property (Carter Acquisition, LLC) was actively marketing the property to any potential buyer and for any potential use.

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<sup>1</sup> K.S.A. 75-5133(b)(6) authorizes the Secretary of Revenue (or designee) to provide monthly retailer sales tax reports to certain City officials, but the contents of such reports are subject to strict confidentiality provisions in K.S.A. 75-5133(a) and will not be attached to this Staff Report.

Finally, Section 415.160 of the City Code specifies that a retailer of tobacco products cannot be located within 1,000 feet of an existing retailer of tobacco products or a City park. The subject property is located within 1,000 feet of an existing retailer on Johnson Drive (Casey's) and two City parks (the Mission Farmer's Market and Birch Park).

Staff's position is that the use of the subject property as a gas station, convenience store, and car wash was discontinued beyond the 180 days specified in Section 420.200(A) of the Code for a legal non-conforming use to remain active, and tobacco products and electronic cigarettes cannot be sold at this location.

**CONSIDERATION BY THE BOARD OF ZONING APPEALS:**

The new owner of the property has appealed City staff's interpretation of the Code, which requires a hearing before the Board of Zoning Appeals ("BZA"). Kansas State statute (K.S.A. 12-759(d)) identifies the BZA's options in connection with appeals of administrative decisions:

"In exercising the foregoing powers, the board, in conformity with the provisions of this act, may reverse or affirm, wholly or partly, or may modify the order, requirement, decision, or determination, and to that end shall have all the powers of the officer from whom the appeal is taken, may attach appropriate conditions, and may issue or direct the issuance of a permit."

**ATTACHMENTS:**

Kansas Entity Warranty Deed dated October 23, 2023

City Notice Letter to Owner dated November 22, 2023

Owner Notice of Appeal to City dated December 22, 2023

Kansas Secretary of State Website Printout for Another Level, LLC

Map of Tobacco Retailers and Electronic Cigarette Establishments



JO CO KS	BK:202310	PG:005505
	20231026-0005505	
Electronic Recording		10/26/2023
Pages: 2	F: \$38.00	1:15 PM
Register of Deeds		T20230042441

**KANSAS ENTITY WARRANTY DEED**  
**(Not Joint Tenancy)**

**THIS DEED**, made and entered into this **23rd** day of **October, 2023**, by and between **Carter Acquisition, LLC**, a Kansas limited liability company, as Grantor, and **Mid KC Petroleum 4, LLC**, a **Kansas limited liability company**, as Grantee(s), whose mailing address is **4516 E. 39th Street, Kansas City, MO 64128**.

**WITNESSETH**, that the Grantor, for and in consideration of the sum of One Dollar and other good and valuable consideration paid by the Grantee(s), the receipt and sufficiency of which is hereby acknowledged, does by these presents **CONVEY AND WARRANT** unto the Grantee(s), the following described Real Estate, situated in the County of **Johnson**, State of Kansas, to-wit:

**LOTS 20 AND 42, MISSIONHILL ACRES, A SUBDIVISION IN THE CITY OF MISSION,  
JOHNSON COUNTY, KANSAS, ACCORDING TO THE RECORDED PLAT THEREOF.**

Subject to all easements, restrictions and reservations, if any, now of record and the general taxes for the current calendar year and thereafter, and special taxes becoming a lien after the date of this deed.

First American Title  
6201 College Blvd., Ste. 230  
Overland Park, KS 66211

Executed on: **October 23rd, 2023**

Carter Acquisition, L.L.C., a Kansas limited liability company

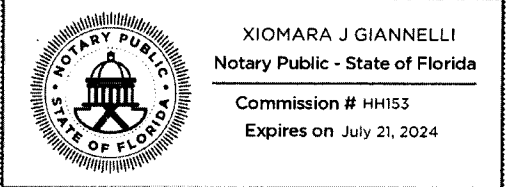
By: *Bryan James Beaver*  
Name: Bryan J. Beaver  
Title: President

STATE OF **Florida**                    )  
  ) ss.  
COUNTY OF **Seminole County** )

On **October 23rd, 2023** this deed was acknowledged before me by **Bryan J. Beaver, President of Carter Acquisition, L.L.C., a Kansas limited liability company**, for and on behalf of said entity.

My Commission expires: 07/21/2024

*Xiomara J Giannelli* \_\_\_\_\_ Notary Public  
Xiomara J Giannelli



Notarized online using audio-video communication

November 22, 2023

Mid KC Petroleum 4, LLC  
4516 E. 39<sup>th</sup> Street  
Kansas City, MO 64128

To Whom It May Concern,

Our records indicate that you are the current owner of a BP gas station and car wash located at 5500 Johnson Drive in the city of Mission, Kansas. We are also aware that this store has been closed since last winter. We wanted to bring to your attention certain stipulations in the City of Mission's zoning code.

