NOTICE FOR POSTING

MEETING OF

BOARD OF ADJUSTMENT, PANEL A

TUESDAY, MAY 17, 2022

BRIEFING: **11:00 a.m.** via **Videoconference and** in **Council Chambers**, Dallas City Hall, 1500 Marilla Street

HEARING: **1:00 p.m.** via **Videoconference and** in **Council Chambers**, Dallas City Hall, 1500 Marilla Street

***** The Board of Adjustment hearing will be held by videoconference and in Council Chambers at City Hall. Individuals who wish to speak in accordance with the Board of Adjustment Rules of Procedure **by joining the meeting virtually**, should register online at https://form.jotform.com/210537186514151 or contact the Planning and Urban Design Department at 214-670-4209 **by the close of business Monday, May 16, 2022. All virtual speakers will be required to show their video in order to address the board.** The public is encouraged to attend the meeting virtually, however, City Hall is available for those wishing to attend the meeting in person following all current pandemic-related public health protocols. Public Affairs and Outreach will also stream the public hearing on Spectrum Cable Channel 96 or 99; and bit.ly/cityofdallastv or YouTube.com/CityofDallasCityHall **and the WebEx link:** https://bit.ly/051722BDA

Purpose: To take action on the attached agenda, which contains the following:

1. Board of Adjustment appeals of cases the Building Official has denied.

2. And any other business which may come before this body and is listed on the agenda.

Handgun Prohibition Notice for Meetings of Governmental Entities

"Pursuant to Section 30.06, Penal Code (trespass by license holder with a concealed handgun), a person licensed under Subchapter H, Chapter 411, Government Code (handgun licensing law), may not enter this property with a concealed handgun."

"De acuerdo con la sección 30.06 del código penal (ingreso sin autorización de un titular de una licencia con una pistola oculta), una persona con licencia según el subcapítulo h, capítulo 411, código del gobierno (ley sobre licencias para portar pistolas), no puede ingresar a esta propiedad con una pistola oculta."

"Pursuant to Section 30.07, Penal Code (trespass by license holder with an openly carried handgun), a person licensed under Subchapter H, Chapter 411, Government Code (handgun licensing law), may not enter this property with a handgun that is carried openly."

"De acuerdo con la sección 30.07 del código penal (ingreso sin autorización de un titular de una licencia con una pistola a la vista), una persona con licencia según el subcapítulo h, capítulo 411, código del gobierno (ley sobre licencias para portar pistolas), no puede ingresar a esta propiedad con una pistola a la vista."

CITY OF DALLAS

BOARD OF ADJUSTMENT, PANEL A

TUESDAY, MAY 17, 2022

AGENDA

BRIEFING: **11:00 a.m. via Videoconference and in Council Chambers Dallas City Hall, 1500 Marilla Street**

HEARING: **1:00 p.m. via Videoconference and in Council Chambers Dallas City Hall, 1500 Marilla Street**

Andreea Udrea, PhD, AICP, Assistant Director
Jennifer Muñoz, Chief Planner/Board Administrator
Pamela Daniel, MUP, Senior Planner
LaTonia Jackson, Board Secretary

PUBLIC TESTIMONY

MISCELLANEOUS ITEM

Approval of the March 22, 2022 Board of Adjustment Panel A Public Hearing Minutes	M1
Approval of the April 19, 2022 Board of Adjustment Panel A Public Hearing Minutes	M2
Approval of the January 11, 2022 Board of Adjustment Special Meeting Minutes	M3

HOLDOVERS

BDA212-017(PD)	4715 Reiger Avenue **REQUEST:** Application of Joseph F. DePumpo for variances to the side yard setback regulations	1
BDA212-020 (PD)	1218 N. Clinton Avenue **REQUEST:** Application of Stephen Marley represented by Alfred Pena for 1) a variance to the side yard setback regulations; 2) a variance to the single-family use regulations	2
BDA212-028(JM)	11411 E. Northwest Hwy., Suite 111 **REQUEST:** Application of Matthew Morgan represented by Roger Albright to appeal the decision of the administrative official	3

UNCONTESTED CASES

None

REGULAR CASES

None

EXECUTIVE SESSION NOTICE

A closed executive session may be held if the discussion of any of the above agenda items concerns one of the following:

1. seeking the advice of its attorney about pending or contemplated litigation, settlement offers, or any matter in which the duty of the attorney to the City Council under the Texas Disciplinary Rules of Professional Conduct of the State Bar of Texas clearly conflicts with the Texas Open Meetings Act. [Tex. Govt. Code §551.071]
2. deliberating the purchase, exchange, lease, or value of real property if deliberation in an open meeting would have a detrimental effect on the position of the city in negotiations with a third person. [Tex. Govt. Code §551.072]
3. deliberating a negotiated contract for a prospective gift or donation to the city if deliberation in an open meeting would have a detrimental effect on the position of the city in negotiations with a third person. [Tex. Govt. Code §551.073]
4. deliberating the appointment, employment, evaluation, reassignment, duties, discipline, or dismissal of a public officer or employee; or to hear a complaint or charge against an officer or employee unless the officer or employee who is the subject of the deliberation or hearing requests a public hearing. [Tex. Govt. Code §551.074]
5. deliberating the deployment, or specific occasions for implementation, of security personnel or devices. [Tex. Govt. Code §551.076]
6. discussing or deliberating commercial or financial information that the city has received from a business prospect that the city seeks to have locate, stay or expand in or near the city and with which the city is conducting economic development negotiations; or deliberating the offer of a financial or other incentive to a business prospect. [Tex Govt. Code §551.087]
7. deliberating security assessments or deployments relating to information resources technology, network security information, or the deployment or specific occasions for implementations of security personnel, critical infrastructure, or security devices. [Tex. Govt. Code §551.089]

FILE NUMBER: BDA212-017(PD)

BUILDING OFFICIAL'S REPORT: Application of Joseph F. DePumpo for variances to the side yard setback regulations at 4715 Reiger Avenue. This property is more fully described as a part of Lot 1 in City Block F/799 and is zoned Planned Development District No. 98, a Multiple Family designation, which requires a side yard setback of ten feet. The applicant proposes to maintain the existing multiple-family dwelling and construct and maintain an addition to the multiple-family structure and provide a five-foot side yard setback on the northeast side, which will require a five-foot variance to the side yard setback regulations on the northeast side, and provide an eight-foot-seven-inch setback on the southwest side which will require a one-foot-five-inch variance to the side yard setback regulations on the southwest side.

LOCATION: 4715 Reiger Avenue

APPLICANT: Joseph F. DePumpo

REQUESTS:

A request for a variance to the side yard setback regulations of five feet on the northeast side, and one-foot-five-inch on the southwest side is made to maintain the existing structure and construct and maintain additions to the multiple family structure along both side yard setbacks.

UPDATES:

No updates have been provided.

STANDARD FOR A VARIANCE:

Section 51(A)-3.102(d)(10) of the Dallas Development Code specifies that the board has the power to grant variances from the front yard, **side yard**, rear yard, lot width, lot depth, lot coverage, floor area for structures accessory to single family uses, height, minimum sidewalks, off-street parking or off-street loading, or landscape regulations provided that the variance is:

(A) not contrary to the public interest when owing to special conditions, a literal enforcement of this chapter would result in unnecessary hardship, and so that the spirit of the ordinance will be observed and substantial justice done;

(B) necessary to permit development of a specific parcel of land that differs from other parcels of land by being of such a restrictive area, shape, or slope, that it cannot be developed in a manner commensurate with the development upon other parcels of land with the same zoning; and

(C) not granted to relieve a self-created or personal hardship, nor for financial reasons only, nor to permit any person a privilege in developing a parcel of land not permitted by this chapter to other parcels of land with the same zoning.

State Law/HB 1475 effective 9-1-21

- the board may consider the following as grounds to determine whether compliance with the ordinance as applied to a structure that is the subject of the appeal would result in unnecessary hardship:

  (a) the financial cost of compliance is greater than 50 percent of the appraised value of the structure as shown on the most recent appraisal roll certified to the assessor for the municipality under Section 26.01 (Submission of Rolls to Taxing Units), Tax Code;
  (b) compliance would result in a loss to the lot on which the structure is located of at least 25 percent of the area on which development is authorized to physically occur;
  (c) compliance would result in the structure not being in compliance with a requirement of a municipal ordinance, building code, or other requirement;
  (d) compliance would result in the unreasonable encroachment on an adjacent property or easement; or
  (e) the municipality consider the structure to be a nonconforming structure.

STAFF RECOMMENDATION:

Approval, subject to the following condition:

- Compliance with the submitted site plan is required.

Rationale:

Staff concluded that the subject site is unique and different from most lots in this MF-2 Multiple Family District considering its restrictive lot area of 11,950 square feet. The applicant submitted evidence with the submitted application materials (**Attachment A**) comparing lot size and floor area ratios within the same zoning district. Per the comparative analysis, the average lot area is 19,464 square feet and the average floor area of structures being 11,491 square feet. Thus, in analyzing the comparative properties the restrictive area of the subject site ensures that the site cannot be developed in a manner commensurate with development upon other parcels of land with the same zoning.

BACKGROUND INFORMATION:

Zoning:

Site:	PDD No. 98 Multiple Family
North:	PDD No. 98 Single Family
South:	PDD No. 98 Multiple Family
East:	PDD No. 98 Single Family
West:	PDD No. 98 Multiple Family

Land Use:

The subject site and surrounding properties to the west and south are developed with multiple-family dwelling units while the properties to the north and east are developed with single-family dwellings.

Zoning/BDA History:

There have been no related board or zoning cases in the vicinity within the last five years.

GENERAL FACTS/STAFF ANALYSIS:

This request focuses on maintaining the existing portion of the structure along the northeast, southeast, and southwest portions of the structure that encroach into the 10-foot side yard setbacks. However, since the Development Code regulates compliance with the most restrictive requirement, the variance will only focus on the northeast and southwest encroachments. The proposed site plan will ensure compliance with the less restrictive portion along the southeast. The request proposes to construct and maintain an addition to an existing covered porch along the southwestern portion of the structure of approximately 96 square feet of floor area and will encroach one-foot-five-inches into the side yard setback along the southwestern portion of the structure.

An addition is proposed of approximately 300 square feet of floor area to the first floor of the existing structure to enclose the existing first floor unenclosed porch and an approximately 426 square feet of floor area to the second floor to align the second story with the façade and footprint of the first story along the southeastern portion of the structure. While additions are proposed along the front façade of the structure, neither the existing structure or additions are proposed to extend beyond the existing footprint or encroach into the required 30-foot front yard setback.

The portions of the structure along the southeastern façade where an encroachment of two-feet-seven-inches already exists is being brought into compliance while the proposed second-story addition proposes to follow the same footprint and encroachment. Additionally, the applicant proposes to provide an addition of approximately 490-square-feet to the first and second story along the rear of the structure and proposes to align the addition with the portion of the façade and roofline currently encroaching into the seven-foot-five-inch side yard setback along the southeastern façade of the structure while the northeastern proposes a side yard setback of five feet.

The site is currently developed with a multiple family dwelling unit consisting of three dwelling units, constructed in 1918, according to Dallas County Appraisal District records, and situated along an interior yard and the north line of Reiger Avenue. The additions are proposed to total 1,297 square feet of floor area. The existing structure contains approximately 2,945 square feet. The proposed additions, while not increasing the number of dwellings, will enlarge two of the existing dwelling units and provide a total of 4,257-square feet of floor area.

Structures on lots designated multiple family must have a minimum side yard setback of ten feet. A site plan has been submitted denoting the portions of the existing multiple

family structure and the proposed addition to provide varied setbacks of five-feet along the northeast side, seven-feet-five-inches on the southeast side, and eight-feet-seven-inches on the southwest side.

PDD No. 98 differs from most Planned Development Districts since the district designates uses permitted on individual lots. The subject site is designated an MF-2 Multiple Family District with the regulations prescribed in Chapter 51. An MF-2 District in Chapter 51 regulates minimum lot area/size per bedroom per dwelling unit. The following exists for a MF-2 Multiple Family District in Chapter 51:

- No separate bedroom/efficiency requires a minimum of 800 square feet of lot area,
- One bedroom requires a minimum of 1,000 square feet or floor area,
- Two bedrooms require a minimum of 1,200 square feet of floor area, and
- More than two bedrooms add this amount (150 square feet of floor area) for each bedroom over two.

In accordance with the above floor area ratios, the proposed floor plan containing eight bedrooms within three dwelling units require a minimum of 3,900 square feet of lot area. However, the minimum lot area of 3,900 square feet does not include the minimum lot area for the off-street parking requirements of one space per bedroom and .25 per guest for a total of ten off-street parking spaces with a minimum area of 8-feet x 15-feet for a minimum area of 1,200 square feet of lot area. The minimum lot area of 3,900 square feet plus 1,200 feet lot area for a total lot area of 5,100 square feet of lot area does also not include the minimum requirement for infrastructure which typically constitutes ten percent of the lot area, the setback regulations or landscape requirements for the site which can further reduce the lot area or buildable area.

The subject site is not irregular in shape and contains approximately 11,950 square feet of lot area and 2,945 square feet of floor area. The applicant submitted evidence with the submitted application materials (**Attachment A**) comparing lot size and floor area ratios within the same zoning district. Per the comparative analysis, the average lot area is 19,464 square feet and the average floor area of structures is 11,491 square feet. Thus, in analyzing the comparative properties the restrictive area of the subject site ensures that the site cannot be developed in a manner commensurate with development upon other parcels of land with the same zoning.

Additionally, PDD No. 98 Sec. 51P-98.105(3) establishes that existing residential structures may not be remodeled or replaced so as to exceed the existing number of dwellings in each existing structure. Any multiple-family or duplex structure that is remodeled for a lesser number of units will thereafter be limited to the more restrictive number of units.

Thus, staff concludes that the subject site is unique and different from most lots in this MF-2 Multiple Family designation within PDD No. 98 considering its restrictive lot area and restrictive floor area which neither can be increased through enlarging the number of dwellings on the lot which restricts the site from being developed in a manner commensurate with development upon other parcels of land with the same zoning.

The applicant has the burden of proof in establishing the following:

- That granting the variance to the side yard setback regulations will not be contrary to the public interest when owing to special conditions, a literal enforcement of this chapter would result in unnecessary hardship, and so that the spirit of the ordinance will be observed and substantial justice done.
- The variance is necessary to permit development of the subject site that differs from other parcels of land by being of such a restrictive area, shape, or slope, that the subject site cannot be developed in a manner commensurate with the development upon other parcels of land in districts with the same MF-2 Multiple Family zoning classification/designation.
- The variance would not be granted to relieve a self-created or personal hardship, nor for financial reasons only, nor to permit any person a privilege in developing this parcel of land (the subject site) not permitted by this chapter to other parcels of land in districts with the same MF-2 Multiple Family zoning classification/designation.

Additionally, the board may consider the following as grounds to determine whether compliance with the ordinance as applied to a structure that is the subject of the appeal would result in unnecessary hardship:

- The financial cost of compliance is greater than 50 percent of the appraised value of the structure as shown on the most recent appraisal roll certified to the assessor for the municipality under Section 26.01 (Submission of Rolls to Taxing Units), Tax Code;
- Compliance would result in a loss to the lot on which the structure is located of at least 25 percent of the area on which development is authorized to physically occur;
- Compliance would result in the structure not being in compliance with a requirement of a municipal ordinance, building code, or other requirement;
- Compliance would result in the unreasonable encroachment on an adjacent property or easement; or
- The municipality consider the structure to be a nonconforming structure.

As of May 10, 2022, five letters have been submitted in opposition of the request and none in support of the request.

If the board were to grant these side yard setback variance requests and impose the submitted site plan as a condition, development would be limited to what is shown on this document. Granting these variance requests will not provide any relief to the Dallas Development Code regulations.

Timeline:

January 3, 2022: The applicant submitted an "Application/Appeal to the Board of Adjustment" and related documents which have been included as part of this case report. Additionally, the applicant submitted evidence (**Attachment A**) with the application.

January 23, 2022: The Board of Adjustment Secretary randomly assigned this case to Board of Adjustment Panel A.

February 3, 2022: The Board of Adjustment Senior Planner emailed the applicant the following information:

- a copy of the application materials including the Building Official's report on the application:
- an attachment that provided the public hearing date and panel that will consider the application; the February 23rd deadline to submit additional evidence for staff to factor into their analysis; and the March 4th deadline to submit additional evidence to be incorporated into the Board's docket materials;
- the criteria/standard that the board will use in their decision to approve or deny the request; and
- the Board of Adjustment Working Rules of Procedure pertaining to "documentary evidence."

March 2, 2022: The Board of Adjustment staff review team meeting was held regarding this request and the others scheduled for the March public hearings. Review team members in attendance included the following: the Board of Adjustment Chief Planner/Board Administrator, the Building Inspection Senior Plans Examiner, the Board of Adjustment Senior Planner, the Chief Arborist, the Conservation Districts Chief Planner, the Senior Engineer, and the Assistant City Attorney to the board.

No review comment sheets were submitted in conjunction with this application.

March 22, 2022: The Board held the request under advisement until April 19, 2022.

April 11, 2022: No updates have been provided.

April 19, 2022: The Board held the request under advisement until May 17, 2022.

May 4, 2022: The applicant submitted a revised site plan depicted a five-foot side yard setback along the northeastern portion of the site and reconfiguration of the proposed front porch. As a result, the BO report (**Attachment B**) was amended to reflect the revision.

BOARD OF ADJUSTMENT ACTION: April 19, 2022

APPEARING IN FAVOR: Joseph DePumpo 927 Turnberry Ln. Southlake, TX.

APPEARING IN OPPOSITION: Jim Anderson 4706 Swiss Ave. Dallas, TX.

MOTION: **Lamb**

I move that the Board of Adjustment in request No. BDA 212-017, **hold** this matter under advisement until **May 17, 2022**.

SECONDED: **Halcomb**
AYES: 5 – Narey, Frankford Lamb, Halcomb, Neumann
NAYS: 0 -

MOTION PASSED: 5-0 (unanimously)

BOARD OF ADJUSTMENT ACTION: March 22, 2022

APPEARING IN FAVOR: Joseph DePumpo 4715 Reiger Ave. Dallas, TX.

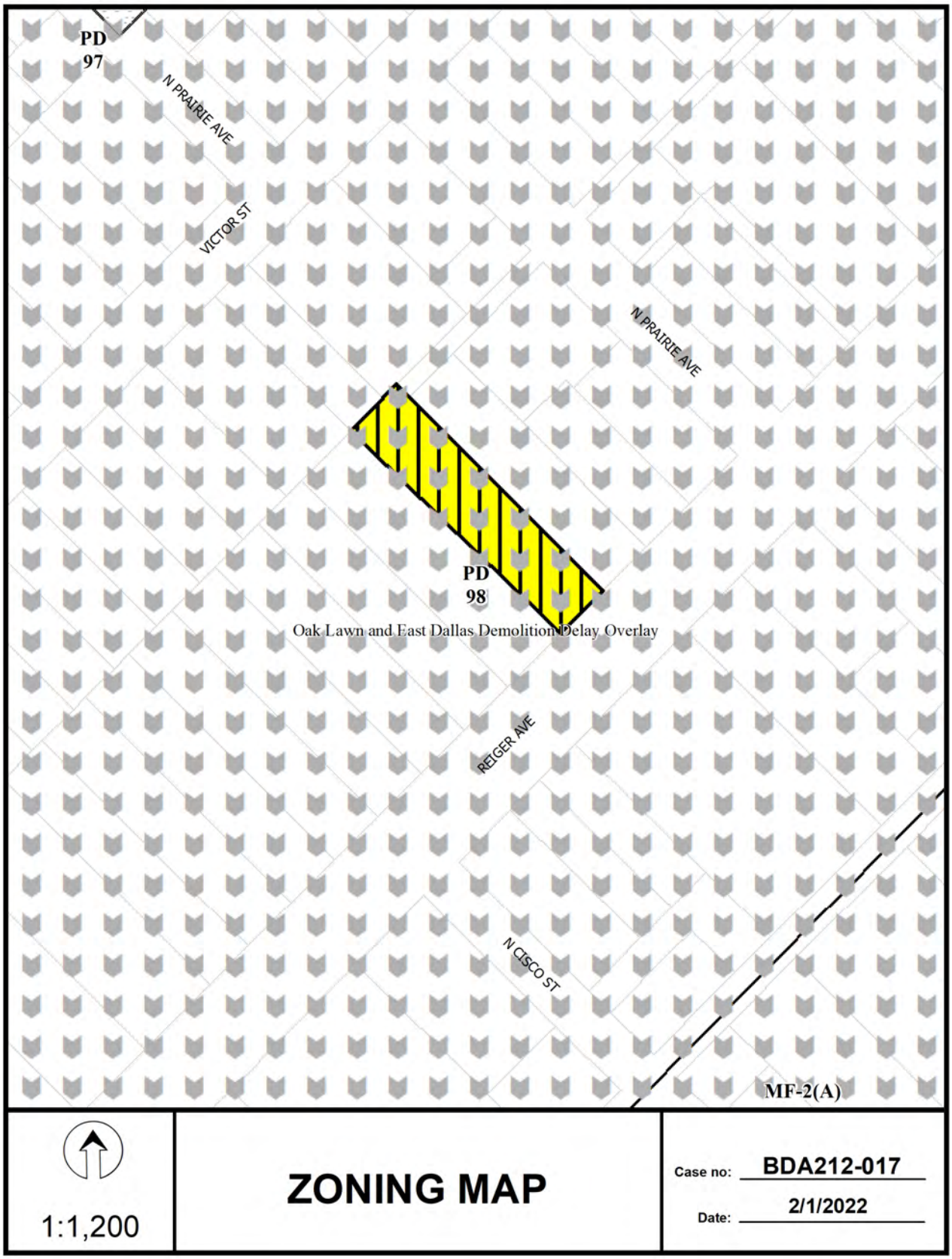
APPEARING IN OPPOSITION: Leah Kagan 4728 Victor St. Dallas, TX.
Jim Anderson 4706 Swiss Ave. Dallas, TX.

MOTION: **Lamb**

I move that the Board of Adjustment in request No. BDA 212-017, **hold** this matter under advisement until **April 19, 2022**.

SECONDED: **Halcomb**
AYES: 5 – Narey, Frankford Lamb, Halcomb, Neumann
NAYS: 0 -

MOTION PASSED: 5-0 (unanimously)



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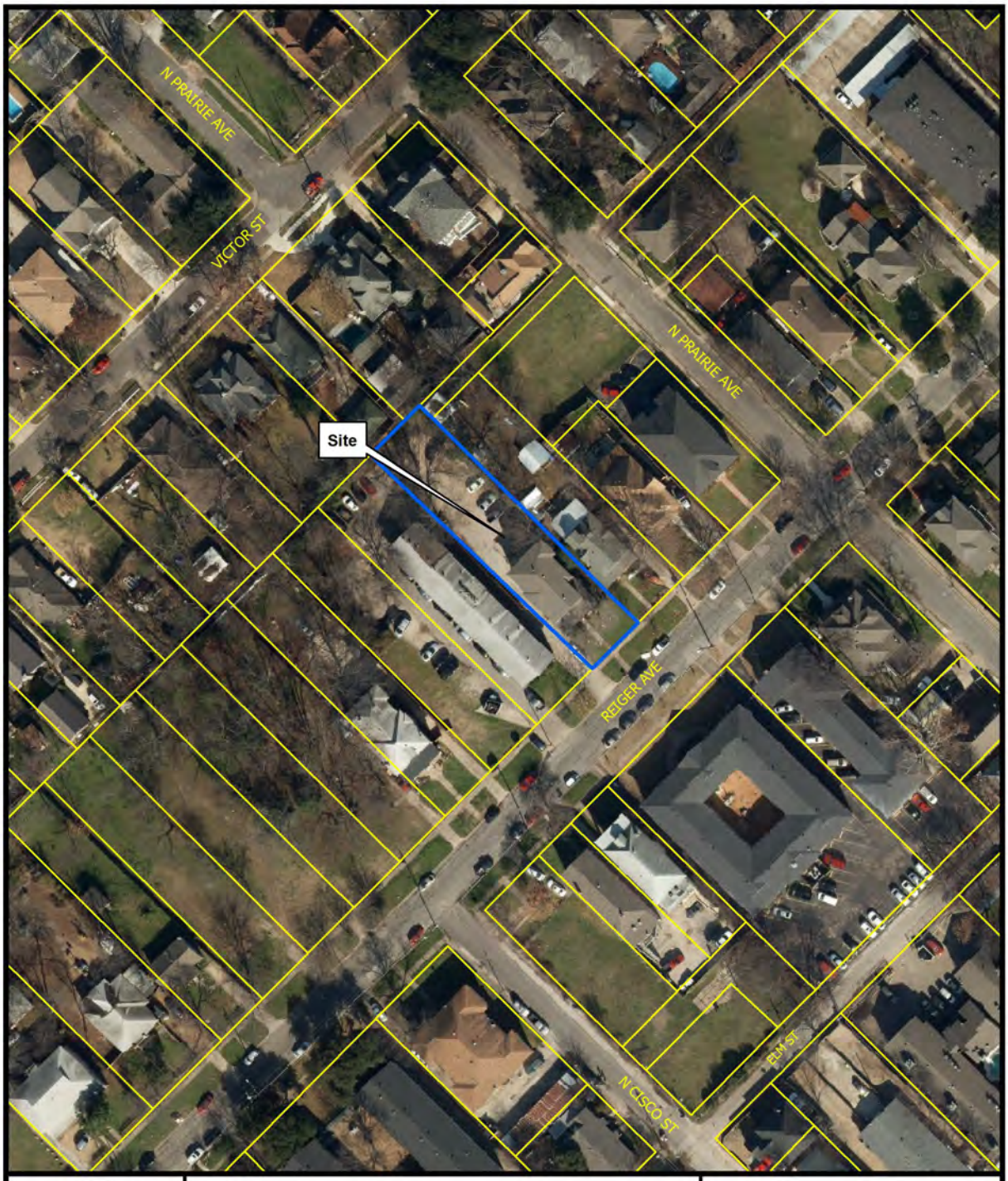
ZONING MAP

Case no: BDA212-017

Date: 2/1/2022



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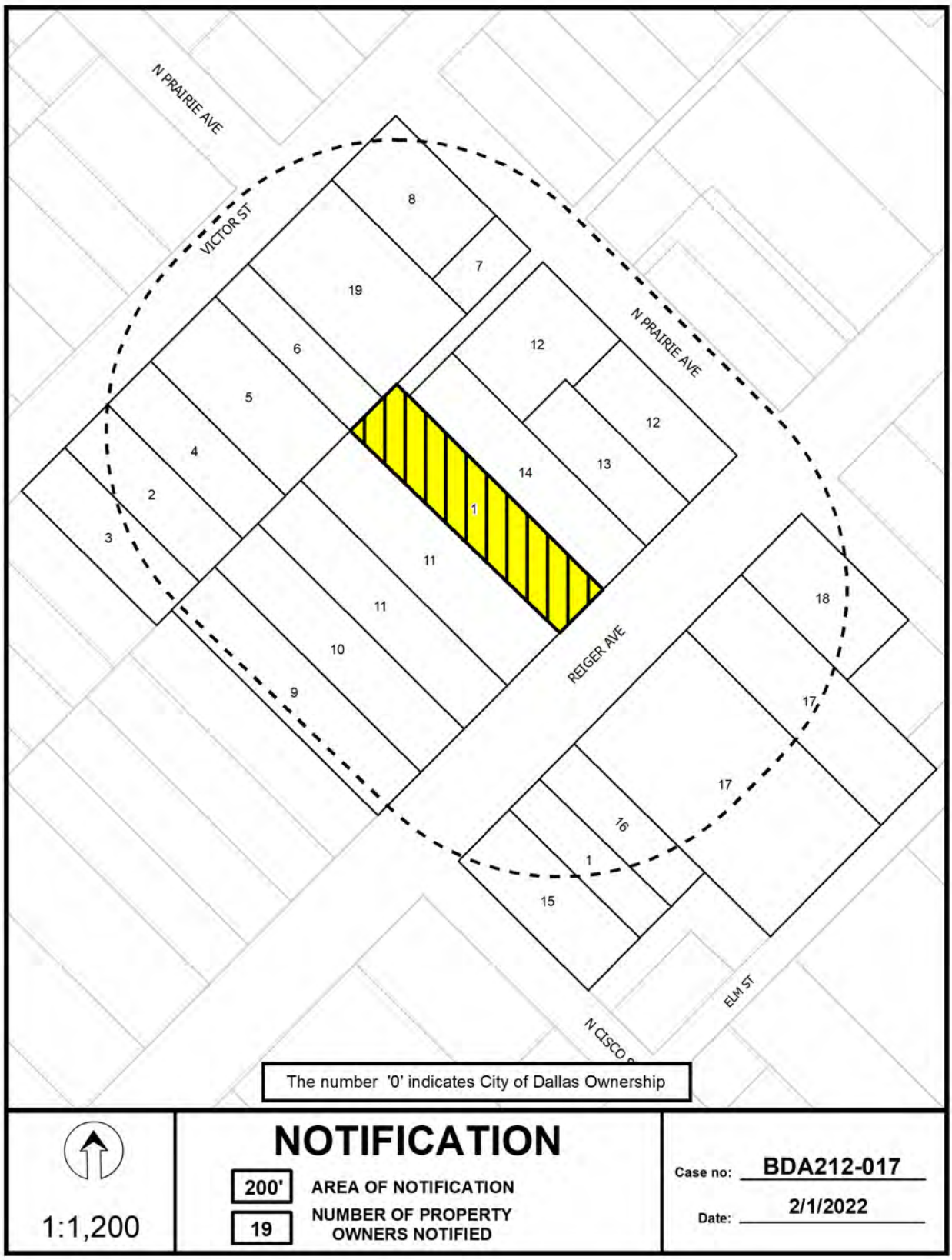
AERIAL MAP

Case no: BDA212-017

Date: 2/1/2022


N PRAIRIE AVE
VICTOR ST
N PRAIRIE AVE
REIGER AVE
ELM ST
N CISCO
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14
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10
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18
17
17
16
1
15
The number '0' indicates City of Dallas Ownership
NOTIFICATION
200'
AREA OF NOTIFICATION
19
NUMBER OF PROPERTY OWNERS NOTIFIED
1:1,200
Case no: BDA212-017
Date: 2/1/2022

02/01/2022

Notification List of Property Owners

BDA212-017

19 Property Owners Notified

Label #	*Address*		*Owner*
1	4715	REIGER AVE	SONICK LLC
2	4716	VICTOR ST	Taxpayer at
3	4712	VICTOR ST	MENDEZ BALDEMAR
4	4720	VICTOR ST	Taxpayer at
5	4726	VICTOR ST	ANDERSON EDWARD M JR
6	4728	VICTOR ST	KAGAN LEAH C
7	321	N PRAIRIE AVE	HOLMES MICHELLE
8	4742	VICTOR ST	HALFORD RANDAL A &
9	4701	REIGER AVE	MIELKE LEROY
10	4705	REIGER AVE	THOMAS GRAHAM
11	4709	REIGER AVE	WWGA 4711 REIGER LLC
12	313	N PRAIRIE AVE	SIMCOE LLC
13	4725	REIGER AVE	HANN KEVIN D & LISA
14	4721	REIGER AVE	BAYER JOEL &
15	4702	REIGER AVE	MAY J0RGE RAUL &
16	4710	REIGER AVE	ELKHOURY NEHMAT
17	4718	REIGER AVE	ELLESTAD REIGER PROPERTIES LLC &
18	4726	REIGER AVE	GR DEV LLC
19	4738	VICTOR ST	BARNES ROBIN L

City of Dallas

APPLICATION/APPEAL TO THE BOARD OF ADJUSTMENT

Case No.: BDA 212-017

Date: 1-3-22

Data Relative to Subject Property:

Location address: 4715 Reiger Ave. Dallas, Texas 75246 Zoning District: PD 98

Lot No.: SW 50' of LT 1 Block No.: F/799 Acreage: .274 Census Tract: 15.02

Street Frontage (in Feet): 1) 50' 2) 3) 4) 5)

To the Honorable Board of Adjustment :

Owner of Property (per Warranty Deed): SONICK LLC/Joseph F. DePumpo

Applicant: Joseph F. DePumpo Telephone: 817-707-8695

Mailing Address: 927 Turnberry Lane, Southlake, TX Zip Code: 76092

E-mail Address: joe@jonistar.com

Represented by: Telephone:

Mailing Address: Zip Code:

E-mail Address:

Affirm that an appeal has been made for a Variance X, or Special Exception __, of Northwest corner SYSB of 6' encroachment (providing 4' SYSB) and southwest corner SYSB of 1'5" encroachment (providing 8'7" SYSB). Required SYSB is 10'.

Application is made to the Board of Adjustment, in accordance with the provisions of the Dallas Development Code, to grant the described appeal for the following reason:

- Structure was build in 1918, prior to zoning, and is currently nonconforming.
- Lot contains less land area than lots in vicinity.
- Structure is only 2,945 sq. ft., whereas stuctures on lots in vicinity are much larger.

Note to Applicant: If the appeal requested in this application is granted by the Board of Adjustment, a permit must be applied for within 180 days of the date of the final action of the Board, unless the Board specifically grants a longer period.

Affidavit

Before me the undersigned on this day personally appeared Joseph F. DePumpo
(Affiant/Applicant's name printed)

who on (his/her) oath certifies that the above statements are true and correct to his/her best knowledge and that he/she is the owner/or principal/or authorized representative of the subject property.

Respectfully submitted: _____
(Affiant/Applicant's signature)

Subscribed and sworn to before me this 30 day of December, 2021

_____
Notary Public in and for Dallas County, Texas

CANDACE N RUHL
Notary ID #132647297
My Commission Expires
August 27, 2024

(Rev. 08-01-11)

MEMORANDUM OF
ACTION TAKEN BY THE
BOARD OF ADJUSTMENT

Date of Hearing _____

Appeal was--Granted OR Denied

Remarks _____

Chairman _____

Building Official's Report

I hereby certify that Joseph DePumpo

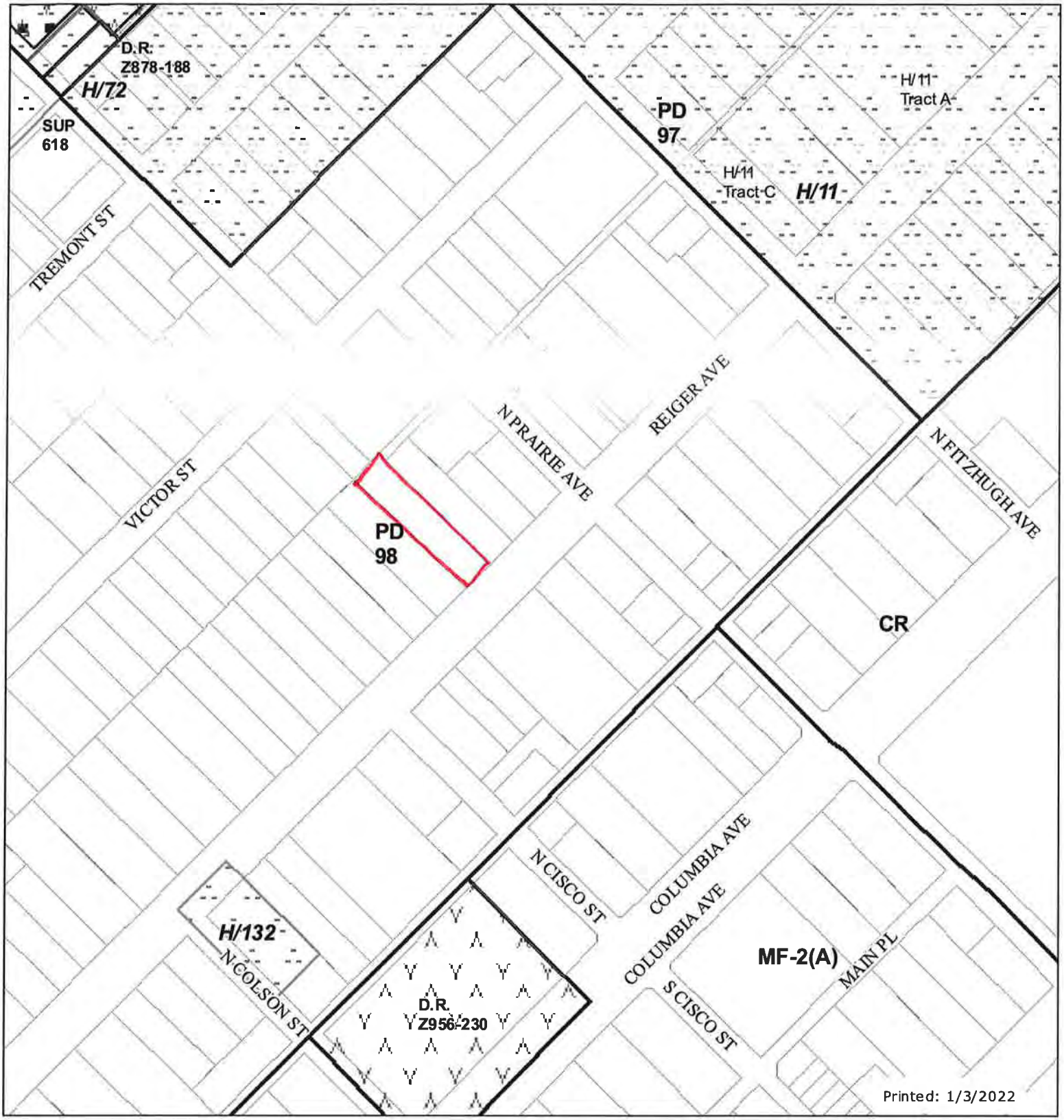
did submit a request for a variance to the side yard setback regulations

at 4715 Reiger Avenue

BDA212-017. Application of Joseph DePumpo for a variance to the side yard setback regulations at 4715 REIGER AVE. This property is more fully described as PT of Lot 1, Block F/799, and is zoned PD-98, which requires a side yard setback of 10 feet. The applicant proposes to construct and maintain a multi-family residential structure and provide a 4 foot side yard setback on the northeast side, which will require a 6 foot variance to the side yard setback regulations on the northeast side, and provide a 8 foot 7 inch side yard setback on the southwest side, which will require a 1 foot 5 inch variance to the side yard setback regulations on the southwest side.

Sincerely,

David Session, Building Official



Legend

- City Limits
- School
- Floodplain
- 100 Year Flood Zone
- Mill's Creek
- Peak's Branch
- X Protected by Levee
- Parks
- railroad
- Certified Parcels
- Base Zoning
- PD193 Oak Lawn
- Dallas Environmental Corridors
- SPSD Overlay
- Deed Restrictions
- SUP
- Dry Overlay
- D
- D-1
- CP
- SP
- MD Overlay
- Historic Subdistricts
- Historic Overlay
- Height Map Overlay
- CD Subdistricts
- PD Subdistricts
- PDS Subdistricts
- NSO Subdistricts
- NSO_Overlay
- Escarpment Overlay
- Parking Management Overlay
- Shop Front Overlay

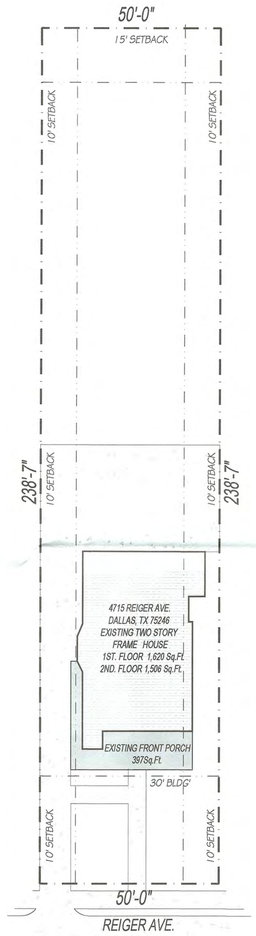
This data is to be used for graphical representation only. The accuracy is not to be taken/used as data produced by a Registered Professional Land Surveyor (RPLS) for the State of Texas. 'This product is for informational purposes and may not have been prepared for or be suitable for legal, engineering, or surveying purposes. It does not represent an on-the-ground survey and represents only the approximate relative location of property boundaries.' (Texas Government Code § 2051.102)

N

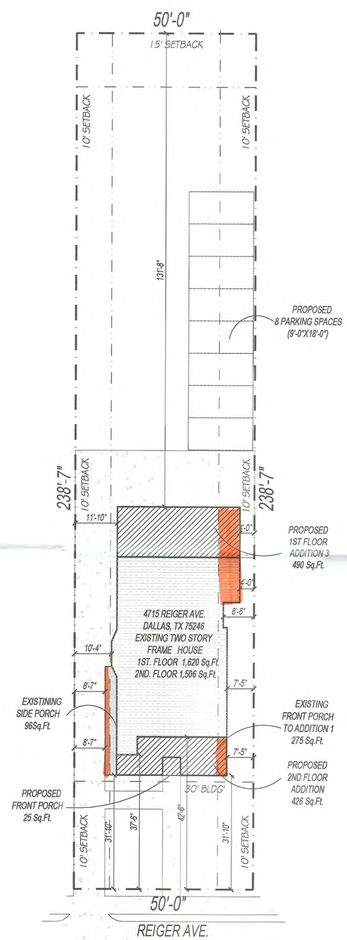
1:2,400

CITY OF DALLAS PLAT BOOKS
ADDITION
SCALE 100 FT. EQUALS 1 INCH
AVE.
FITZHUGH AVE.
800/4
799/1/2/3
799/F
799/E

VICINITY MAP
for reference only



1 EXISTING SITE PLAN
Scale: 1'-0":20'



2 PROPOSED SITE PLAN
Scale: 1'-0":20'

912-917

1-20

ONLINE PERMIT ONLY

Revision	Date

THESE PLANS ARE INTENDED TO PROVIDE BASIC CONSTRUCTION INFORMATION NECESSARY TO SUBSTANTIALLY BUILD THIS STRUCTURE. THESE PLANS MUST BE VERIFIED AND CHECKED BY THE BUILDER, HOMEOWNER, AND ALL CONTRACTORS OF THIS JOB PRIOR TO CONSTRUCTION. BUILDER SHOULD OBTAIN COMPLETE ENGINEERING SERVICES, HVAC, AND STRUCTURAL BEFORE BEGINNING CONSTRUCTION OF ANY KIND. NOTE: ALL FEDERAL, STATE, AND LOCAL CODES AND RESTRICTIONS TAKE PRECEDENCE OVER ANY PART OF THESE PLANS.

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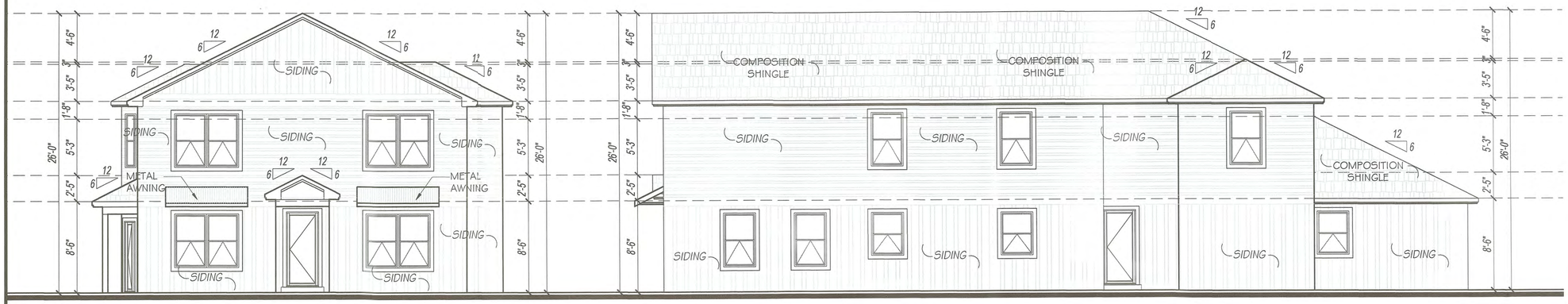
Project Name & Address

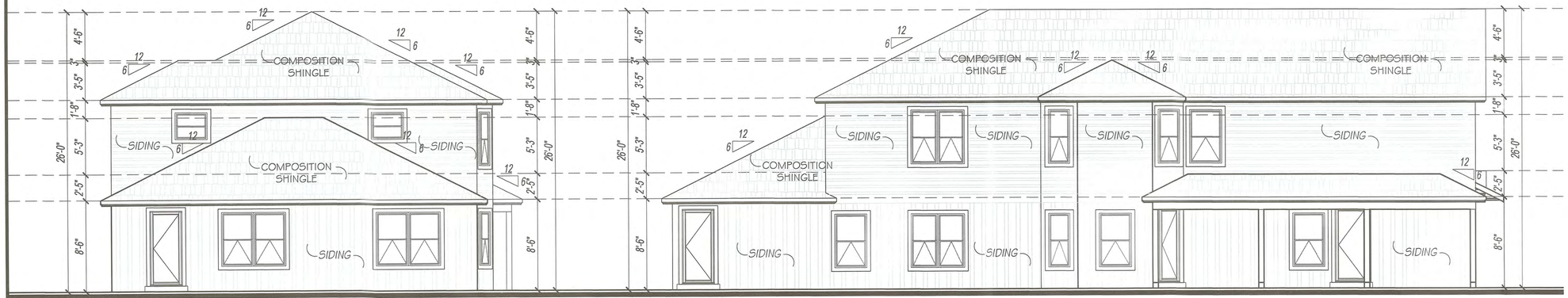
4715 REIGER AVE.
DALLAS, TX
75246

Project	Sheet
SITE	1.0
Date 09/01/21	
Scale 1'-0"=20'	
Drawn By AH	



1 FRONT ELEVATION
Scale: 3/16":1'-0"

2 RIGHT ELEVATION
Scale: 3/16":1'-0"



3 REAR ELEVATION
Scale: 3/16":1'-0"

4 LEFT ELEVATION
Scale: 3/16":1'-0"

3/2/17
2/24/17

ONLINE PERMIT ONLY

Revision	Date

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Project Name & Address

4715 REIGER AVE.
DALLAS, TX
75246

Project	Sheet
ELEVATIONS	2.0
Date 09/01/21	
Scale 3/16"=1'-0"	
Drawn By AH	

BDA212-017_ATTACHMENT_A

Revised Attachment to Application/Appeal to the Board of Adjustment
for Variance for Property at 4715 Reiger Ave.