Article VIII of Chapter 410 of the Mission Municipal Code pertains to property located in the Downtown District of the city. Section 410.340 reads as follows:

Section 410.340 - Development Standards and Prohibited Uses.

- A. The following uses are prohibited in the Downtown District and East Gateway District on any property that is residentially zoned ("R" or "DND" Districts), or is within one hundred (100) feet of any residentially zoned ("R" or "DND" Districts), or is wholly or partially within one hundred (100) feet of Johnson Drive:
1. Gasoline service stations and convenience service stores.
  2. Body shops, auto glass installation shops, tire stores, transmission repair and similar auto service establishments.
  3. Establishments where new or used vehicles are sold.
  4. Car washes.
  5. Any development or redevelopment that does not conform with the City's Master Plan and Design Guidelines.

Chapter 420 of the Mission Municipal Code pertains to Accessory Uses, Prohibited Uses, and Non-Conforming Uses. Section 420.200 reads as follows:

Section 420.200 - Abandonment and Discontinuance of Non-Conforming Situations.

- A. When a non-conforming use is discontinued for a consecutive period of one hundred eighty (180) days or discontinued for any period of time without a present intention to reinstate the non-conforming use, the property involved may thereafter be used only for conforming purposes.

The store at 5500 Johnson Drive is located in the City's Downtown District. The store was in operation as a gas station and car wash when the ordinance prohibiting such uses was adopted, thus making it a legal, non-conforming use. However, because it has been closed for more than 180 consecutive days, it has lost its standing as a legal non-conforming use. It cannot be re-opened as a gas station, convenience store, or a car wash.

In addition, the City of Mission adopted Ordinance 1589 this past August. Ordinance 1589 stipulates that as of the date of adoption, no tobacco retailer or electronic cigarette retailer can be located within 1,000 feet of another such retailer or a park, school, or church. Since there is an existing tobacco retailer within a 1,000 feet of 5500 Johnson Drive, as well as a City park across the street, the sale of tobacco products and electronic cigarettes on your property is prohibited.

We wanted to make you aware of these zoning requirements as we know you have been trying to lease this location.

If you should have any further questions, please feel free to contact me by email at [bscott@missionks.org](mailto:bscott@missionks.org) or by phone at (913) 676-8353.

Sincerely,

Brian Scott  
Deputy City Administrator of Planning and Development Services

cc: Karie Kneller, City Planner  
Robyn Fulks, City Clerk



900 W. 48th Place, Suite 900, Kansas City, MO 64112 • (816) 753-1000

December 22, 2023

Curtis J. Petersen  
(913) 234-7458  
(913) 273-1046 Fax  
cpetersen@polsinelli.com

Brian Scott  
Deputy City Administrator of Planning and Development Services  
6090 Woodson Street  
Mission, Kansas 66202


**Re:** Mid KC Petroleum 4, LLC / 5500 Johnson Drive

Dear Mr. Scott:

On behalf of our client, this letter is in response to the City's correspondence dated November 22, 2023 regarding its store located at 5500 Mission Road, Mission, Kansas. The City's letter contends that the use of the property as a gas station, convenience store, and car wash has lost its legal non-conforming status. The letter also contends that the sale of tobacco products and electronic cigarettes on the subject property is prohibited.

In the event the City's letter is considered a decision of an officer administering the provisions of the Mission Municipal Code under Section 440.290, this letter will serve as our client's formal notice of appeal of that decision based on the City's misapplication of the relevant Code provisions to the facts at hand. If there is any fee required with such an appeal, please advise accordingly and we will submit the required fee immediately.

Please feel free to contact me with any questions.

Sincerely  
  
Curtis J. Petersen

CJP:hle

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Kansas City | Los Angeles | Miami | Nashville | New York | Phoenix | Raleigh | Salt Lake City  
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[polsinelli.com](http://polsinelli.com)

## Business Entity Search

Date: 01/10/2024

Be advised the business information on this page is for summary informational purposes only. It is not an official filing with the Secretary of State's office and should not be relied on as such. Please view actual documents filed by customers with the secretary of State's office to ensure accurate information. When filing a Uniform Commercial Code statement on an entity, consult with your attorney to ensure the correct debtor name.