Under Section 51A-3.102(d)(10) of the Dallas City Code, the Board of Adjustment has the "powers and duties . . . to grant variances . . . provided that:

(A) the variance is not contrary to the public interest when, owing to special conditions, a literal enforcement of this chapter would result in unnecessary hardship, and so that the spirit of the ordinance will be observed and substantial justice done;

(B) the variance is necessary to permit development of a specific parcel of land that differs from other parcels of land by being of such a restrictive area, shape, or slope that it cannot be developed in a manner commensurate with the development upon other parcels of land with the same zoning; and

(C) the variance is not granted to relieve a self-created or personal hardship, nor for financial reasons only, nor to permit any person a privilege in developing a parcel of land not permitted by this chapter to other parcels of land with the same zoning."

This application for a variance meets each of these requirements as discussed below.

Subpart A - Not Contrary to Public Interest

The requested variance is not contrary to the public interest. The subject property was built in 1918, long before any zoning laws existed, and thus has been nonconforming for many decades. The site plan shows that the existing setback on one side of the structure varies from 4 ft., to 8.5 ft. Moving that side of the structure inward to comply with the 10 ft. setback requirement would destroy the structural design and aesthetics of the building as shown in the elevation plans. Thus, literal enforcement of the 10 ft. setback requirement would, for all practical purposes, require the structure to be demolished, which would result in unnecessary hardship. The spirit of the ordinance will be observed and substantial justice done by granting the requested variance.

Subpart B - Necessary to Permit Development of a Specific Parcel of Land

The average lot size and average structure size for multifamily properties adjacent to the subject property are substantially larger than the lot size and structure size for the subject property. For example, the average lot size for the multifamily properties listed below is **19,464 sq. ft.** But the lot size of the subject property is only **11,950 sq. ft.** And the average structure size for those same properties is **11,491 sq. ft.** But the structure size for the subject property is only **2,945 sq. ft.** All the properties are in PD-98 zoning. Two

of the properties are directly across the street from the subject property and the third is immediately next door to it.

	Lot size	**Structure size**
Directly across the street		
4718 Reiger Ave.	29,250	17,900
4722 Reiger Ave.	14,625	8,542
Property on left when viewed from street		
4711 Reiger Ave.	14,518	8,032
Average	19,464	11,491

This comparison demonstrates that the lot at issue "differs from other parcels of land by being of such a restrictive area . . . that it cannot be developed in a manner commensurate with the development upon other parcels of land with the same zoning" as required by Subpart B.

Subpart C - Not Sought to Relieve a Self-Created or Personal Hardship

The requested variance is not sought to relieve a self-created or personal hardship, nor for financial reasons only, nor to permit any person a privilege in developing a parcel of land not permitted by this chapter to other parcels of land with the same zoning.

Applicant is an attentive and responsible property owner who has owned this property for over sixteen years. In addition to this variance request, Applicant has submitted a permit application to renovate and substantially improve the structure, which will benefit the neighborhood and provide even nicer living accommodations at the property. Applicant plans to continue to hold the property for many years to come.

The property contains a three-unit apartment building and the tenants in one of the units have lived there for over fifteen years. A tenant in another unit, who recently moved out, had lived there for over six years. Other tenants have lived in the building for longer than five-year periods under Applicant's ownership. These long-term tenancies show that Applicant provides well-maintained housing at fair rental rates for stable families, which benefits the community. Applicant's history shows that it does not seek this variance solely for financial reasons.

Section 211.009 of the Local Government Code Provides Additional Support for Granting the Requested Variance

Section 211.009 of the Local Government Code lists additional items the Board may consider in determining whether a failure to grant a variance would result in an unnecessary hardship to the Applicant. Specifically, Section 211.009(a)(3) allows the Board to authorize a variance that "is not contrary to the public interest and, due to special conditions, a literal enforcement of the ordinance would result in unnecessary hardship, and so that the spirit of the ordinance is observed and substantial justice is done."

Section 211.009(b-1), in turn, lists the following grounds the Board may consider in determining unnecessary hardship:

> In exercising its authority under Subsection (a)(3), the board may consider the following as grounds to determine whether compliance with the ordinance as applied to a structure that is the subject of the appeal would result in unnecessary hardship:
>
> (1) the financial cost of compliance is greater than 50 percent of the appraised value of the structure as shown on the most recent appraisal roll certified to the assessor for the municipality under Section 26.01, Tax Code;
>
> (2) compliance would result in a loss to the lot on which the structure is located of at least 25 percent of the area on which development may physically occur;
>
> (3) compliance would result in the structure not being in compliance with a requirement of a municipal ordinance, building code, or other requirement;
>
> (4) compliance would result in the unreasonable encroachment on an adjacent property or easement; or
>
> (5) the municipality considers the structure to be a nonconforming structure.

Local Government Code § 211.009(b-1), effective September 1, 2021.

In this case, Sections 211.009(b-1)(1) and (5) show that a failure to grant the variance would result in an unnecessary hardship to the Applicant. Subsection (1) argues in favor of granting the variance because the financial cost of modifying the structure to comply with the 10 ft. side-yard setback is greater than 50 percent of

the appraised value of the structure. Specifically, the Dallas Central Appraisal District's current certified value of the structure is $144,450. *See* DCAD website. In addition to destroying the aesthetics of the building, the cost of moving the entire side of the building from its existing location (which provides a setback of between 4 ft. and 8.5 ft.) to a 10 ft. setback would greatly exceed $72,225 (50% of the structure's appraised value).

Subsection 5 also supports granting the variance because the City of Dallas considers the structure to be nonconforming. As explained, the structure was built many decades before the existing 10 ft. setback requirement took effect. Thus, Subsection 5 provides another reason the Board should grant the requested variance.

Applicant meets each requirement of Section 51A-3.102(d)(10)(A)-(C) of the Dallas City Code and has shown that additional considerations in Section 211.009(b-1) of the Local Government Code demonstrate that a refusal to grant the requested variance would cause Applicant unnecessary hardship. Accordingly, Applicant respectfully requests that the Board grant the requested variance.

MEMORANDUM OF ACTION TAKEN BY THE BOARD OF ADJUSTMENT

Date of Hearing _____

Appeal was--Granted OR Denied

Remarks _____

Chairman

Building Official's Report

I hereby certify that Joseph DePumpo

did submit a request for a variance to the side yard setback regulations

at 4715 Reiger Avenue

BDA212-017. Application of Joseph DePumpo for a variance to the side yard setback regulations at 4715 REIGER AVE. This property is more fully described as PT of Lot 1, Block F/799, and is zoned PD-98, which requires a side yard setback of 10 feet. The applicant proposes to construct and maintain a multi-family residential structure and provide a 5 foot side yard setback on the northeast side, which will require a 5 foot variance to the side yard setback regulations on the northeast side, and provide a 8 foot 7 inch side yard setback on the southwest side, which will require a 1 foot 5 inch variance to the side yard setback regulations on the southwest side.

Sincerely,

David Session, Building Official

Revision	Date

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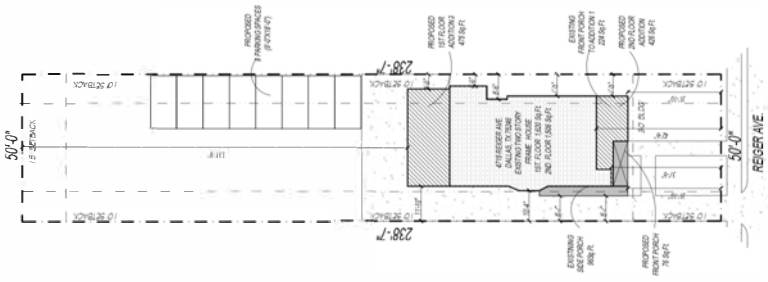
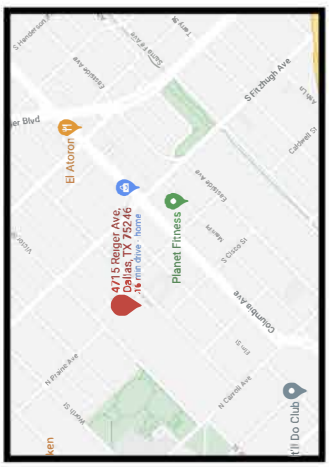
Project Name & Address
4715 REIGER AVE.
DALLAS, TX
75246

Project	Sheet
SITE	1.0
Date 05/04/22	
Scale 1"=20'	
Drawn By AH	



1 PROPOSED SITE PLAN
Scale: 1'-0"-20'



VICINITY MAP
for reference only

FILE NUMBER: BDA212-020(PD)

BUILDING OFFICIAL'S REPORT: Application of Stephen Marley represented by Alfred Pena for 1) a variance to the side yard setback regulations of five-feet to construct an accessory structure zero feet from the property line, within a required five-foot side yard setback; and, 2) a variance to the single-family use regulations to construct and maintain a 798-square-foot accessory structure (39.54 percent of the 2,018-square-foot floor area of the main structure) which will require a 294-square-foot variance to the floor area ratio of the main structure at 1218 N. Clinton Avenue. This property is more fully described as Lot 5 in City Block 15/3802 and is zoned Subarea 1 within Conservation District No. 13, in which a minimum side yard setback of five feet must be maintained, and an accessory structure may not exceed 25 percent of the floor area of the main structure.

LOCATION: 1218 N. Clinton Avenue

APPLICANT: Stephen Marley represented by Alfred Pena

REQUESTS:

The applicant proposes to construct and maintain an accessory structure with approximately 798 square feet of floor area wholly into a required five-foot side yard setback on a site developed with a single-family dwelling.

UPDATES:

There have been no updates to the request. However, on April 27, 2022, the applicant provided revised evidence.

STANDARD FOR A VARIANCE:

Section 51(A)-3.102(d)(10) of the Dallas Development Code specifies that the board has the power to grant variances from the front yard, **side yard**, rear yard, lot width, lot depth, lot coverage, **floor area** for structures accessory to single-family uses, height, minimum sidewalks, off-street parking or off-street loading, or landscape regulations provided that the variance is:

(A) not contrary to the public interest when owing to special conditions, a literal enforcement of this chapter would result in unnecessary hardship, and so that the spirit of the ordinance will be observed and substantial justice done;

(B) necessary to permit development of a specific parcel of land that differs from other parcels of land by being of such a restrictive area, shape, or slope, that it cannot be developed in a manner commensurate with the development upon other parcels of land with the same zoning; and

(C) not granted to relieve a self-created or personal hardship, nor for financial reasons only, nor to permit any person a privilege in developing a parcel of land not permitted by this chapter to other parcels of land with the same zoning.

STAFF RECOMMENDATION (Side yard variance and FAR variance):

Approval, subject to compliance with the submitted site plan:

Rationale:

Staff concluded that the subject site is unique and different from most lots in Subarea 1 within Conservation District No. 13 considering its restrictive lot area of 10,800 square feet. Evidence (**Attachment A**) provided by the applicant, reflects a comparison of six lots within the same zoning district. Per the comparative analysis, the average lot area is 13,894 square feet. Thus, in analyzing the comparative properties the restrictive area of the subject site ensures that the site cannot be developed in a manner commensurate with development upon other parcels of land with the same zoning.

BACKGROUND INFORMATION:

Zoning:

Site:	Subarea 1 within Conservation District No. 13
North:	Subarea 1 within Conservation District No. 13
South:	Subarea 1 within Conservation District No. 13
East:	Subarea 1 within Conservation District No. 13
West:	Subarea 1 within Conservation District No. 13

Land Use:

The subject site and all surrounding properties are developed with single-family uses.

Zoning/BDA History:

There have been five recent related board cases in the vicinity within the last five years.

1. **BDA201-082**: On September 20, 2021, Panel C, Board of Adjustment approved 1) a variance to the side yard setback regulations of four-feet to construct an accessory dwelling unit one-foot from the property line, within a required five-foot side yard setback; and 2) a variance to the single-family use regulations to construct and maintain a 699-square-foot accessory structure (34.8 percent of the 2,005-square-foot floor area of the main structure) at 1107 S. Canterbury.

2. **BDA189-040**: On April 16, 2019, Panel A, Board of Adjustment denied a variance for to the off-street parking regulations of 15' is made to replace an existing approximately 360 square foot garage with parking spaces in it that are accessed from N. Edgefield Avenue to the east with a new approximately 650 square foot garage with parking spaces in it that would be accessed from the alley to the west – parking spaces in this new enclosed structure/garage that would be located 5' from the right-of-way line adjacent to the alley or 15' into the 20' required distance these enclosed parking spaces must be from the alley right-of-way line on a site developed with a single family home at 1107 N. Edgefield Avenue.
3. **BDA189-052**: On May 21, 2019, Panel A, Board of Adjustment approved a variance to the front yard setback regulations to provide a 21-foot front yard setback, which will require a 51-foot variance to the front yard setback at 1828 Kessler Parkway.
4. **BDA178-033**: On March 21, 2018, Panel B, Board of Adjustment approved a variance to the front yard setback regulations of 19' is requested to construct and maintain the aforementioned structure 16' from the front property line or 19' into the required 35' front yard setback; 2. a variance to the off-street parking regulations of 4' is requested as the proposed home would have parking spaces in an enclosed structure (an attached garage) that would be located 16' from the right-of-way line adjacent to the street or as much as 4' into the required 20' distance from the right-of-way line adjacent to Kessler Parkway at 2016 Kessler Parkway.
5. **BDA178-030**: On March 19, 2018, Panel C, Board of Adjustments approved a variance to the front yard of setback 11-foot-three-inch variance to the front yard setback regulations to provide a 20-foot three-inch front yard setback at 1520 Olympia Drive.

GENERAL FACTS/STAFF ANALYSIS:

The subject property zoned Subarea 1 within Conservation District No. 13. In this district, a minimum side yard setback of five feet is required. Additionally, an accessory structure cannot exceed 25 percent of the floor area ratio of the main structure. The requests for variances to the side yard setback and maximum floor area ratio regulations focus on constructing and maintaining a 798-square-foot accessory structure. The proposed unit is 39.54 percent of the 2,018-square-foot floor area of the main structure, which will require a 294-square-foot variance to the floor area ratio of the main structure. The proposed unit is to be constructed wholly within the required five-foot side property line, or five feet into a required five-foot side yard setback.

DCAD records indicate the following improvements for the property located at 1218 N. Clinton Avenue: "main improvement": a structure with 2,018 square feet of living area

built-in 1924” and “additional improvements”: a 400-square-foot detached garage, a 232-square-foot “detached quarters,” and a swimming pool.

The site plan depicts an existing one-story accessory structure with approximately 287 square feet of floor area. The applicant proposes to construct a second story accessory structure with approximately 798 square feet, with the proposed second story addition encroaching wholly into a required five-foot side yard setback. The second story addition with stairs will equate to approximately 39.5 percent of the existing 2,018-square-foot floor area ratio of the main structure.

The property is irregular in shape since it is neither rectangular nor square and according to the application, contains 0.248 acres, or approximately 10,802 square feet in lot area. In Subarea 1 within Conservation District No. 13 the minimum lot size is 7,500 square feet. However, properties within the vicinity are one-and-one-half times greater than the minimum lot size.

The applicant has submitted a document comparing the lot sizes of the subject site with six adjacent properties in the same zoning district. Staff concluded that the subject site is unique and different from most lots in Subarea 1 within Conservation District No. 13 considering its restrictive lot area of 10,800 square feet. Evidence (**Attachment A**) provided by the applicant, reflects a comparison of six lots within the same zoning district. Per the comparative analysis, the average lot area is 13,894 square feet. Thus, in analyzing the comparative properties the restrictive area of the subject site ensures that the site cannot be developed in a manner commensurate with development upon other parcels of land with the same zoning.

The applicant has the burden of proof in establishing the following:

- That granting the variances will not be contrary to the public interest when owing to special conditions, a literal enforcement of this chapter would result in unnecessary hardship, and so that the spirit of the ordinance will be observed, and substantial justice done.
- The variances are necessary to permit development of the subject site that differs from other parcels of land by being of such a restrictive area, shape, or slope, that the subject site cannot be developed in a manner commensurate with the development upon other parcels of land in districts with the same zoning classification.
- The variances would not be granted to relieve a self-created or personal hardship, nor for financial reasons only, nor to permit any person a privilege in

developing this parcel of land (the subject site) not permitted by this chapter to other parcels of land in districts with the same zoning classification.

As of May 10, 2022, staff has received 13 letters in support of the request and none in opposition to the request.

If the board were to grant a variance to the floor area regulations and a variance to the side yard setback for structures accessory to single-family uses and impose the submitted site plan as a condition, the building footprint of the structure on the site would be limited to what is shown on this document. However, granting these variances will not provide any relief to the Dallas Development Code regulations other than allowing an additional structure on the site to exceed the floor area ratio and encroach into the side yard setback as depicted on the site plan (i.e. development on the site must meet all other code requirements).

Timeline:

January 7, 2022: The applicant submitted an "Application/Appeal to the Board of Adjustment" and related documents which have been included as part of this case report. Additionally, the applicant submitted evidence (**Attachment A**) with the application.

March 1, 2022: The Board of Adjustment Secretary randomly assigned this case to Board of Adjustment Panel A.

February 3, 2022: The Senior Planner emailed the applicant the following information:

- a copy of the application materials including the Building Official's report on the application.
- an attachment that provided the public hearing date and panel that will consider the application; the February 23rd deadline to submit additional evidence for staff to factor into their analysis; and the March 4th deadline to submit additional evidence to be incorporated into the Board's docket materials;
- the criteria/standard that the board will use in their decision to approve or deny the request; and
- the Board of Adjustment Working Rules of Procedure pertaining to documentary evidence.

March 2, 2022: The Board of Adjustment staff review team meeting was held regarding this request and the others scheduled for the March public hearings. Review team members in attendance included the following: the Board of Adjustment Chief Planner/Board Administrator, the Building Inspection Senior Plans Examiner, the

Board of Adjustment Senior Planner, the Chief Arborist, the Conservation Districts Chief Planner, the Senior Engineer, and the Assistant City Attorney to the board.

No review comment sheets were submitted in conjunction with this application.

March 22, 2022: The Board held the request under advisement until April 19, 2022.

April 8, 2022: The applicant requested a postponement (**Attachment B**) to allow more time to garner support from neighbors.

April 19, 2022: The Board held the request under advisement until May 17, 2022.

April 27, 2022: The applicant provided revised evidence (**Attachment A**).

BOARD OF ADJUSTMENT ACTION: April 19, 2022

APPEARING IN FAVOR: Stephen Marley 1218 N. Clinton Ave. Dallas, TX
Jason Michael 1300 W. Canterbury Dallas TX

APPEARING IN OPPOSITION: None.

MOTION: **Lamb**

I move that the Board of Adjustment in request No. BDA 212-020, **hold** this matter under advisement until **May 17, 2022**.

SECONDED: **Halcomb**
AYES: 5 – Narey, Frankford Lamb, Halcomb, Neumann
NAYS: 0 -

MOTION PASSED: 5-0 (unanimously)

BOARD OF ADJUSTMENT ACTION: March 22, 2022

APPEARING IN FAVOR: Alfredo Pena 410 E. 5th St. Dallas, TX
Stephen Marley 1218 N. Clinton Ave. Dallas, TX
Jason Michael 1300 W. Canterbury Dallas TX

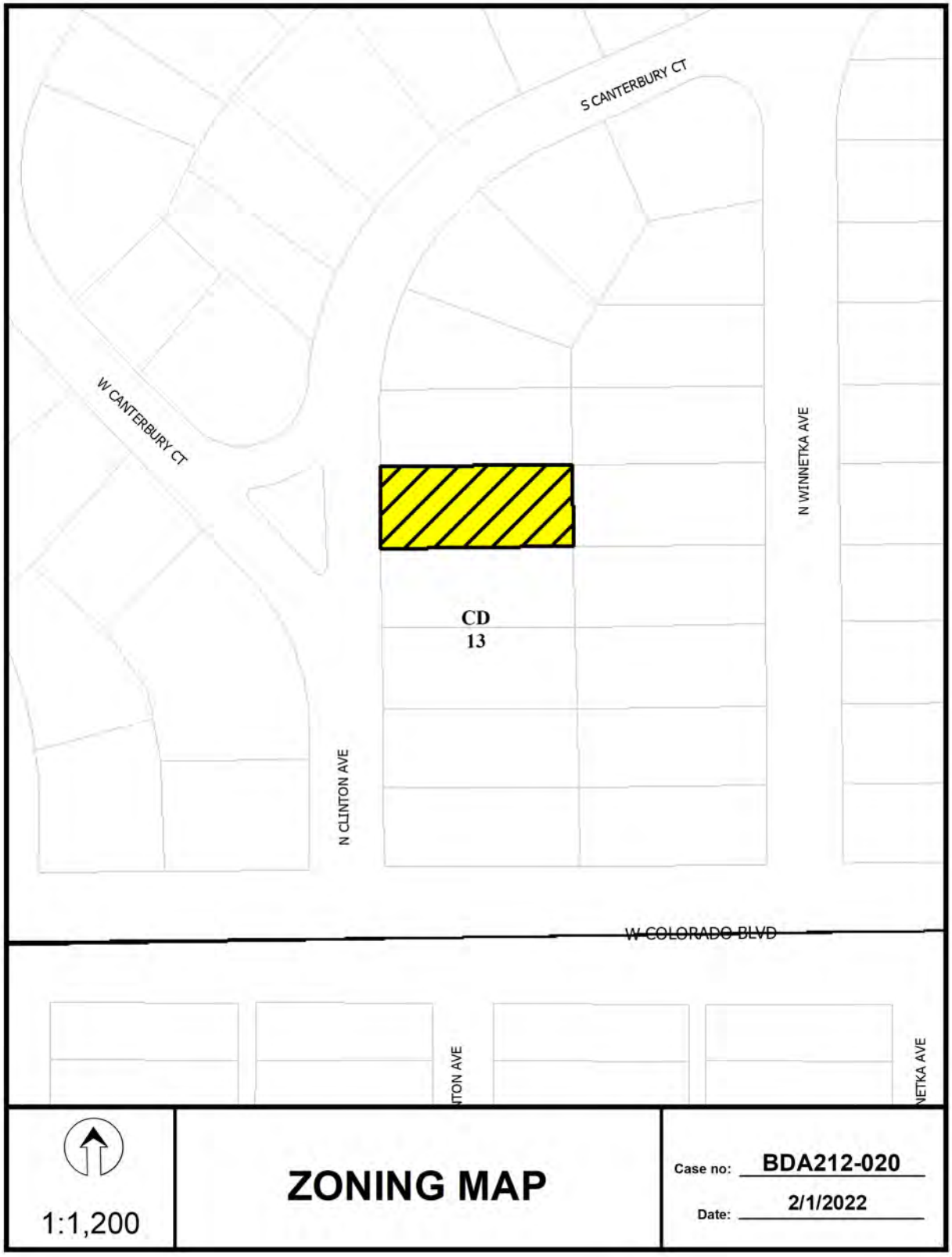
APPEARING IN OPPOSITION: None.

MOTION: **Halcomb**

I move that the Board of Adjustment in request No. BDA 212-020, **hold** this matter under advisement until **April 19, 2022**.

SECONDED: **Frankford**
AYES: 5 – Narey, Frankford Lamb, Halcomb, Neumann
NAYS: 0 -

MOTION PASSED: 5-0 (unanimously)

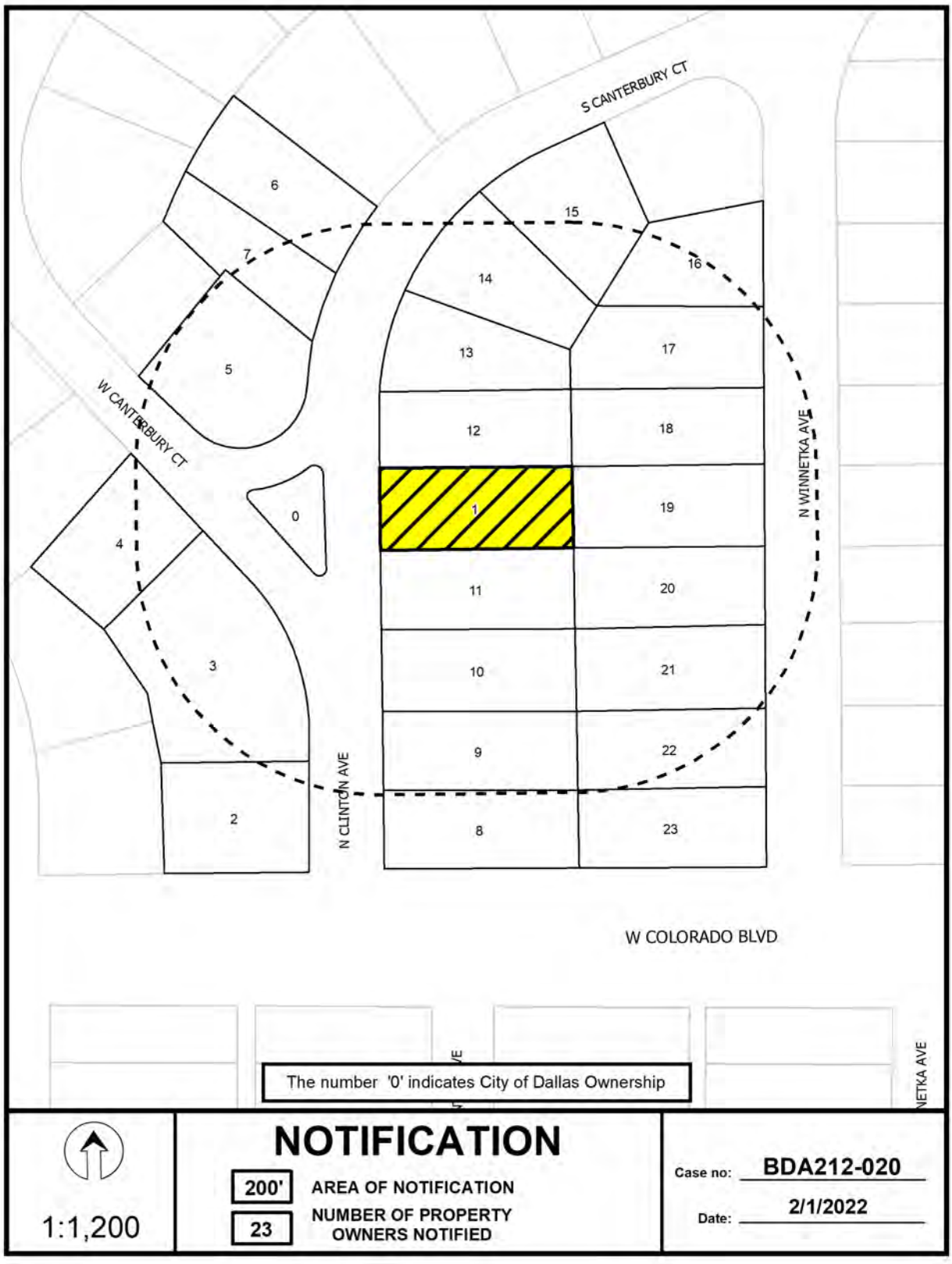

S CANTERBURY CT
W CANTERBURY CT
N WINNETKA AVE
CD
13
N CLINTON AVE
W COLORADO BLVD
1:1,200
ZONING MAP
Case no: BDA212-020
Date: 2/1/2022

1:1,200

AERIAL MAP

Case no: BDA212-020

Date: 2/1/2022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W CANTERBURY CT
N WINNETKA AVE
N CLINTON AVE
W COLORADO BLVD
6
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14
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17
12
18
1
19
0
4
11
20
3
10
21
9
22
2
8
23
The number '0' indicates City of Dallas Ownership
NOTIFICATION
200'
AREA OF NOTIFICATION
23
NUMBER OF PROPERTY OWNERS NOTIFIED
1:1,200
Case no: BDA212-020
Date: 2/1/2022

02/01/2022

Notification List of Property Owners

BDA212-020

23 Property Owners Notified

Label #	*Address*		*Owner*
1	1218	N CLINTON AVE	MARLEY STEPHEN
2	1203	N CLINTON AVE	ROGERS SAMUEL H & KELLY C
3	1217	N CLINTON AVE	GULATI KUNAL & JOSEFA
4	1303	W CANTERBURY CT	SHAW BRIAN PATRICK &
5	1300	CANTERBURY CT	MICHAEL JASON & NICOLE
6	1127	CANTERBURY CT	VAUGHN KATHLEEN S
7	1131	CANTERBURY CT	ZARRELLA JOHN & NANCY
8	1202	N CLINTON AVE	PETERSON JILL
9	1206	N CLINTON AVE	BRUMBAUGH R DAVID &
10	1210	N CLINTON AVE	MONKRES J PIERCE & SANDRA
11	1214	N CLINTON AVE	KOZACK DAVID E &
12	1222	N CLINTON AVE	HARPER STEPHEN PAUL
13	1124	CANTERBURY CT	HILL ANN JOHNSON
14	1118	CANTERBURY CT	LEFTWICH GREGORY S &
15	1112	CANTERBURY CT	ROBINSON REBECCA &
16	1231	N WINNETKA AVE	EVETTS GREGORY A &
17	1227	N WINNETKA AVE	WAKS LAWRENCE & ERIN
18	1225	N WINNETKA AVE	ESCOBEDO CHRIS
19	1219	N WINNETKA AVE	MARTENSEN JEFFREY B &
20	1215	N WINNETKA AVE	MCLARTY CHRISTOPHER &
21	1211	N WINNETKA AVE	MURPHY REBECCA &
22	1207	N WINNETKA AVE	Taxpayer at
23	1203	N WINNETKA AVE	ELLIS LEONARD L III

City of Dallas

APPLICATION/APPEAL TO THE BOARD OF ADJUSTMENT

Case No.: BDA 212-020

Data Relative to Subject Property: Date: ~~01-06-22~~ 1-7-22 cat

Location address: 1218 N Clinton Avenue Zoning District: CD13 (Subarea 1)

Lot No.: 5 Block No.: 15/3802 Acreage: 0.248 Census Tract: 44.00

Street Frontage (in Feet): 1) 67.2 2) 3) 4) 5)

To the Honorable Board of Adjustment :

Owner of Property (per Warranty Deed): Stephen Marley

Applicant: Stephen Marley Telephone:

Mailing Address: 1218 N Clinton, Dallas, TX Zip Code: 75208

E-mail Address: swmarley@gmail.com

Represented by: Alfredo Peña Telephone: 817-602-8161

Mailing Address: 410 E 5th St., Dallas, TX Zip Code: 75203

E-mail Address: fred@tezanto.com

Affirm that an appeal has been made for a Variance X, or Special Exception __, of

1 - Increase Accessory Structure living space size

2 - Reduce side setback to allow existing structure location to remain

Please Note - The Conservation District zoning allows one accessory dwelling unit.

Application is made to the Board of Adjustment, in accordance with the provisions of the Dallas Development Code, to grant the described appeal for the following reason:

Owner wishes to add on to the house in the future but due to proximity slope, the house can only extend rearward on the north half which is limited by a large existing tree and the existing swimming pool. The house is one of the smaller ones on the block making the 25% of living space not sufficient to properly have both a home office and guest suite above the existing garage. The garage footprint is NOT changing.

Note to Applicant: If the appeal requested in this application is granted by the Board of Adjustment, a permit must be applied for within 180 days of the date of the final action of the Board, unless the Board specifically grants a longer period.

Affidavit

Before me the undersigned on this day personally appeared STEPHEN MARLEY
(Affiant/Applicant's name printed)

who on (his/her) oath certifies that the above statements are true and correct to his/her best knowledge and that he/she is the owner/or principal/or authorized representative of the subject property.

Respectfully submitted: _____
(Affiant/Applicant's signature)

Subscribed and sworn to before me this 7th day of JANUARY, 2022

_____
Notary Public in and for Dallas County, Texas

(Rev. 08-01-11)

BETH HAYS
Notary Public, State of Texas
Comm. Expires 06-22-2025
Notary ID 133169845

City of Dallas

APPLICATION/APPEAL TO THE BOARD OF ADJUSTMENT

Case No.: BDA 212-020

Data Relative to Subject Property: Date: ~~01-06-22~~ 1-7-22 cor

Location address: 1218 N Clinton Avenue Zoning District: CD13 (Subarea 1)

Lot No.: 5 Block No.: 15/3802 Acreage: 0.248 Census Tract: 44.00

Street Frontage (in Feet): 1) 67.2 2) 3) 4) 5)

To the Honorable Board of Adjustment :

Owner of Property (per Warranty Deed): Stephen Marley

Applicant: Stephen Marley Telephone:

Mailing Address: 1218 N Clinton, Dallas, TX Zip Code: 75208

E-mail Address: swmarley@gmail.com

Represented by: ~~Alfredo Peña~~ Self (Applicant) Telephone: ~~817-602-8161~~

Mailing Address: ~~410 E 5th St., Dallas, TX~~ Zip Code: ~~75203~~

E-mail Address: ~~fred@tezanto.com~~

4/14/22

Affirm that an appeal has been made for a Variance X, or Special Exception __, of

1 - Increase Accessory Structure living space size
2 - Reduce side setback to allow existing structure location to remain
Please Note - The Conservation District zoning allows one accessory dwelling unit.

Application is made to the Board of Adjustment, in accordance with the provisions of the Dallas Development Code, to grant the described appeal for the following reason:

Owner wishes to add on to the house in the future but due to proximity slope, the house can only extend rearward on the north half which is limited by a large existing tree and the existing swimming pool. The house is one of the smaller ones on the block making the 25% of living space not sufficient to properly have both a home office and guest suite above the existing garage. The garage footprint is NOT changing.

Note to Applicant: If the appeal requested in this application is granted by the Board of Adjustment, a permit must be applied for within 180 days of the date of the final action of the Board, unless the Board specifically grants a longer period.

Affidavit

Before me the undersigned on this day personally appeared STEPHEN MARLEY
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who on (his/her) oath certifies that the above statements are true and correct to his/her best knowledge and that he/she is the owner/or principal/or authorized representative of the subject property.

Respectfully submitted: _____
(Affiant/Applicant's signature)

Subscribed and sworn to before me this 7th day of JANUARY, 2022

Notary Public in and for Dallas County, Texas

BETH HAYS
Notary Public, State of Texas
Comm. Expires 06-22-2025
Notary ID 133169845

(Rev. 08-01-11)

MEMORANDUM OF
ACTION TAKEN BY THE
BOARD OF ADJUSTMENT

Date of Hearing _____

Appeal was--Granted OR Denied

Remarks _____

Chairman _____

Building Official's Report

I hereby certify that STEPHEN MARLEY

represented by ALFREDO PENA

did submit a request for a variance to the floor area ratio regulations, and for a variance to the side yard setback regulations

at 1218 N. Clinton Avenue

BDA212-020. Application of STEPHEN MARLEY represented by ALFREDO PENA for a variance to the floor area ratio regulations, and for a variance to the side yard setback regulations at 1218 N CLINTON AVE. This property is more fully described as Lot 5, Block 15/3802, and is zoned CD-13 (Subarea 1), which an accessory structure may not exceed 25% of the floor area of the main structure and requires a side yard setback of 5 feet. The applicant proposes to construct and maintain a single family residential accessory structure with 798 square feet of floor area (39.54% of the 2018 square foot floor area of the main structure), which will require a 294 square foot variance to the floor area ratio regulations, and to construct and maintain a single family residential accessory structure and provide a 0 foot side yard setback, which will require a 5 foot variance to the front side rear yard setback regulations.

Sincerely,

David Session, Building Official

Legend

- City Limits
- School
- Floodplain
- 100 Year Flood Zone
- Mill's Creek
- Peak's Branch
- X Protected by Levee
- Parks
- railroad
- Certified Parcels
- Base Zoning
- PD193 Oak Lawn
- Dallas Environmental Corridors
- SPSD Overlay
- Deed Restrictions
- SUP
- Dry Overlay
- D
- D-1
- CP
- SP
- MD Overlay
- Historic Subdistricts
- Historic Overlay
- Height Map Overlay
- CD Subdistricts
- PD Subdistricts
- PDS Subdistricts
- NSO Subdistricts
- NSO_Overlay
- Escarpment Overlay
- Parking Management Overlay
- Shiloh Overlay

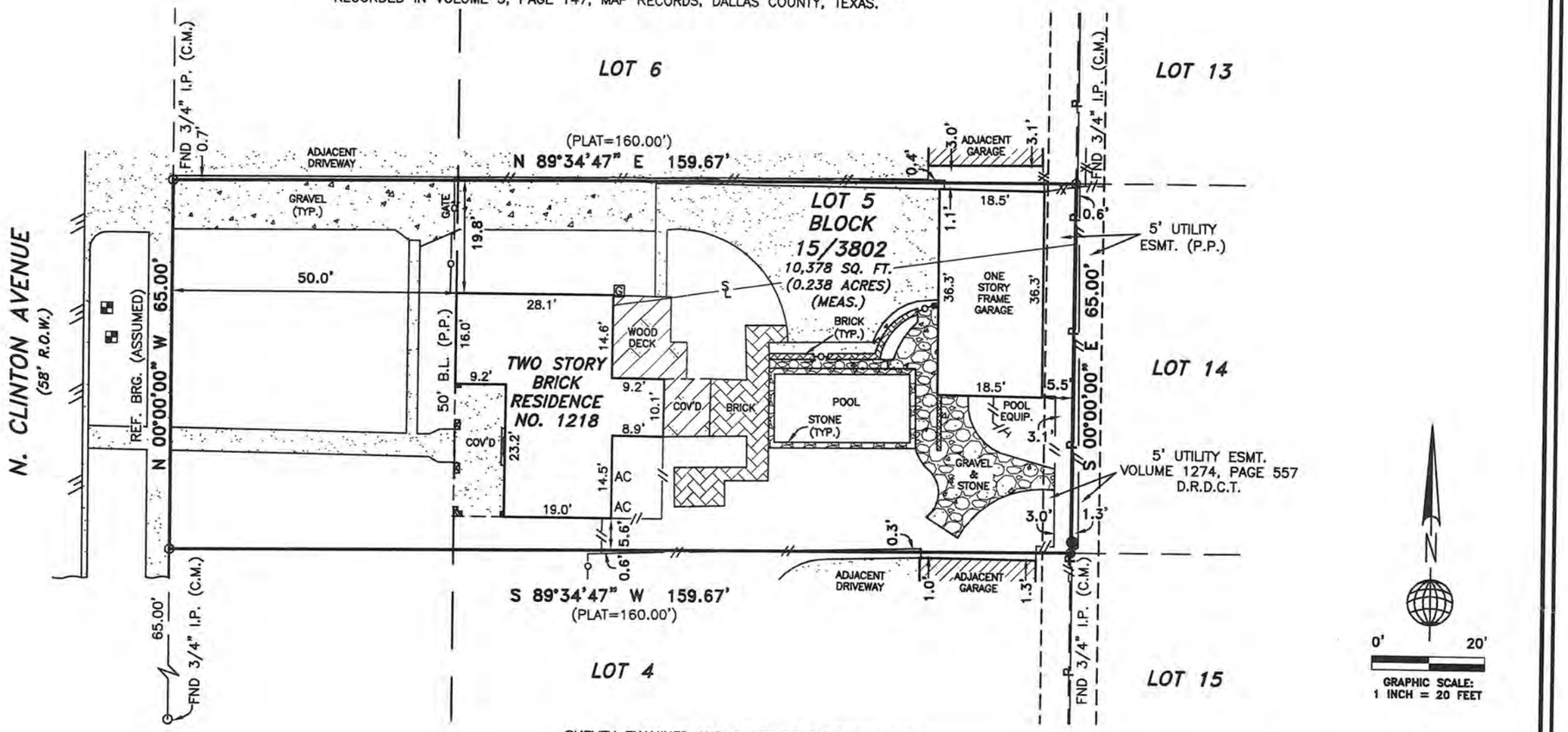
N

1:2,400


3803/16
3802/15
3799/12
ABST. 1101
N. WINNETKA AVE.
N. CLINTON AVE.
W. COLORADO BLVD.
N. EDGEFIELD BLVD.

"SURVEY PLAT"

LOT 5, BLOCK 15, FIRST INSTALLMENT OF KESSLER PARK, AN ADDITION TO THE CITY OF DALLAS, DALLAS COUNTY, TEXAS, ACCORDING TO THE MAP OR PLAT THEREOF, RECORDED IN VOLUME 3, PAGE 147, MAP RECORDS, DALLAS COUNTY, TEXAS.



SURVEY EXAMINED AND ACCEPTED BY PURCHASERS: _____ DATE: _____

CERTIFIED TO: HSTX TITLE AND STEPHEN MARLEY | GF#:HSTX21-00171 | DATE: 03/29/2021 | JOB NO.:21-03-081

FND= FOUND I.R.= IRON ROD I.P.= IRON PIPE ESMT.= EASEMENT B.L.= BUILDING LINE (C.M.)= CONTROL MONUMENT

SYMBOL LEGEND	
-//-	WOOD FENCE
-x-	CHAIN LINK FENCE
-x-	WIRE FENCE
-o-	WROUGHT IRON FENCE
☒	COLUMN
●	POWER POLE
◪	WATER METER
-P-	POWERLINE
-S-	OVERHEAD SERVICE LINE
T	TRANSFORMER AND PAD
G	GAS METER
	ASPHALT SURFACE
	CONCRETE

I, JASON L. MORGAN, REGISTERED PROFESSIONAL LAND SURVEYOR OF THE STATE OF TEXAS, DO HEREBY CERTIFY THAT THE PLAT HEREON IS A TRUE, CORRECT AND ACCURATE REPRESENTATION OF THE SUBJECT PROPERTY AS DETERMINED BY AN ON THE GROUND SURVEY UNDER MY SUPERVISION. THIS SURVEY MEETS OR EXCEEDS THE MINIMUM STANDARDS PROMULGATED BY THE TEXAS BOARD OF PROFESSIONAL LAND SURVEYING AND WAS PERFORMED IN CONNECTION WITH TITLE COMMITMENT GF NO. HSTX21-00171 PROVIDED BY HSTX TITLE REFLECTING ONLY THE EASEMENT(S) LISTED IN SCHEDULE "B" OF SAID COMMITMENT. USE OF THIS SURVEY BY ANY OTHER PARTY SHALL BE AT THEIR OWN RISK AND THE UNDERSIGNED IS NOT RESPONSIBLE TO OTHERS FOR ANY LOSS RESULTING THEREFROM. THIS SURVEY IS NOT VALID WITHOUT A RED SEAL AND SIGNATURE.

STATE OF TEXAS REGISTERED JASON L. MORGAN 5587 PROFESSIONAL LAND SURVEYOR

JASON L. MORGAN TXRPLS 5587

Global Land Surveying, Inc.

SERVING COLLIN, DALLAS AND DENTON COUNTIES SINCE 2002

GLOBAL LAND SURVEYING, INC.
P.O. BOX 260369
PLANO, TEXAS 75026
PHONE (972) 881-1700
JMORGAN@GLS-INC.COM
TBPELS FIRM NO. 10016300

ADDRESS: 1218 N. CLINTON AVENUE

NOTES:

1) (P.P.) INDICATES BUILDING LINES, EASEMENTS, R.O.W.S, DIMENSIONS, ETC. ARE PER PLAT REFERENCED IN LEGAL DESCRIPTION ABOVE.
2) THE PROPERTY SHOWN HEREON APPEARS TO BE SUBJECT TO THE EASEMENTS RECORDED IN VOLUME 1274, PAGE 557, REAL PROPERTY RECORDS OF DALLAS COUNTY, TEXAS.
3) THE PROPERTY SHOWN HEREON APPEARS TO BE SUBJECT TO THE TERMS, PROVISIONS, CONDITIONS, BUILDING LINES AND EASEMENTS DESCRIBED IN RESTRICTIVE COVENANTS RECORDED IN VOLUME 1105, PAGE 530, OF THE DEED RECORDS OF DALLAS COUNTY, TEXAS.

FLOOD STATEMENT:

ACCORDING TO MY INTERPRETATIONS OF COMMUNITY PANEL NO. 480171 0340J, DATED 08/23/2001, OF THE NATIONAL FLOOD INSURANCE RATE MAPS FOR DALLAS COUNTY, TEXAS, THE SUBJECT PROPERTY APPEARS TO LIE WITHIN FLOOD ZONE "X" AND IS NOT SHOWN TO BE WITHIN A SPECIAL FLOOD HAZARD AREA. THIS FLOOD STATEMENT SHALL NOT CREATE LIABILITY ON THE PART OF THE SURVEYOR.