### Business Summary

**Current Entity Name**

ANOTHER LEVEL LLC

**Business Entity ID Number**

9344243

Current Mailing Address: 5500 Johnson Dr, MISSION, KS 66202

Business Entity Type: KANSAS LTD LIABILITY COMPANY

Date of Formation in Kansas: 03/13/2019

State of Organization: KS

Current Status: FORFEITED - FAILED TO TIMELY FILE A/R

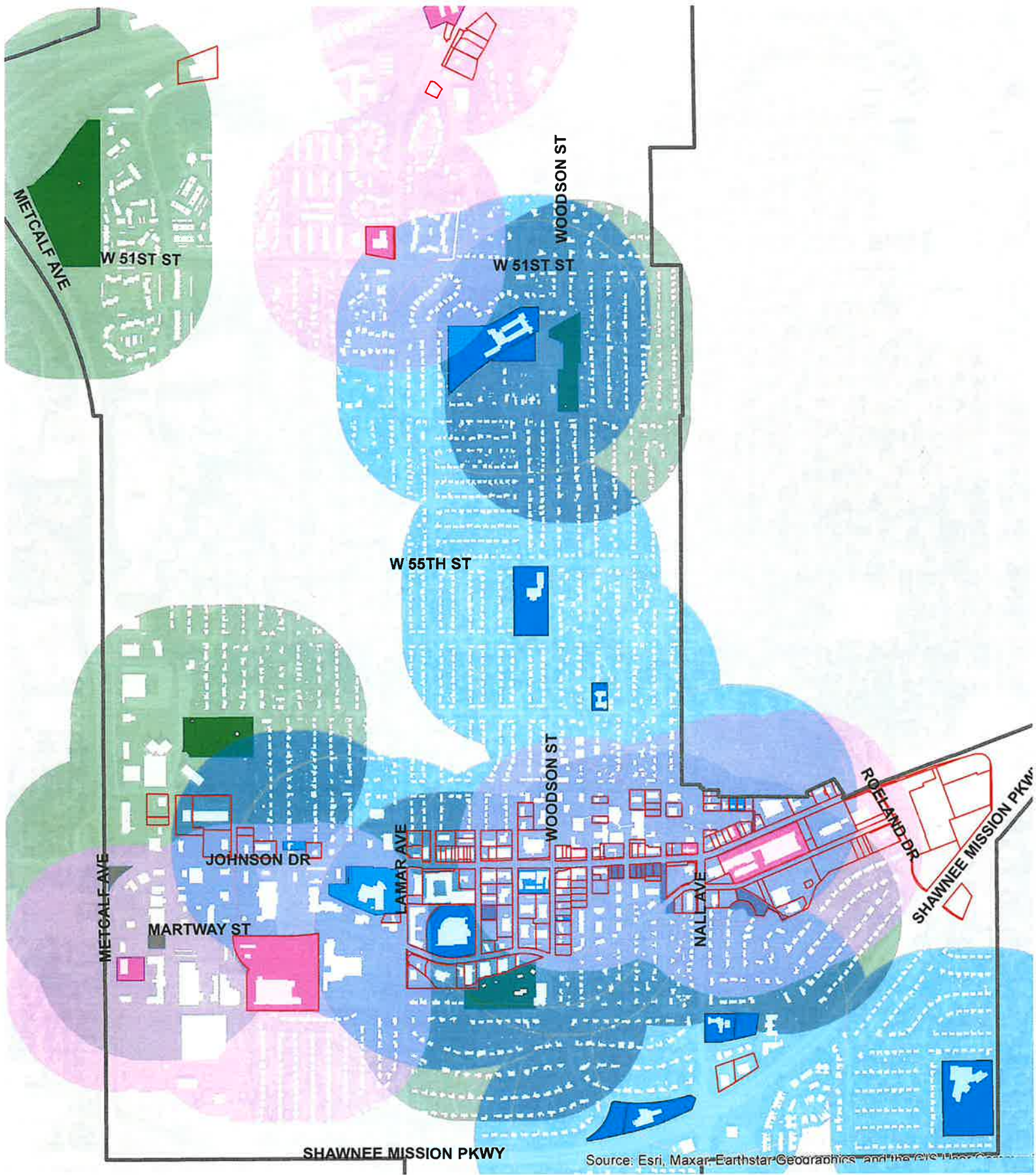
**Resident Agent and Registered Office****Resident Agent:** ANOTHER LEVEL LLC**Registered Office:** 5500 Johnson Dr, MISSION, KS 66202**Annual Reports**

The following annual report information is valid for active and delinquent status entities only.

Tax Closing Month: 12

The Last Annual Report on File: 12/2020

**Next Annual Report Due:** 04/15/2022**Forfeiture Date:** 07/15/2022



Source: Esri, Maxar, Earthstar Geographics, and the GIS User Community