TEZANTO
817.602.8161
fred@tezanto.com

REGISTERED ARCHITECT ALFREDO PEÑA 27434 STATE OF TEXAS

Alfredo Peña
01-07-22

JESSICA MAROS AND STEPHEN MARLEY
1218 N CLINTON
DALLAS, TX 75208

SURVEY - FOR REFERENCE

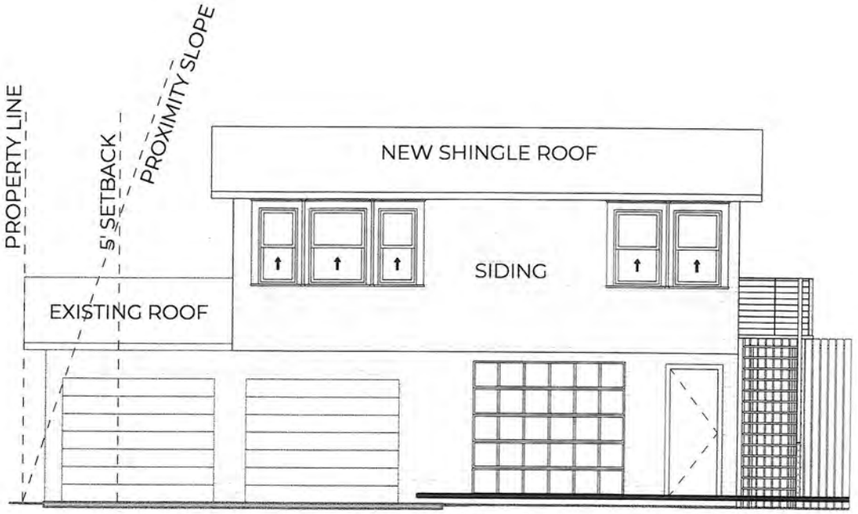
212-020

Project number: 21.06-01

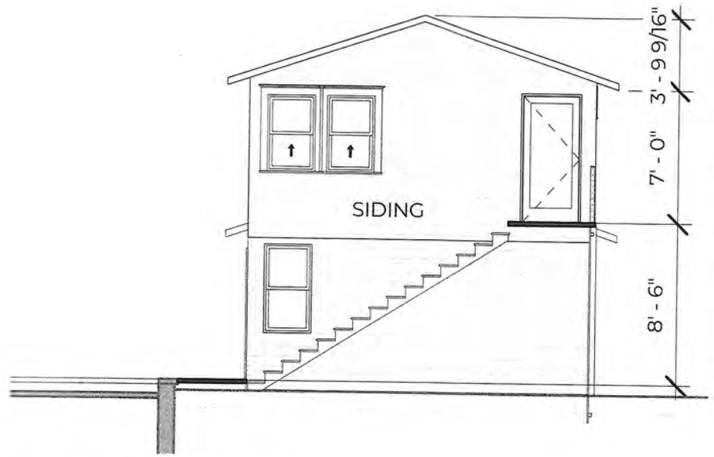
Date: 01-07-22

A-02

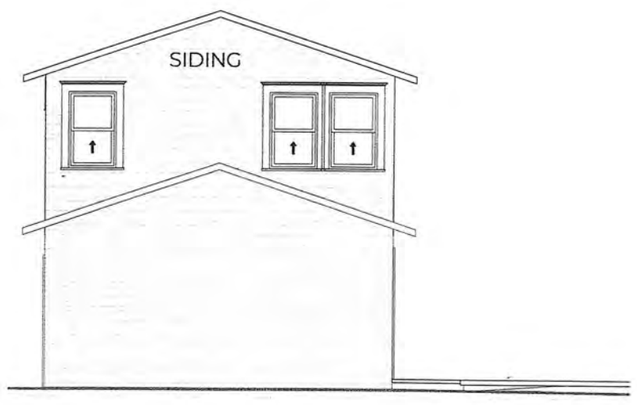
1/7/2022 9:03:54 AM



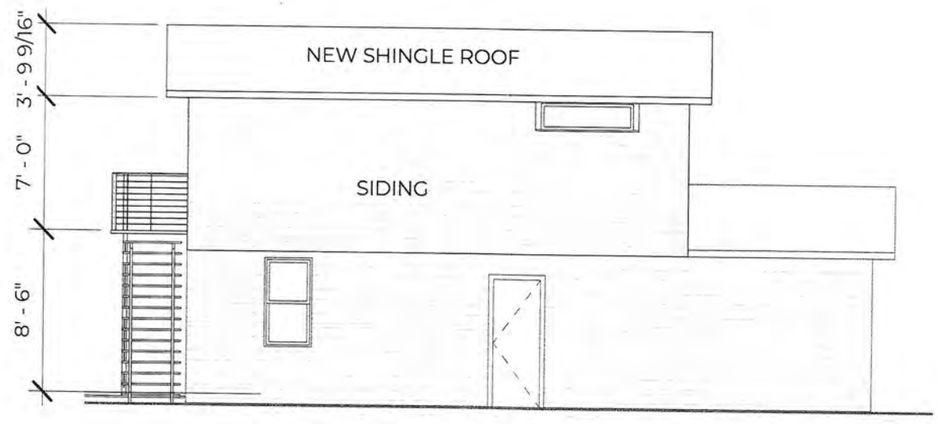
4 WEST ELEVATION
1/8" = 1'-0"



3 SOUTH ELEVATION
1/8" = 1'-0"



2 NORTH ELEVATION
1/8" = 1'-0"



1 EAST ELEVATION
1/8" = 1'-0"

TEZANTO
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REGISTERED ARCHITECT
ALFREDO PEÑA
27434
STATE OF TEXAS

Alfredo Peña
01-07-22

JESSICA MAROS AND STEPHEN MARLEY
1218 N CLINTON
DALLAS, TX 75208

EXTERIOR ELEVATIONS

212-020

Project number: 21.06-01

Date: 01-07-22

A-21

1/7/2022 9:04:01 AM

ZONING INFORMATION

ZONING TYPE:	CD-13 (SUBAREA 1) R-7.5(A)

"EXCEPT AS OTHERWISE PROVIDED IN THIS SUBSECTION, THE DEVELOPMENT STANDARDS OF THE R-7.5(A) SINGLE FAMILY DISTRICT APPLY TO THIS DISTRICT"

DATE LIMIT OF CONTRIBUTING STRUCTURES: 1947

SITE RESTRICTIONS:

FRONT SETBACK:	25 FT (R-7.5(A)) AVERAGE OF BLOCK (CD013)
SIDE/REAR SETBACKS	5 FT
HEIGHT:	30 FT
HEIGHT LOOMING:	3x DISTANCE FROM SIDE PROPERTY LINE
LOT COVERAGE:	45%
FLOOR AREA RATIO:	0.5

LOT COVERAGE:

LOT SIZE:	10,378 SQ FT
ALLOWED LOT COVERAGE	4,670.10 SQ FT
FLOOR AREA RATIO SQ FT LIMIT:	5,189 SQ FT
CURRENT COVERAGE:	1,372 SQ FT - RESIDENCE 800 SQ FT - ACCESSORY STRUCT. **2,172 SQ FT - TOTAL EXISTING COVERAGE**
CURRENT PERCENTAGE:	20.9%
PROPOSED INCREASE:	0 SQ FT

LIVING AREA SQ FT CALCULATIONS FOR ACCESSORY STRUCTURE:

HOUSE CALCULATIONS:

1ST FLR EXISTING SQUARE FOOTAGE (INCLUDING PORCHES):	1,208 SQ FT
2ND FLR EXISTING:	993 SQ FT
TOTAL:	**2,201 SQ FT - TOTAL PROPOSED LIVING AREA**
25% FOR ACCESSORY STRUCUTURE:	550 SQ FT
EXISTING ACCESSORY STRUCTURE:	800 SQ FT TOTAL 513 SQ FT (PARKING/GARAGE) **287 SQ FT - EXISTING STUDIO**
POSSIBLE STUDIO INCREASE:	263 SQ FT
PROPOSED STUDIO ADDITION:	486 SQ FT

main structure per DCAD is 2018#

2018# X .25 = 504#

Existing Accessory Structure is 672#

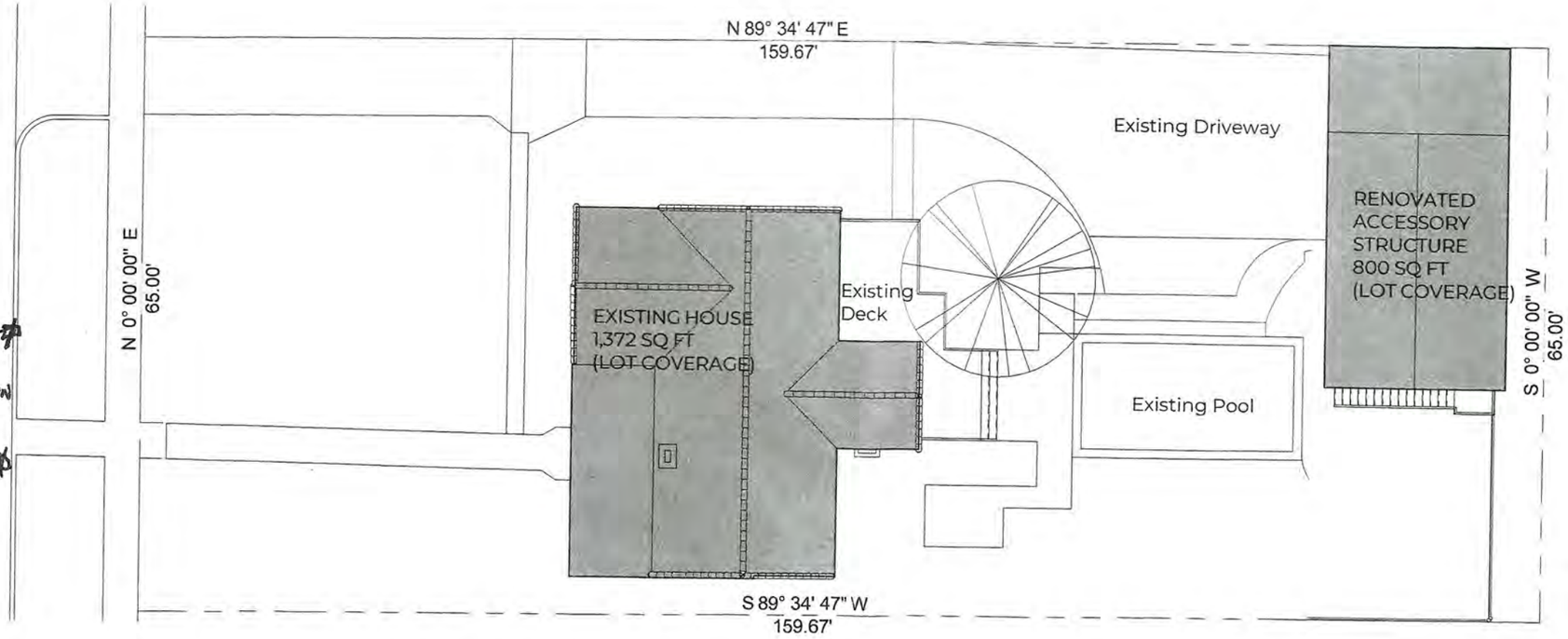
Credit for parking space is 374#

Existing Studio is 287#

Proposed Studio addition is 486#

672 + 486 + 287 = 1445#

1445 - 374 = 1071#



1 **SITE PLAN**
1/16" = 1'-0"

1/7/2022 1:55:25 PM

TEZANTO
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REGISTERED ARCHITECT
ALFREDO PEÑA
27434
STATE OF TEXAS
Alfredo Peña
01-07-22

JESSICA MAROS AND STEPHEN MARLEY
1218 N CLINTON
DALLAS, TX 75208

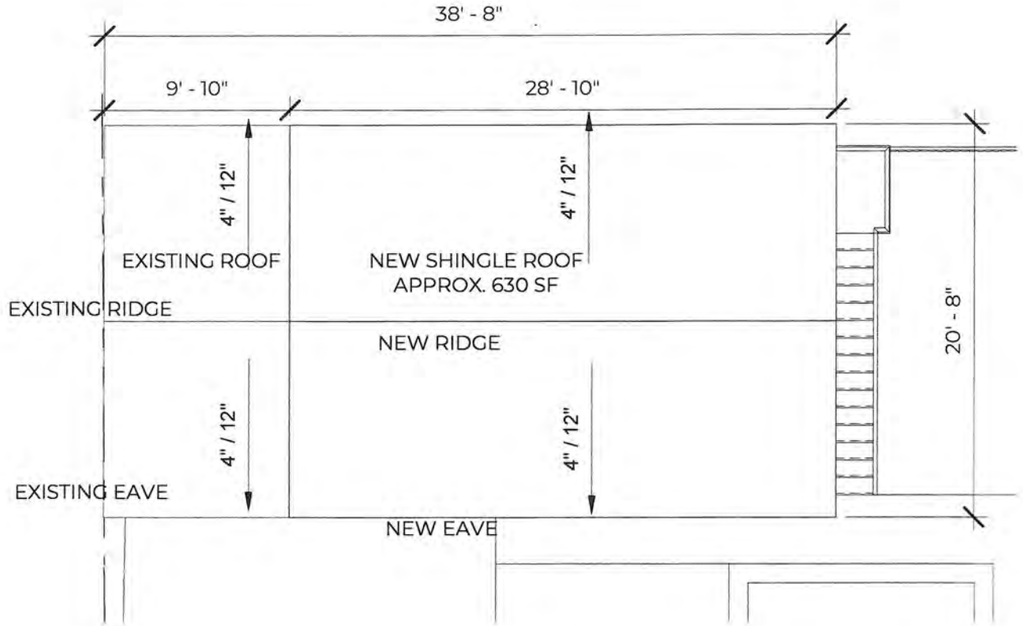
SITE PLAN

212-020

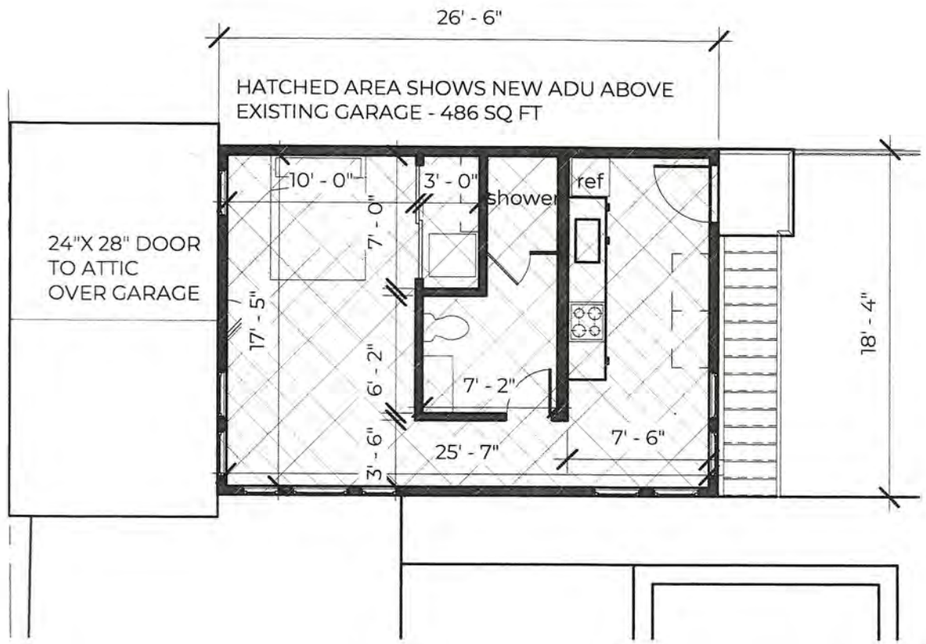
Project number: 21.06-01

Date: 01-07-22

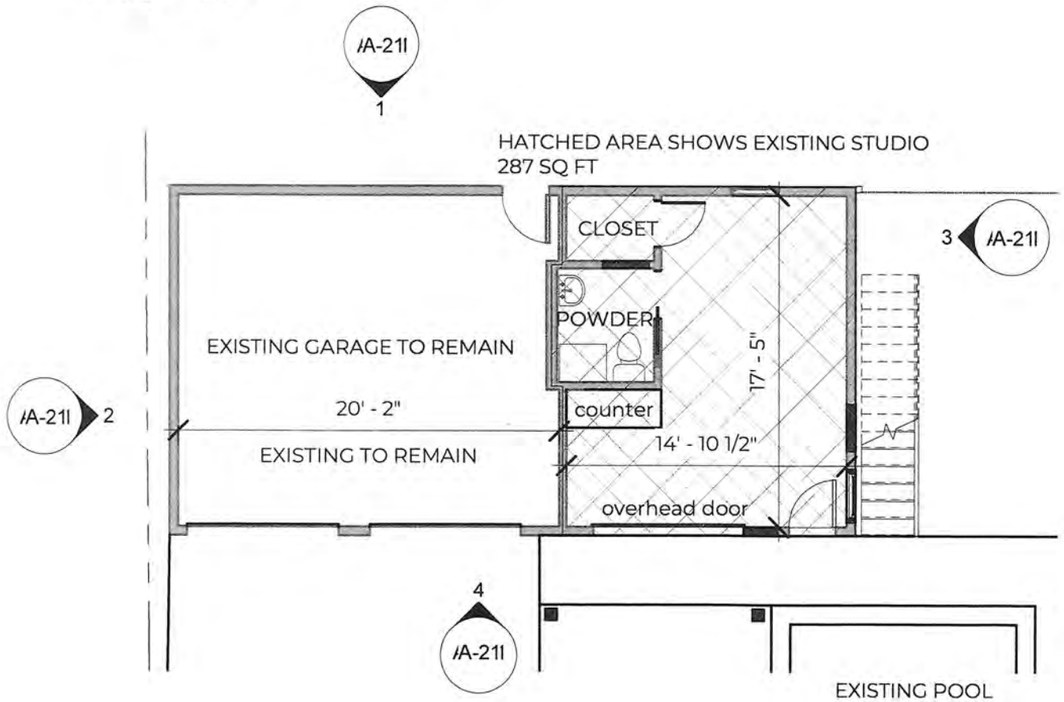
A-01



3 GARAGE ROOF PLAN
1/8" = 1'-0"



2 GARAGE SECOND FLOOR
1/8" = 1'-0"



1 GARAGE FIRST FLOOR
1/8" = 1'-0"

1/7/2022 9:03:57 AM

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REGISTERED ARCHITECT
ALFREDO PEÑA
27434
STATE OF TEXAS

Alfredo Peña
01-07-22

JESSICA MAROS AND STEPHEN MARLEY
1218 N CLINTON
DALLAS, TX 75208

FLOOR PLANS

212-020

Project number: 21.06-01

Date: 01-07-22

A-12

Case Summary

BOA Case No: BDA212-020 for 1218 N Clinton Ave, Dallas, TX 75208

Purpose:

The current owner of 1218 N Clinton Ave desires to develop his property in a commensurate fashion as the neighbors and add square footage onto existing structures; however, as a result of several significant constraints, the property cannot be developed in a straightforward manner and the development plan requires two variances. The purpose of this appeal is to seek a variance to CD-13, Subarea 1 code requirements, specifically:

- An accessory structure ("AU") may not exceed 25% of the floor area of the main structure; and
- A side yard setback of 5 feet.

Key Details & Measurements:

- Lot size = 10,800 SF
- Main Structure = 2,720 SF (proposed improved SF** – see **Appendix** for more detail)
- Allowable | Proposed AU = 680 SF (per DCAD SF) | 798 SF (comprised of 298 SF existing and a 500 SF addition), representing a +4% variance request
- Approx. AU construction year = July 2001
- Implementation of CD-13 = May 2005

Rationale for Request:

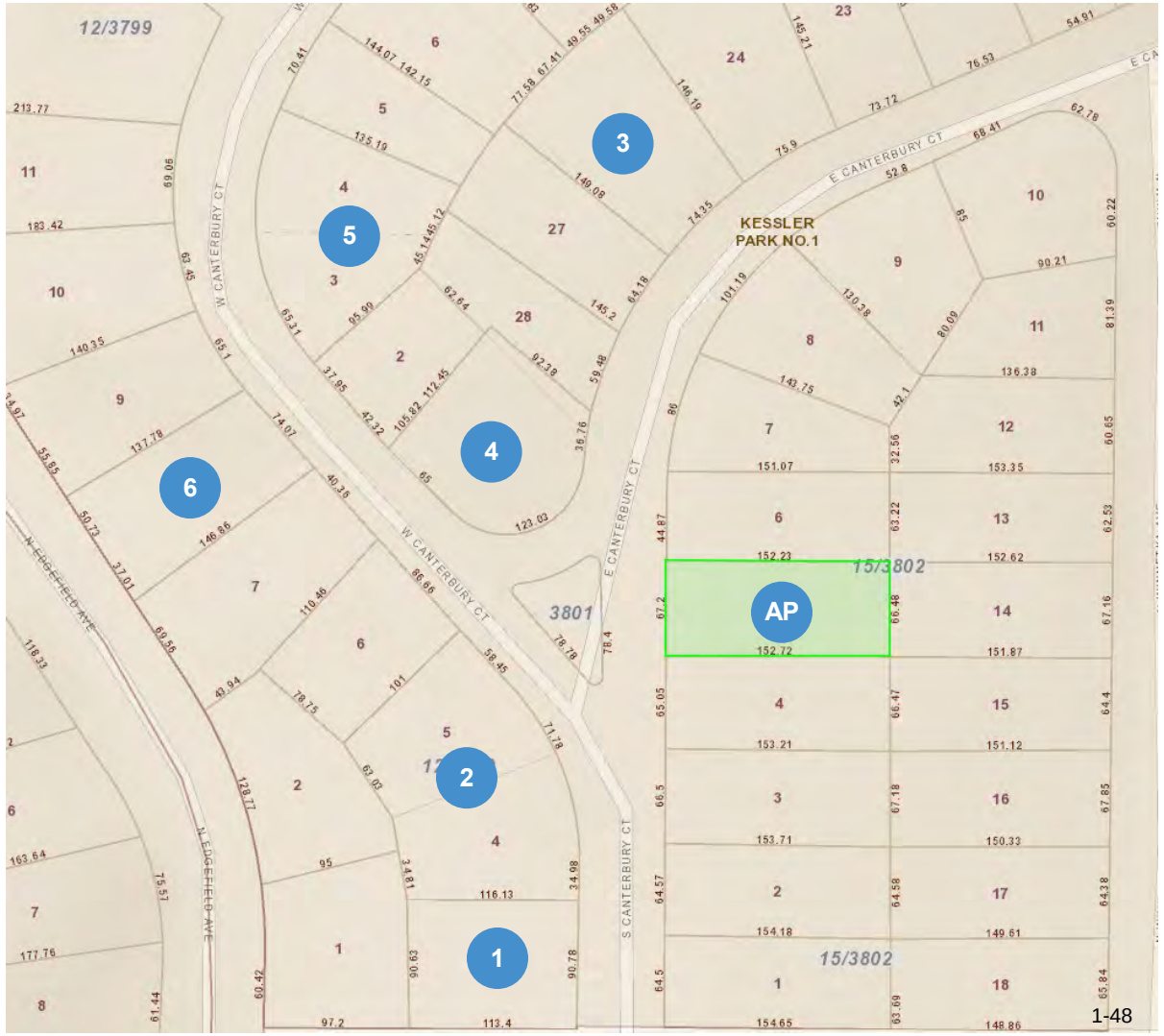
We are requesting this variance due to the following key factors preventing us from developing the property in a commensurate fashion to properties in the immediate vicinity with the same zoning:

1. Disparity in lot size, approximately 22% smaller in SF, to comparative properties in the immediate vicinity that are within CD-13;
2. Limitations to develop property are environmental (significant tree), code (anti-looming), and historical (existing structure and infrastructure) constraints, not self-created; and
3. Significant public interest and support of our intended development plan and request.

** Proposed main structure SF as submitted to CD-13 on Apr 22, 2022, ProjectDOX# CD22040103. Submission to City of Dallas for building permit intended for May 2022 - ProjectDOX # and building permit# forthcoming.

1 Discrepancy In Lot Size

Substantial lot size discrepancy exists comparative to many adjacent properties in the area.



ID	St No.	St Name	Lot SF
1	1203	N Clinton Ave	11,403
2	1217	N Clinton Ave	19,765
AP	1218	N Clinton Ave	10,800
3	1123	Canterbury Ct	12,905
4	1300	Canterbury Ct	12,440
5	1316	W Canterbury Ct	14,820
6	1317	W Canterbury Ct	12,030
Avg. excluding Applicant Property			13,894
Shortage in lot area from comparable average			(3,094)
% shortage			(22.3%)

Source: DCAD

2 Limitations Impacting Site

In addition to lot size, several limitations exist that are not self created.

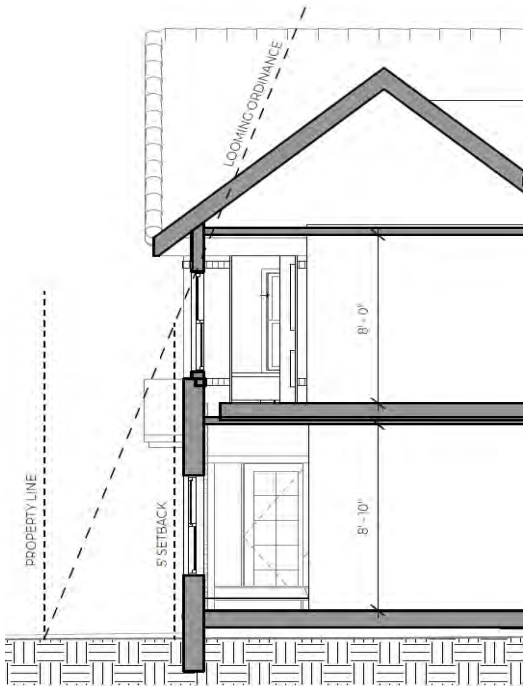
A. Environmental

Expansion rearwards on the northern side of the main house is blocked by a grand, mature eastern redcedar (Juniperus Virginiana) designated as “significant” by the City of Dallas under Article X Tree Conservation Regulations as it measures 24” in diameter at 4’6” off the ground. Based on its growing timeline, the age of this tree is estimated to be ~100+ years old. Removal of the tree would have a detrimental impact to the Applicant Property and the surrounding neighborhood.

We have made a commitment to keep and maintain the tree

B. Code (Anti-looming)

Conservation District ordinances, setback rules, anti-looming rules and design requirements of contributing houses make expansion rearwards on the southern side of the main house prohibitive.



C. Historical

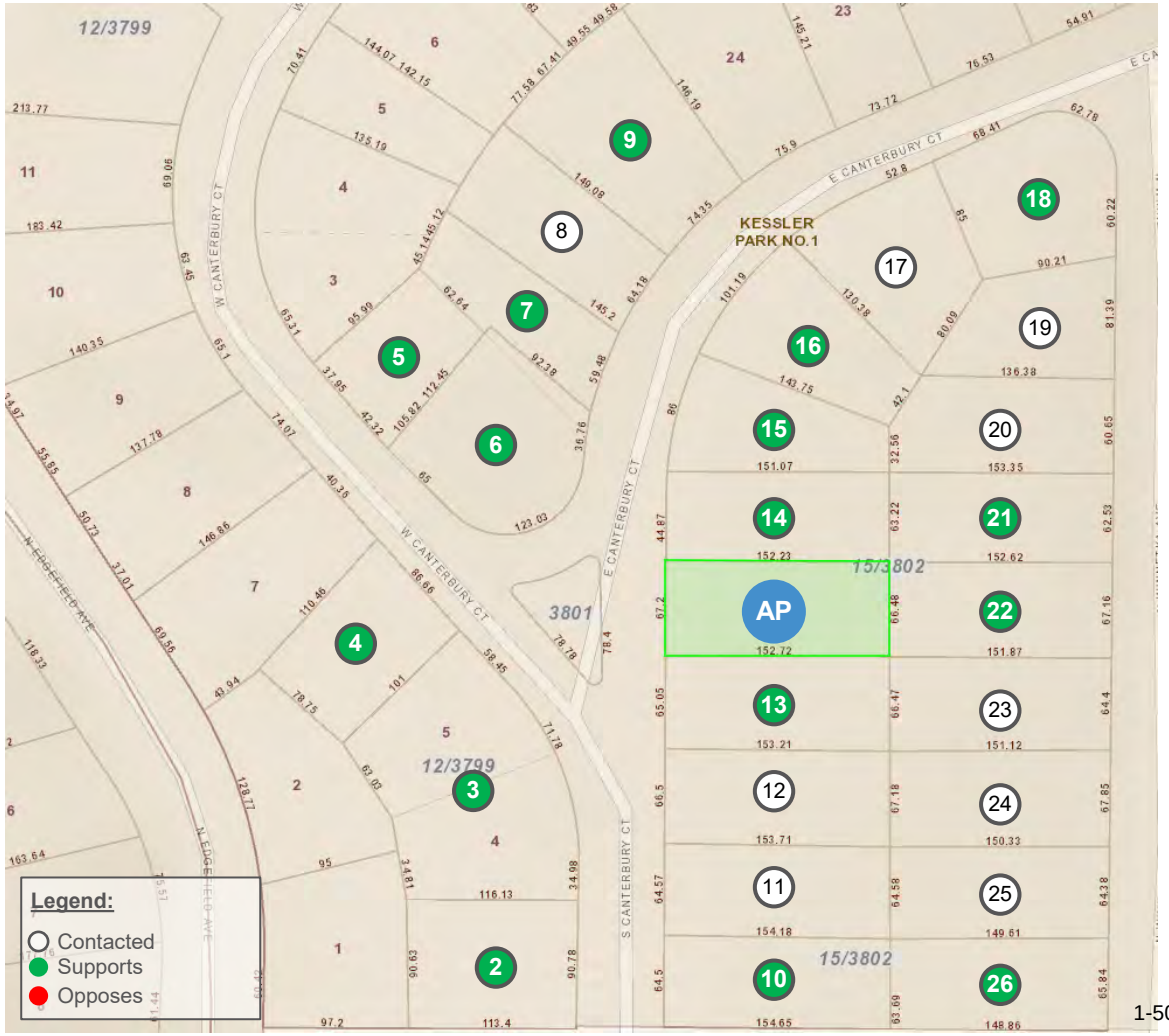
Existing AU structure was built prior to implementation of CD-13 and the 5ft side yard setback regulation. The goal of this setback variance is to maintain what is already existing and add a partial second floor to the structure, not place a larger footprint in the setback area.

The footprint of the existing structure cannot be shifted into (south) the property due to existing pool equipment installed by the previous owners and the code requirement to maintain access to the utility easement behind the property.

Constraints A and B negatively impact the potential SF of the main house, resulting in an AU to main house ratio greater than the required 25% threshold and the need for a variance. Constraint C results in the need for a variance to improve a structure that was grandfathered into CD-13.

3 Substantial Neighbor Support For Proposed Investment

After speaking directly with neighbors, we have received significant support with most committing to writing a letter to the City to directly support our proposed development plan.



1-50

ID	Address		Disposition
AP	1218	N Clinton Ave	n/a
2	1203	N Clinton Ave	Supports
3	1217	N Clinton Ave	Supports
4	1303	W Canterbury Ct	Supports
5	1310	W Canterbury	Supports
6	1300	Canterbury Ct	Supports
7	1131	Canterbury Ct	Supports
8	1127	Canterbury Ct	
9	1123	Canterbury Ct	Supports
10	1202	N Clinton Ave	Supports
11	1206	N Clinton Ave	
12	1210	N Clinton Ave	
13	1214	N Clinton Ave	Supports
14	1222	N Clinton Ave	Supports
15	1124	Canterbury Ct	Supports
16	1118	Canterbury Ct	Supports
17	1112	Canterbury Ct	
18	1235	N Winnetka Ave	Supports
19	1231	N Winnetka Ave	
20	1227	N Winnetka Ave	
21	1225	N Winnetka Ave	Supports
22	1219	N Winnetka Ave	Supports
23	1215	N Winnetka Ave	
24	1211	N Winnetka Ave	
25	1207	N Winnetka Ave	
26	1203	N Winnetka Ave	Supports

In total, 16 neighbors have expressed support for our variance, either verbally or in writing

Summary

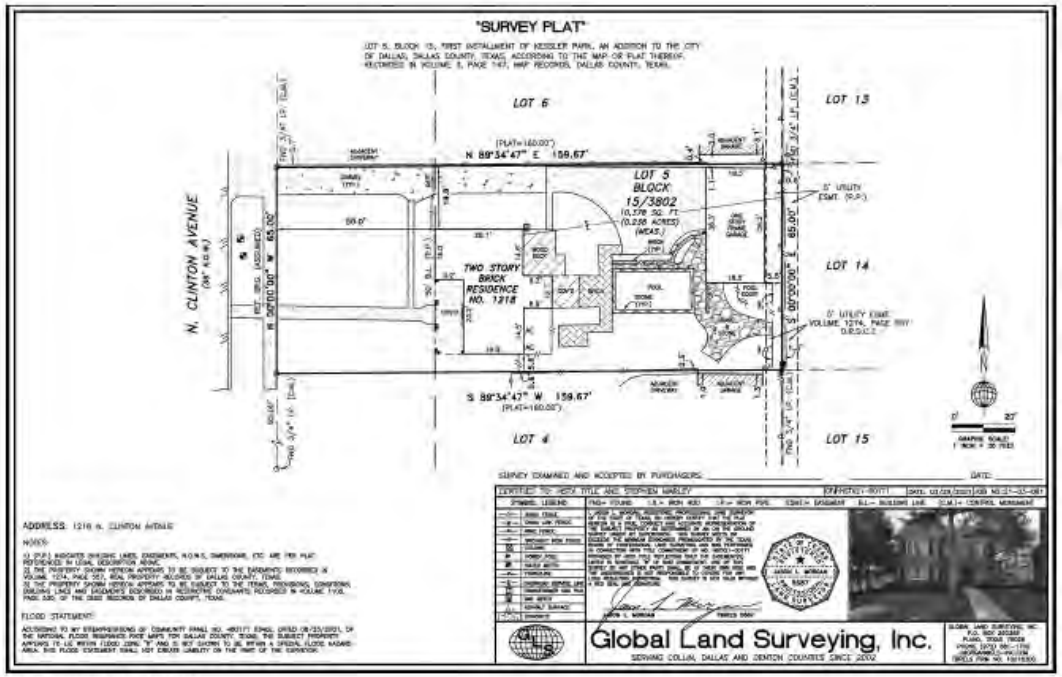
We believe the BOA should grant the variance requests as:

- The variance is necessary to develop the property in a commensurate fashion given lot constraints
- The variance is necessary to develop the property in a commensurate fashion not to relieve a self-created or personal hardship
- The variance is not contrary to public interest and has significant neighbor support
- The development plan does not expand the footprint of the existing grandfathered structure

APPENDIX

Site Plan, Floor Plans, & Elevations

Site Plan



SITE SURVEY - FOR REFERENCE

ZONING INFORMATION

ZONING TYPE:

SITE RESTRICTIONS:

FRONT SETBACK:	
SIDE/REAR SETBACKS:	
HEIGHT:	
HEIGHT (DOMINANT):	
LOT COVERAGE:	
FLOOR AREA RATIO:	

LIVING AREA SQ FT CALCULATIONS FOR ACCESSORY STRUCTURE:

HOUSE CALCULATIONS:

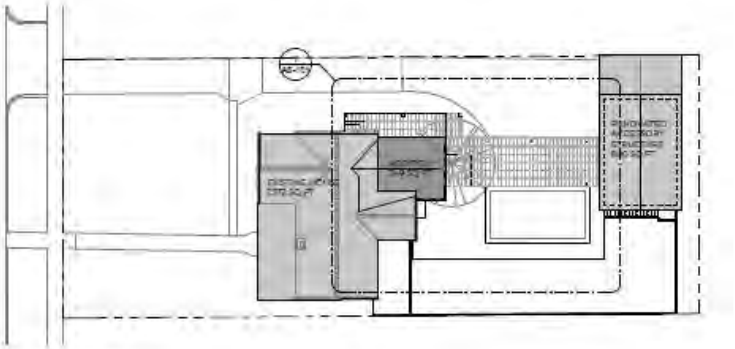
FLOOR AREA PER DCAD:	
1ST FLOOR PROPOSED AREA:	
2ND FLOOR PROPOSED AREA:	
TOTAL:	**PROPOSED FLOOR AREA**

25% FOR ACCESSORY STRUCTURE

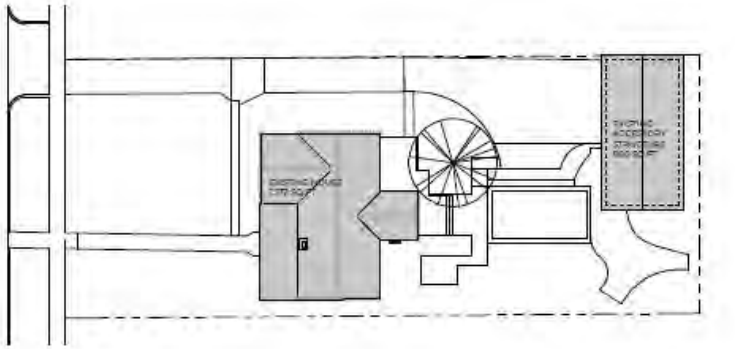
PER DCAD AREA:	
PER PROPOSED DESIGN:	
EXISTING ACCESSORY STRUCTURE:	
PROPOSED STUDIO ADDITION:	
PROPOSED TOTAL FLOOR AREA:	

LOT COVERAGE:

LOT SIZE:	
ALLOWED LOT COVERAGE	
FLOOR AREA RATIO (F.A.R.) SQ FT LIMIT:	
CURRENT COVERAGE:	
	COVERAGE
CURRENT PERCENTAGE:	
PROPOSED INCREASE:	
PROPOSED COVERAGE:	

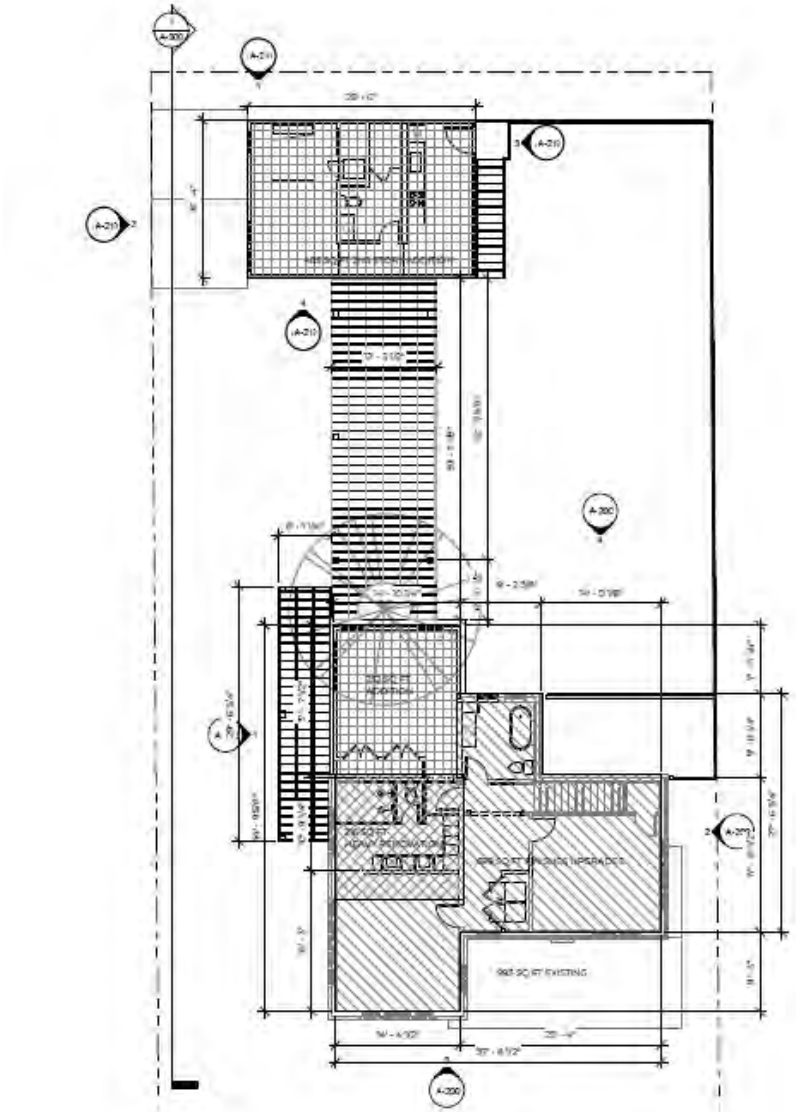


② SITE PLAN - PROPOSED

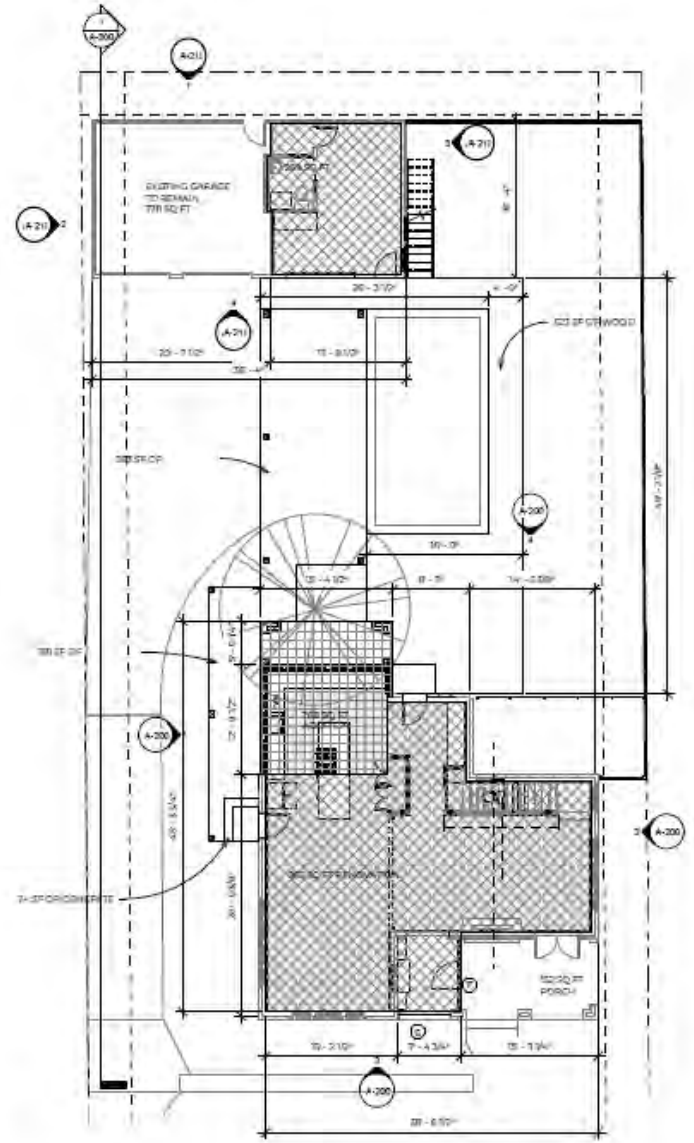


① SITE PLAN - EXISTING

Floor Plans – First And Second Floor

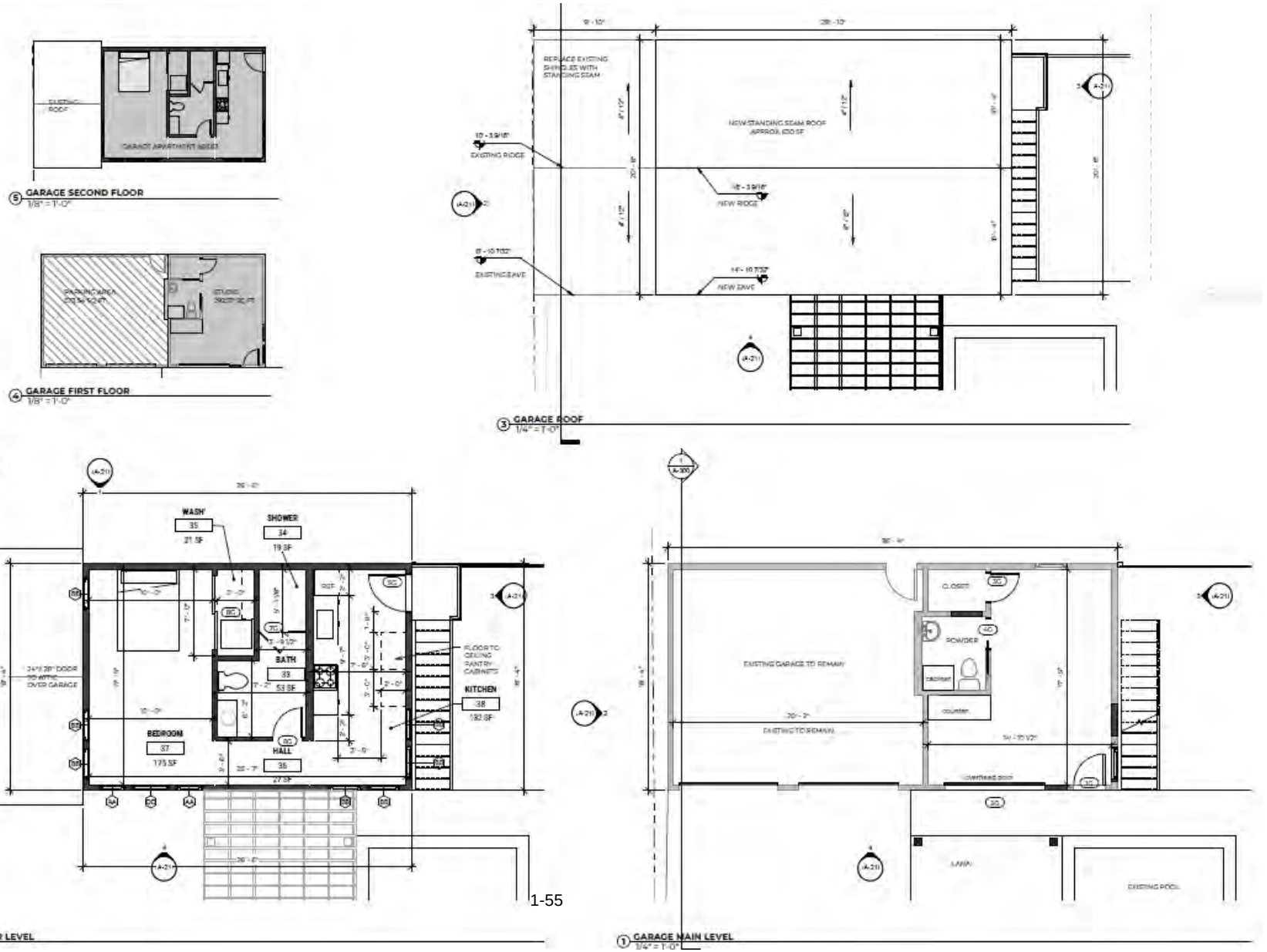


2 OVERALL SECOND FLOOR PLAN
1/8" = 1'-0"



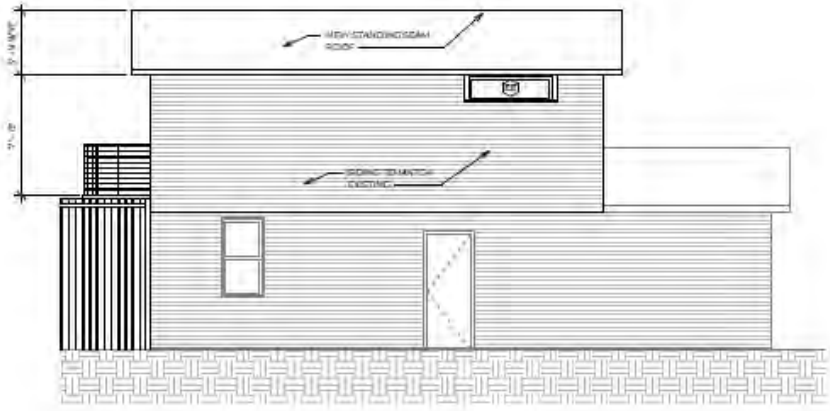
1 OVERALL FIRST FLOOR PLAN
1/8" = 1'-0"

Floor Plan Detail – Proposed Accessory Structure

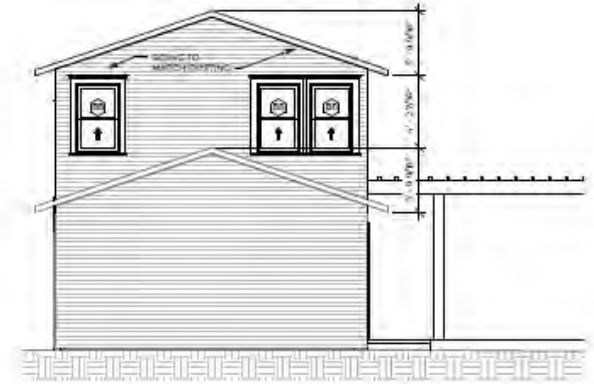


Elevations – Proposed Accessory Structure

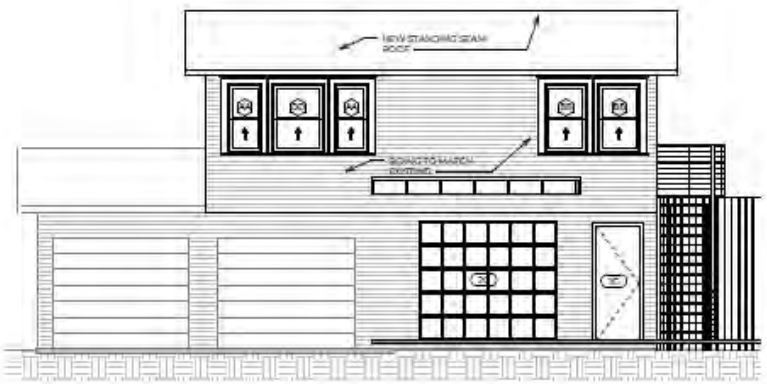
④ GARAGE SOUTH ELEVATION



③ GARAGE EAST ELEVATION



② GARAGE NORTH ELEVATION



① GARAGE WEST ELEVATION

Elevation & Height Comparison Of Structures

① HEIGHT COMPARISON DIAGRAM
1/4" = 1'-0"

From:	Stephen Marley
To:	Daniel, Pamela
Cc:	Jackson, Latonia
Subject:	Fwd: BDA212-020 (3-22-22)
Date:	Friday, April 8, 2022 12:47:08 PM
Attachments:	image005.png image006.png image007.png image008.png image009.png image010.png image011.png image012.png BOA Panel A Hearing Materials for 1218 N Clinton - BDA212-020 04182022.pdf

External Email!

Pamela,

Attached are additional materials for the BOA related to our case - BDA212-020. As mentioned prior, we are requesting a postponement to the May hearing to further compile supporting evidence, perform additional neighbor outreach and receive / document feedback, and submit main house plans to the City that would ultimately impact the size request of one of our variances. I know you mentioned we would have to request that postponement at the April hearing date, but I just wanted to reiterate our desire to postpone.

Given the 1p deadline today, please confirm receipt of this email + materials.

Thank you,

Stephen Marley
M: (214) 732-5784

---------- Forwarded message ---------
From: **Fred Peña** [redacted]
Date: Wed, Mar 30, 2022 at 5:09 PM
Subject: Fwd: BDA212-020 (3-22-22)
To: Stephen Marley <swmarley@gmail.com>

see below/attached.

Fred Peña, AIA
Owner | Architect
T 817.602.8161 tezanto.com
Dallas, TX

---------- Forwarded message ---------
From: **Jackson, Latonia** <latonia.jackson@dallascityhall.com>
Date: Fri, Mar 25, 2022 at 1:16 PM

Subject: RE: BDA212-020 (3-22-22)
To: Fred Peña [redacted]
Cc: Daniel, Pamela <pamela.daniel@dallascityhall.com>

Good afternoon,

Please see attached in reference to your case. Please let us know if you have any questions.

Thank you,

LaTonia Y. Jackson
Board Secretary
City of Dallas | DallasCityNews.net
Department of Planning and Urban Design

Board of Adjustment

Dallas City Hall

1500 Marilla St. 5BN
O: (214) 670-4545
latonia.jackson@dallascityhall.com

How am I doing? Please contact my supervisor at jennifer.munoz@dallascityhall.com

From: Daniel, Pamela <pamela.daniel@dallascityhall.com>
Sent: Thursday, March 17, 2022 5:06 PM
To: Fred Peña [redacted]
Cc: Jackson, Latonia <latonia.jackson@dallascityhall.com>
Subject: BDA212-020 (3-22-22)

Fred,

Good afternoon! Please see attached information regarding the Board of Adjustment and your scheduled March case.

It is highly recommended that the representative and/or applicant is registered to speak or is available for questions on behalf of their respective case. *Please submit speaker registration online at the link below. Registration must be submitted no later than* ***Monday, March 21, 2022 for Panel A.***

Online registration isn't required for in-person attendance, however it is helpful to know the capacity in advance. If planning to attend the live hearing, please respond to this email so that I may notate your attendance for record when submitting the anticipated speaker list.

If you have any questions or concerns regarding speaker registration… or any issues with signing up, please feel free to email latonia.jackson@dallascityhall.com or contact the office at 214-670-4209.

The docket is also on our webpage at the following link:

http://dallascityhall.com/government/meetings/Pages/zoning-board.aspx

With Gratitude!

Pamela F. Riley Daniel
Senior Planner
City of Dallas |
www.dallascityhall.com
Planning & Urban Design

1500 Marilla St., 5BN

Dallas, TX 75201
O: (214) 671-5098
pamela.daniel@dallascityhall.com

jennifer.munoz@dallascityhall.com.

OPEN RECORDS NOTICE: This email and responses may be subject to the Texas Open Records Act and may be disclosed to the public upon request. Please respond accordingly.

FILE NUMBER: BDA212-028(JM)

BUILDING OFFICIAL'S REPORT: Application of Matthew Morgan represented by Roger Albright to appeal the decision of the administrative official at 11411 E. Northwest Hwy., Suite 111. This property is more fully described as Lot 1C, Block A/8043, and is zoned RR Regional Retail District, which requires that the building official shall revoke a certificate of occupancy if the building official determines that the certificate of occupancy was issued on the basis of false, incomplete, or incorrect information; the use is being operated in violation of the Dallas Development Code, other city ordinances, rules, or regulations, or any county, state, or federal laws or regulations. The applicant proposes to appeal the decision of an administrative official in the revocation of a certificate of occupancy.

LOCATION: 11411 E. Northwest Highway, Suite 111

APPLICANT: Matthew Morgan represented by Roger Albright

REQUEST:

A request is made to appeal the decision of the administrative official, more specifically, the Building Official's authorized representative, the Assistant Building Official in Development Services, to deny an application for a Certificate of Occupancy for a restaurant and/or commercial amusement (inside) use determined to be a gambling place, which does not comply with other regulations.

UPDATES:

The City's attorney revised previously submitted additional evidence for consideration (**Attachment B**). No new information was provided by the applicant at the docket deadline.

STANDARD FOR APPEAL FROM DECISION OF AN ADMINISTRATIVE OFFICIAL:

Dallas Development Code Sections 51A-3.102(d)(1) and 51A-4.703(a)(2) state that any aggrieved person may appeal a decision of an administrative official when that decision concerns issues within the jurisdiction of the Board of Adjustment.

The Board of Adjustment may hear and decide an appeal that alleges error in a decision made by an administrative official. Tex. Local Gov't Code Section 211.009(a)(1).

Administrative official means that person within a city department having the final decision-making authority within the department relative to the zoning enforcement issue. Dallas Development Code Section 51A-4.703(a)(2).

STAFF RECOMMENDATION:

Staff does not make a recommendation on appeals of the decisions of administrative officials.

BACKGROUND INFORMATION:

Zoning:

Site:	RR Regional Retail District
Northwest:	R-7.5(A) Single Family District
North:	MF-1(A) Multifamily District
East:	MC-4 Multiple Commercial District
South:	MC-4 Multiple Commercial and CR Community Retail Districts
West:	RR Regional Retail District

Land Use:

The subject site is developed with a mix of commercial uses within multiple suites. Surrounding land uses include single-family to the northwest; multifamily to the north; and commercial uses to the east, south, and west.

Zoning/BDA History:

There have not been any recent related board or zoning cases recorded either on or in the immediate vicinity of the subject site.

GENERAL FACTS/STAFF ANALYSIS:

The board shall have all the powers of the administrative official on the action appealed. The board may in whole or in part affirm, reverse, or amend the decision of the official.

- CO No. 2105031098 for a commercial amusement (inside) use issued on 6/22/21.
- CO revoked by Assistant Building Official Megan Wimer on 12/17/21.
    - Issued in error.
    - In violation of the Texas Penal Code Section 47.04, “Keeping a Gambling Place.”
    - Pursuant to Paragraph (1) of Section 306.5, “Denial,” of Chapter 52, “Administrative Procedures for the Construction Codes,” of the Dallas City Code, the building official shall deny an application for a CO if determined that the request does not comply with the codes, the Dallas Development Code, other city ordinances, rules, or regulations, or any county, state, or federal laws of regulations.

Timeline:

February 2, 2022: The applicant submitted an "Application/Appeal to the Board of Adjustment" and related documents which have been included as part of this case report.

February 14, 2022: The Board of Adjustment Secretary randomly assigned this case to Board of Adjustment Panel A.

February 15, 2022: The Board of Adjustment Chief Planner emailed the applicant the following information:

- a copy of the application materials including the Building Official's report on the application.
- an attachment that provided the public hearing date and panel that will consider the application; the deadline to submit additional evidence for staff to factor into their analysis; and the deadline to submit additional evidence to be incorporated into the Board's docket materials;
- the criteria/standard that the board will use in their decision to approve or deny the request;
- the appeal of a decision of an administrative official procedure outline; and
- the Board of Adjustment Working Rules of Procedure pertaining to documentary evidence.

February 28, 2022: The applicant's attorney submitted additional evidence for consideration (**Attachment A**).

March 2, 2022: The Board of Adjustment staff review team meeting was held regarding this request and the others scheduled for the March public hearings. Review team members in attendance included the following: the Board of Adjustment Chief Planner/Board Administrator, the Building Inspection Senior Plans Examiner, the Board of Adjustment Senior Planner, the Chief Arborist, the Conservation Districts Chief Planner, the Senior Engineer, and the Assistant City Attorney to the board. No review comment sheets were submitted in conjunction with this application.

March 11, 2022: The City's attorney submitted additional evidence for consideration (**Attachment B**).

March 22, 2022: The applicant and City representation agreed to a holdover. Panel A held this appeal to April 19, 2022.

April 8, 2022: No new information was provided by the docket deadline.

April 19, 2022: The applicant and City representation agreed to a holdover. Panel A held this appeal to May 17, 2022.

May 6, 2022: The City's attorney revised previously submitted additional evidence for consideration (**Attachment B**). No new information was provided by the applicant at the docket deadline.

BOARD OF ADJUSTMENT ACTION: April 19, 2022

APPEARING IN FAVOR: Roger Albright 11411 W. NW Hwy. #111 Dallas, TX

APPEARING IN OPPOSITION: Gary Powell 1500 Marilla St. Dallas, TX
Megan Wimer 320 E. Jefferson Blvd. Dallas TX

MOTION: **Neumann**

I move that the Board of Adjustment in Appeal No. BDA 212-028, **hold** this matter under advisement until **May 17, 2022.**

SECONDED: **Lamb**
AYES: 5 – Lamb, Halcomb, Narey, Frankford, Neumann
NAYS: 0 –
MOTION PASSED: 5 - 0 (unanimously)

BOARD OF ADJUSTMENT ACTION: March 22, 2022

APPEARING IN FAVOR: Roger Albright 11411 W. NW Hwy. #111 Dallas, TX
Matt Morgan 11411 W. NW Hwy #111 Dallas, TX

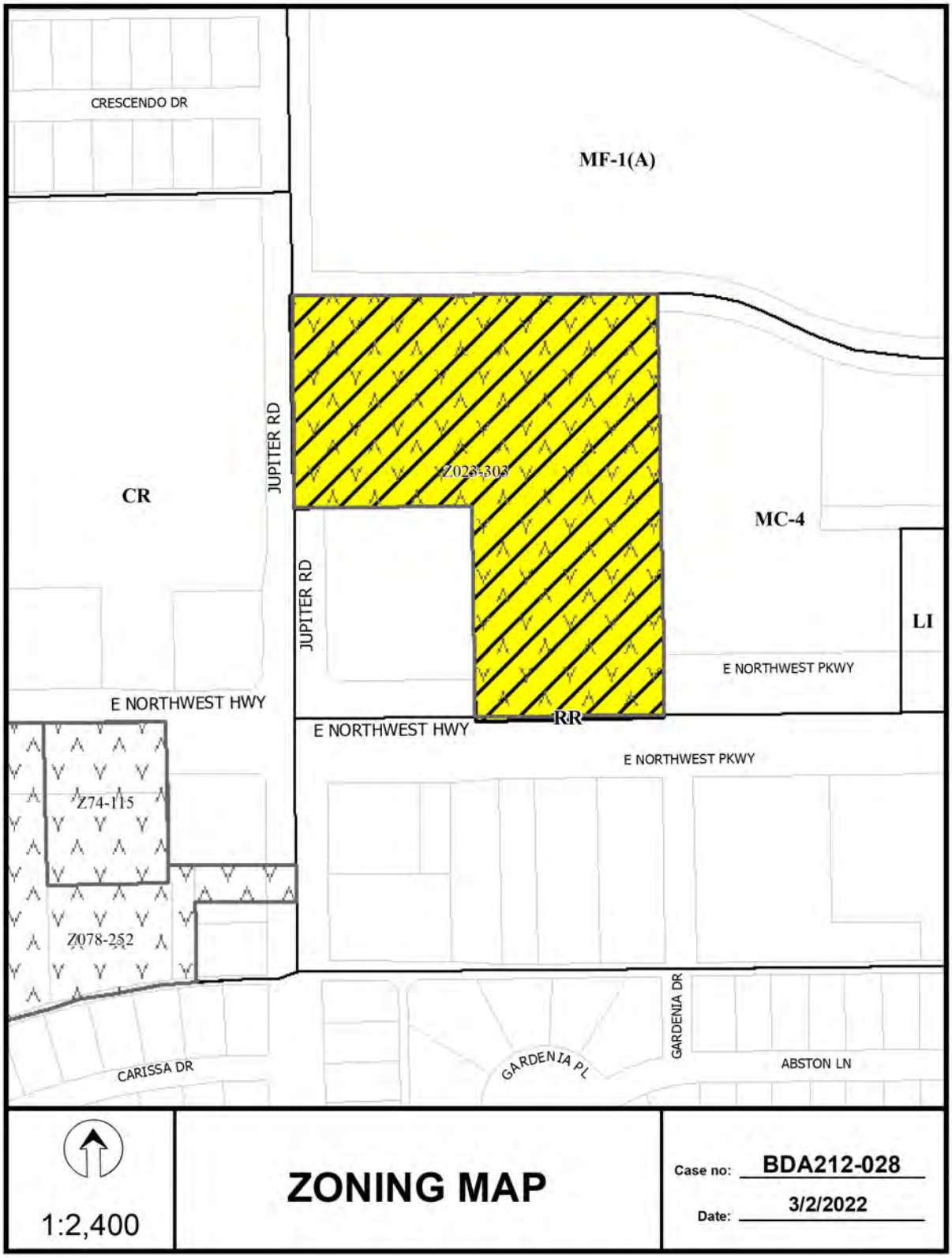
APPEARING IN OPPOSITION: Gary Powell 1500 Marilla St. Dallas, TX
Megan Wimer 320 E. Jefferson Blvd. Dallas TX

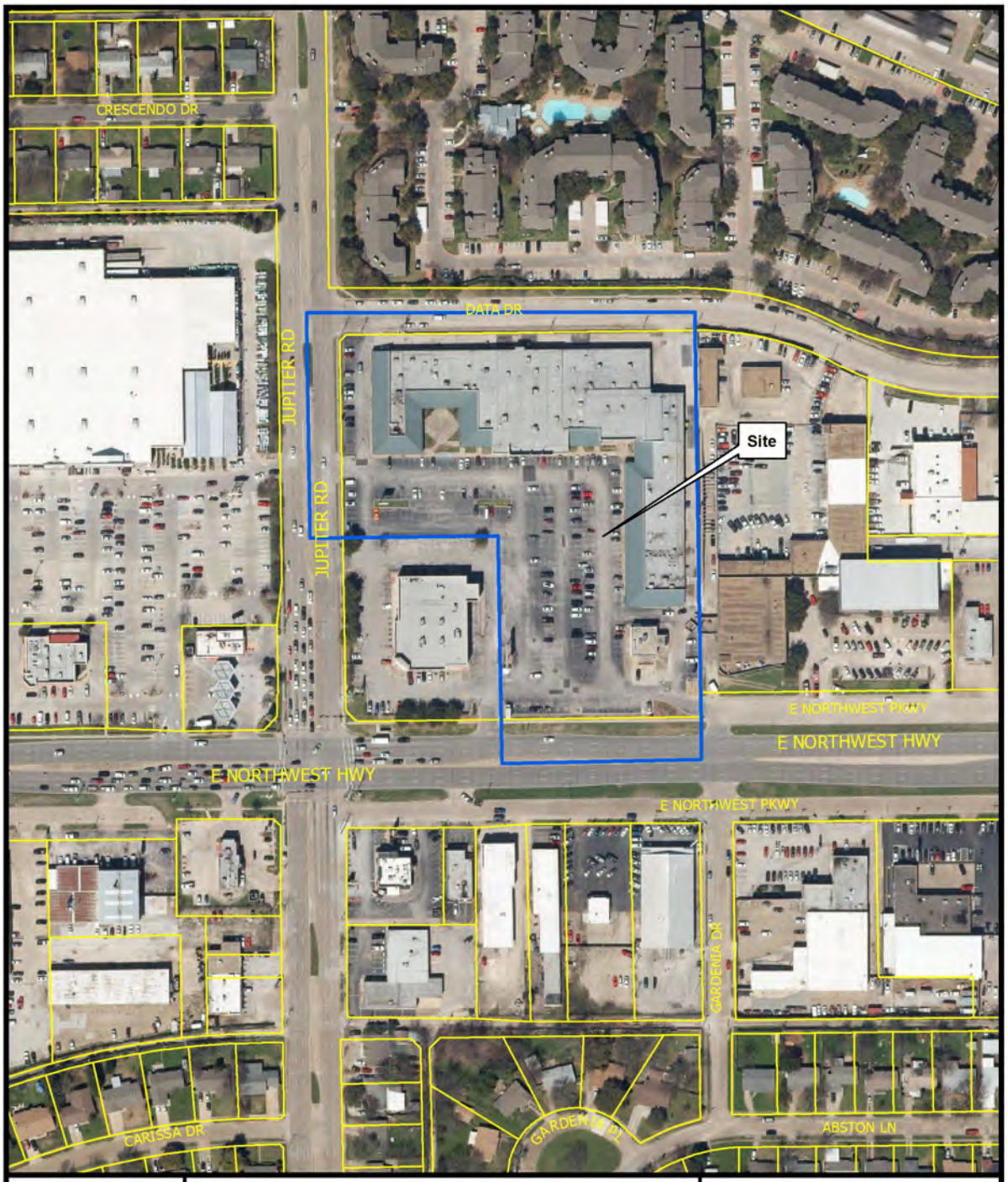
MOTION: **Lamb**

I move that the Board of Adjustment in request No. BDA 212-028, **hold** this matter under advisement until **April 19, 2022**.

SECONDED: **Halcomb**
AYES: 5 – Narey, Frankford Lamb, Halcomb, Neumann
NAYS: 0 -

MOTION PASSED: 5-0 (unanimously)


CRESCENDO DR
MF-1(A)
CR
JUPITER RD
Z028-303
JUPITER RD
MC-4
LI
E NORTHWEST PKWY
E NORTHWEST HWY
RR
E NORTHWEST HWY
E NORTHWEST PKWY
Z74-115
Z078-252
GARDENIA DR
CARISSA DR
GARDENIA PL
ABSTON LN
1:2,400
ZONING MAP
Case no: BDA212-028
Date: 3/2/2022



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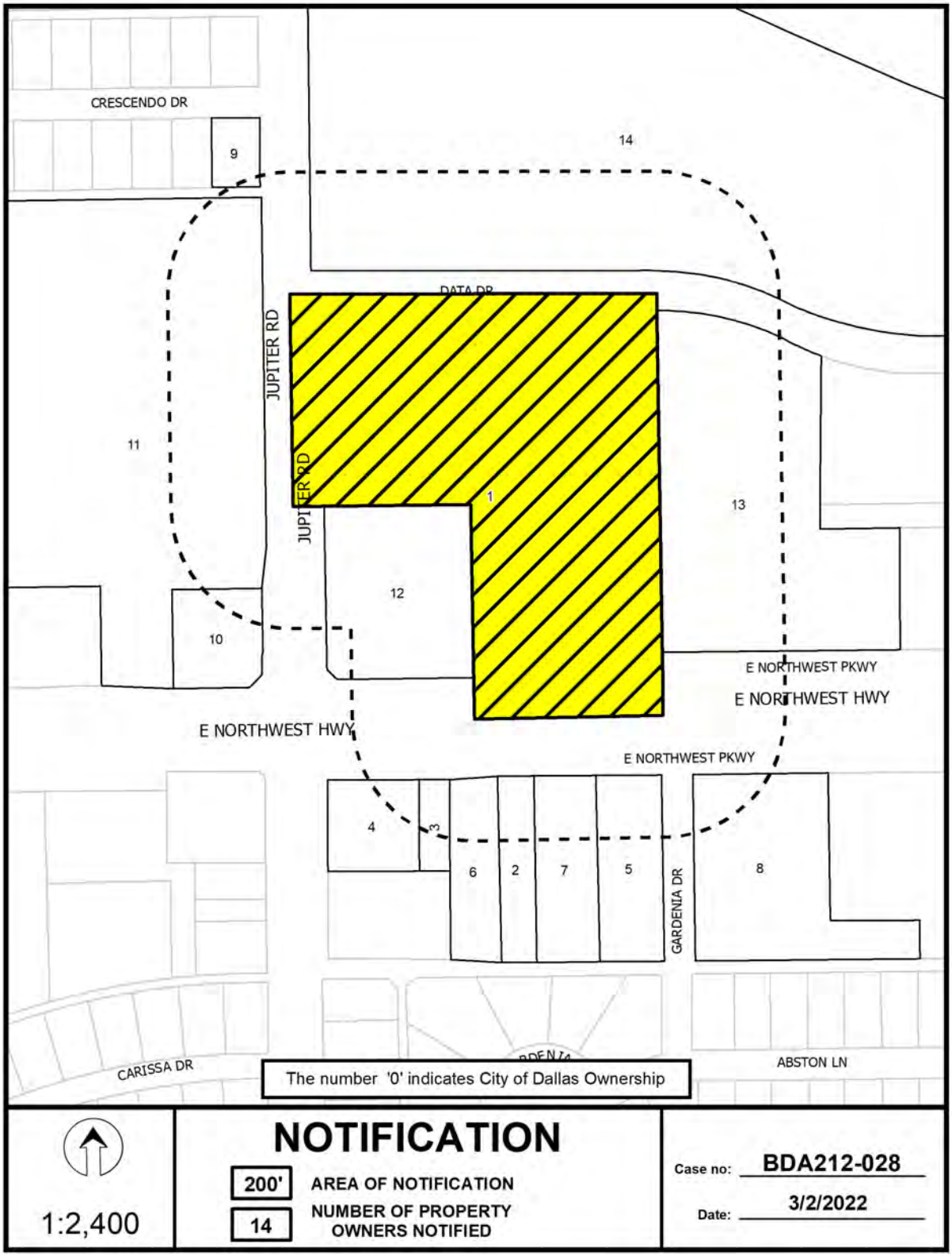
AERIAL MAP

Case no: BDA212-028

Date: 3/2/2022


CRESCENDO DR
9
14
DATA DR
JUPITER RD
JUPITER RD
11
1
13
12
10
E NORTHWEST PKWY
E NORTHWEST HWY
E NORTHWEST HWY
E NORTHWEST PKWY
4
3
6
2
7
5
8
GARDENIA DR
CARISSA DR
ABSTON LN
The number '0' indicates City of Dallas Ownership
NOTIFICATION
200'
AREA OF NOTIFICATION
14
NUMBER OF PROPERTY OWNERS NOTIFIED
1:2,400
Case no: BDA212-028
Date: 3/2/2022

03/02/2022

Notification List of Property Owners

BDA212-028

14 Property Owners Notified

Label #	*Address*		*Owner*
1	11411	E NORTHWEST HWY	BLUMIN HIGHPOINT LTD
2	11426	E NORTHWEST HWY	LONESTARFLAG INVESTMENTS LLC
3	11414	E NORTHWEST HWY	HAWTHORN ROBERT P
4	11404	E NORTHWEST HWY	BURGER KING 757
5	11450	E NORTHWEST HWY	CAMPBELL JAMES R JR &
6	11420	E NORTHWEST HWY	BERHE SAMSON
7	11440	E NORTHWEST HWY	CAMPBELL JAMES R &
8	11540	E NORTHWEST HWY	KHALIL NAGY
9	11332	CRESCENDO DR	KNIGHT STACIE
10	11363	E NORTHWEST HWY	7-ELEVEN INC
11	11333	E NORTHWEST HWY	LOWES HOME CENTERS INC
12	11403	E NORTHWEST HWY	USSTABLEP1 11403 EAST NORTHWEST
13	11501	E NORTHWEST HWY	AVOUE MARCHAND INV INC
14	12610	JUPITER RD	WRC 12610 APARTMENTS LP

City of Dallas

APPLICATION/APPEAL TO THE BOARD OF ADJUSTMENT

Case No.: BDA 212-028

Data Relative to Subject Property: Date: ~~01-26-2022~~ 2-2-22

Location address: 11411 E. Northwest Hwy., Suite 111 Zoning District: RR

Lot No.: ~~1A~~ 1C Block No.: A/8043 Acreage: 5.980 Census Tract: 130.10

Street Frontage (in Feet): 1) 550 ft 2) 314 ft 3) 310 ft 4) _____ 5) _____

To the Honorable Board of Adjustment :

Owner of Property (per Warranty Deed): Blumin-Highpoint, Ltd., a Texas limited partnership

Applicant: Matthew Morgan Telephone: (512)423-9881

Mailing Address: _____ Zip Code: _____

E-mail Address: mkmorgan83@gmail.com

Represented by: Roger E. Albright Telephone: 972-644-8181

Mailing Address: 1701 N. Collins Blvd., Ste 1100, Richardson, TX Zip Code: 75080

E-mail Address: roger@sheilswinnubst.com

Affirm that an appeal has been made for a Variance __ , or Special Exception __ , of _____

Appeal the decision of building official to revoke Certificate of Occupancy.

Application is made to the Board of Adjustment, in accordance with the provisions of the Dallas Development Code, to grant the described appeal for the following reason:

Applicant submitted complete permit and CO application and all requested documents, including a notarized land use statement. Building Official did not indicate that land use statement was inconsistent with state law and proceeded to issue the CO on 6/22/21. No further inquiry of the applicant regarding land use or operation details of the business since issuance of CO until revocation letter. The Building Official has not provided to the applicant any information or specific reason to support its determination that this use is violates Section 47.04(b) of the Texas Penal Code.

Note to Applicant: If the appeal requested in this application is granted by the Board of Adjustment, a permit must be applied for within 180 days of the date of the final action of the Board, unless the Board specifically grants a longer period.

Affidavit

Before me the undersigned on this day personally appeared Matthew Morgan
(Affiant/Applicant's name printed)

who on (his/her) oath certifies that the above statements are true and correct to his/her best knowledge and that he/she is the owner/or principal/or authorized representative of the subject property.

Respectfully submitted: _____
(Affiant/Applicant's signature)

Subscribed and sworn to before me this 26 day of January, 2022

Kelsea L. Sumner
Notary Public in and for Dallas County, Texas

(Rev. 08-01-11)

KELSEA L SUMNER
Notary Public
State of Texas
ID # 13103994-5 1-70
My Comm. Expires 03-13-2025

MEMORANDUM OF
ACTION TAKEN BY THE
BOARD OF ADJUSTMENT

Date of Hearing _____

Appeal was--Granted OR Denied

Remarks _____

Chairman _____

Building Official's Report

I hereby certify that Matthew Morgan

represented by Roger Albright

did submit a request to appeal the decision of the administrative official

at 11411 E. Northwest Hwy Suite 111

BDA212-028. Application of Matthew Morgan represented by Roger Albright to appeal the decision of the administrative official at 11411 E NORTHWEST HWY Suite 111. This property is more fully described as Lot 1C, Block A/8043, and is zoned RR, which requires that the building official shall revoke a certificate of occupancy if the building official determines that the certificate of occupancy was issued on the basis of false, incomplete, or incorrect information; the use is being operated in violation of the Dallas Development Code, other city ordinances, rules, or regulations, or any county, state, or federal laws or regulations. The applicant proposes to appeal the decision of an administrative official in the revocation of a certificate of occupancy.

Sincerely,

David Session, Building Official

CITY OF DALLAS

AFFIDAVIT

Appeal number: BDA 212-028

I, Blumin-Highpoint, Ltd, Owner of the subject property
(Owner or "Grantee" of property as it appears on the Warranty Deed)

at: 11411 E. Northwest Highway
(Address of property as stated on application)

Authorize: Matthew Morgan
(Applicant's name as stated on application)

To pursue an appeal to the City of Dallas Zoning Board of Adjustment for the following request(s)

_____Variance (specify below)

_____Special Exception (specify below)

_X_Other Appeal (specify below)

Specify: Appeal Building Official's decision to revoke Certificate of Occupancy

---

CRAIG BLUMIN
Print name of property owner or registered agent

Signature of property owner or registered agent

Date 2/01/2022

Before me, the undersigned, on this day personally appeared CRAIG BLUMIN

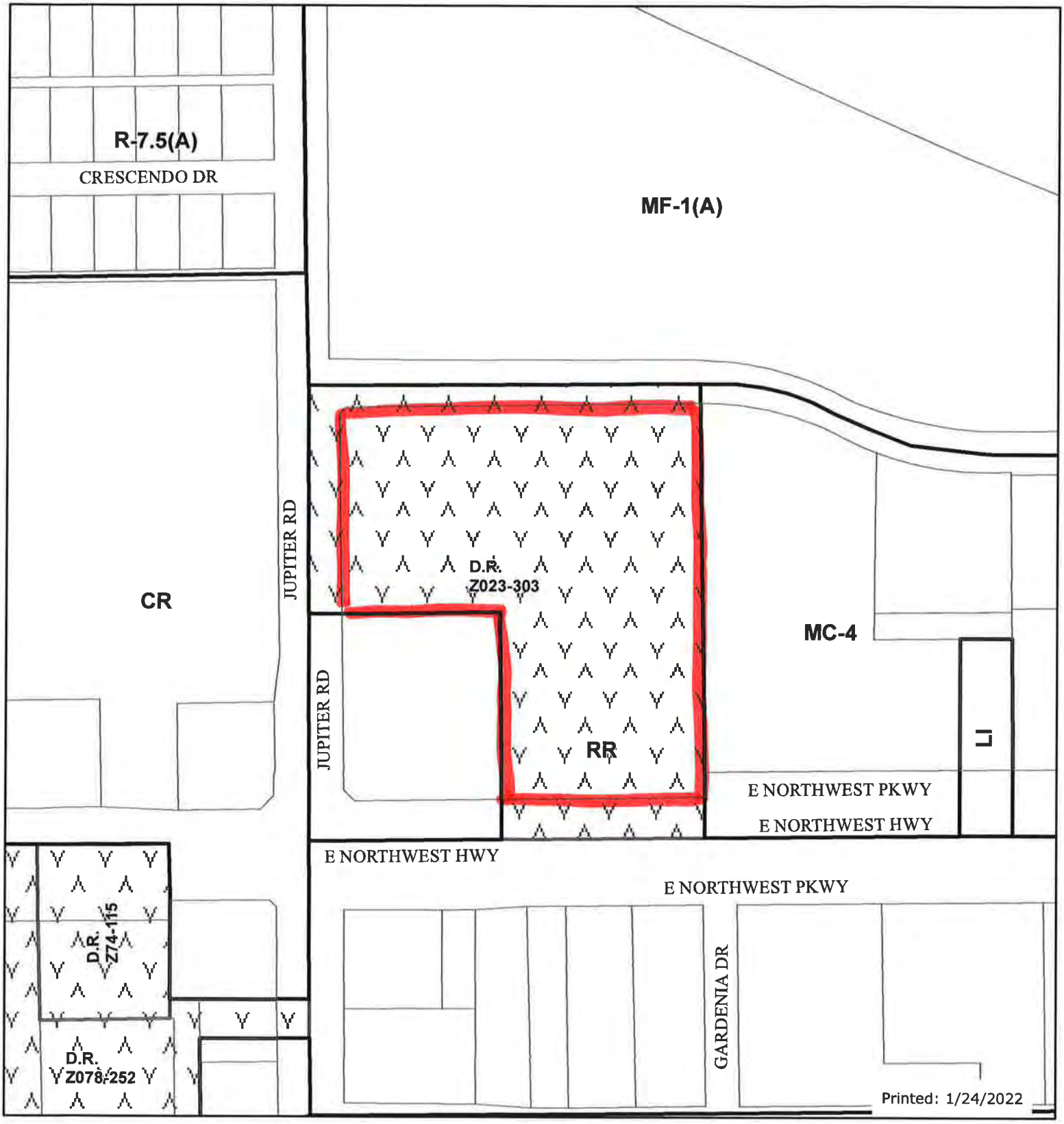
Who on his/her oath certifies that the above statements are true and correct to his/her best knowledge.

Subscribed and sworn to before me this 1ST day of FEBRUARY, 2022

CYNTHIA LANGLEY
ID #11671400
My Commission Expires
July 27, 2023

Notary Public for Dallas County, Texas

Commission expires on 7/27/2023



Legend

- City Limits
- School
- Floodplain
- 100 Year Flood Zone
- Mill's Creek
- Peak's Branch
- X Protected by Levee
- Parks
- railroad
- Certified Parcels
- Base Zoning
- PD193 Oak Lawn
- Dallas Environmental Corridors
- SPSD Overlay
- Deed Restrictions
- SUP
- Dry Overlay
- D
- D-1
- CP
- SP
- MD Overlay
- Historic Subdistricts
- Historic Overlay
- Height Map Overlay
- CD Subdistricts
- PD Subdistricts
- PDS Subdistricts
- NSO Subdistricts
- NSO_Overlay
- Escarpment Overlay
- Parking Management Overlay
- Shop Front Overlay

This data is to be used for graphical representation only. The accuracy is not to be taken/used as data produced by a Registered Professional Land Surveyor (RPLS) for the State of Texas. 'This product is for informational purposes and may not have been prepared for or be suitable for legal, engineering, or surveying purposes. It does not represent an on-the-ground survey and represents only the approximate relative location of property boundaries.' (Texas Government Code § 2051.102)

N

1:2,400

Legend

- City Limits
- School
- Floodplain
- 100 Year Flood Zone
- Mill's Creek
- Peak's Branch
- X Protected by Levee
- Parks
- railroad
- Certified Parcels
- Base Zoning
- PD193 Oak Lawn
- Dallas Environmental Corridors
- SPSD Overlay
- Deed Restrictions
- SUP
- Dry Overlay
- D
- D-1
- CP
- SP
- MD Overlay
- Historic Subdistricts
- Historic Overlay
- Height Map Overlay
- CD Subdistricts
- PD Subdistricts
- PDS Subdistricts
- NSO Subdistricts
- NSO_Overlay
- Escarpment Overlay
- Parking Management Overlay
- Shop Front Overlay

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N

1:2,400

CITY OF DALLAS

December 17, 2021

CERTIFIED MAIL NO. 7020 1290 0000 3631 0129

Matthew Morgan, Owner
11411 W. Northwest Highway #111
Dallas, TX 75218

RE: Revocation of Certificate of Occupancy No. 2105031098 for a commercial amusement (inside) use, dba Shuffle 214 at 11411 W. Northwest Highway #111 ("the Property")

Dear Mr. Crow:

This letter is to inform you that the above-referenced certificate of occupancy issued on June 22, 2021 is hereby revoked. The building official is required to revoke a certificate of occupancy if he or she determines that it was issued in error.[1]

Upon rereview of the attached land use statement submitted with the certificate of occupancy application, it has been determined that the described operations violate Texas Penal Code Section 47.04, "Keeping a Gambling Place." Therefore, Certificate of Occupancy No. 2003031040 was issued in error.

Any use operating on the Property without a certificate of occupancy is an illegal land use that must immediately cease operating.[2] The commercial amusement (inside) use may not operate until a new certificate of occupancy is issued that complies with all relevant codes. Pursuant to Paragraph (1) of Section 306.5, "Denial," of Chapter 52, "Administrative Procedures for the Construction Codes," of the Dallas City Code, the building official shall deny an application for a certificate of occupancy if the building official determines that the certificate of occupancy requested does not comply with the codes, the Dallas Development Code, other city ordinances, rules, or regulations, or any county, state, or federal laws or regulations.

---

1 Paragraph (1) of Section 306.13, "Revocation of Certificate of Occupancy," of Chapter 52, "Administrative Procedures for the Construction Codes," of the Dallas City Code.

2 Section 51A-1.104, "Certificate of Occupancy," of Chapter 51A of the Dallas Development Code; Subsection 306.1, "Use or Occupancy," of Chapter 52, "Administrative Procedures for the Construction Codes," of the Dallas City Code.

CITY OF DALLAS

This decision is final unless appealed to the Board of Adjustment in accordance with Section 51A-4.703 of the Dallas Development Code before the 20th day after written notice of the above action.[3] If you have any questions, please contact me at 214-948-4501.

Sincerely,

Megan Wimer, AICP, CBO, Assistant Building Official
Building Inspection Division

cc: Dr. Eric Johnson, Chief of Economic Development and Neighborhood Services
David Session, CBO, Interim Building Official
Tammy L. Palomino, First Assistant City Attorney
Major Devon Palk, Dallas Police Department
Lieutenant Lisette Rivera, Dallas Police Department

[3] Section 51A-4.703(a)(2), "Board of Adjustment Hearing Procedures," of Chapter 51A of the Dallas Development Code.

SHUFFLE 214

Land Use Statement

6/7/2021

Regarding the property we have leased located at 11411 E. Northwest Highway #111 Dallas, TX 75218, our intended use is to operate a membership-based private club with normal operating hours of 10am-5am daily. Our day-to-day business operations involve facilitating the game of poker. We operate as a private club and thus charge a membership fee prior to becoming a member. In doing so, we operate and abide by all local, state and federal laws. Pursuant to Chapter 47 of the Texas Penal Code, we understand and operate our business whereby no person may receive any economic benefit other than personal winnings at our location. Our sister company, Shuffle 512 operates in the exact same manner and has been in operation since June 2018 in Austin, Texas. We are in good standing with the Texas State Comptroller's office and are up to date on all applicable taxes.

No food or beverages will be prepared or sold on site by our business. We will not be selling or serving alcohol. There will be no live entertainment or dancing on site. Live poker will be the game of skill played in our establishment by our members in a social club atmosphere. There will be no game or amusement machines/computers used on site. The product we sell is membership to our social club and members pay for the amount of time they spend in our establishment. Our use and intended plans have been approved by our Landlord prior to leasing the space.

Sincerely,

Matthew Morgan

Owner, Shuffle 214

512.423.9881

MICHELE STOY
Notary Public, State of Texas
Comm. Expires 07-20-2024
Notary ID 130747078

Michele Stoy
6/8/2021

Help

Product Tracking & Reporting

Home | Search | Reports | Manual Entry | Rates/Enrollments | PTR / SUR | USPS Corporate Accounts

USPS Tracking Intranet Tracking Number Result

Result for Domestic Tracking Number 7020 1290 0000 3631 0129

Tracking Expires On
December 21, 2023

Destination and Origin

Destination

Zip Code	City	State
75218	DALLAS	TX

Origin

City	State

Tracking Number Classification

Class/Service

Class/Service:	Certified Mail
Class of Mail Code/Description:	-1 / Unknown

Destination Address Information

Address:	11411 E NORTHWEST HWY STE 111
City:	DALLAS
State:	TX
5-Digit ZIP Code:	75218
4-Digit ZIP Code add on:	1441
Delivery Point Code:	36
Record Type Code:	Building/Apartment
Delivery Type:	Business, CBU

Service Delivery Information

PO Box:	N
Other Information	Service Calculation Information

Agent Information

Request internal USPS Tracking Plus Statement

Extra Services

Extra Services Details

Extra Service	Result
Certified Mail	

Events

Event	Event Code	Event Date	Event Time	Location	Input Method	Scanner ID	Scanner Name	Tracking Data / Time Received (Time)	Other Information
DELIVERED, LEFT WITH INDIVIDUAL	01	01/19/2022	16:24	DALLAS, TX 75218	Scanned	MDD TR C057A05477 (interface type - wireless)	Scanned by route 5218C019	01/19/2022 16:29:06	Facility Finance Number: 482232 Request Delivery Record View Delivery Signature and Address GEO Location Data Available
DELIVERED, LEFT WITH INDIVIDUAL	01	12/22/2021	12:29	DALLAS, TX 75218	Scanned	MDD TR D009A05590 (interface type - wireless)	Scanned by route 5219C013	12/22/2021 12:33:05	Facility Finance Number: 482232 Request Delivery Record

Event	Event Code	Event Date	Event Time	Location	Input Method	Scanner ID	Carrier Route	Posting Date / Time (Central Time)	Other Information
									View Delivery Signature and Address GEO Location Data Available
OUT FOR DELIVERY	OF	12/22/2021	08:21	DALLAS, TX 75218	System Generated			12/22/2021 08:21:17	
SORTING/PROCESSING COMPLETE	PC	12/22/2021	08:11	DALLAS, TX 75218	System Generated			12/22/2021 08:21:17	
ARRIVAL AT UNIT	07	12/22/2021	06:10	DALLAS, TX 75218	Scanned	PASS-001	Destined to route C013	12/22/2021 06:21:10	OFD Same Day
DEPART USPS FACILITY	EF	12/22/2021	04:52	DALLAS, TX 75260	System Generated			12/22/2021 05:16:08	Dispatch Label ID: DS14 4118 4333 2112 2204 5503 200
ENROUTE/PROCESSED	10	12/21/2021	21:23	DALLAS, TX 75260	Scanned	DBCS-056	Destined to route 75218144130	12/21/2021 21:27:52	
ENROUTE/PROCESSED	10	12/21/2021	08:21	DALLAS, TX 75260	Scanned	DBCS-073	Destined to route 75218144130	12/21/2021 08:26:10	
ENROUTE/PROCESSED	10	12/20/2021	21:43	COPPELL, TX 75099	Scanned	AFCS200-009		12/20/2021 21:56:11	

Enter up to 35 items separated by commas

Select Search Type: Quick Search

Submit

Help

Product Tracking & Reporting

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January 19, 2022

USPS Tracking Intranet

Delivery Signature and Address

Tracking Number: 7020 1290 0000 3631 0129

This item was delivered on 12/22/2021 at 12:29:00

< Return to Tracking Number View

C-19

C-19

11411 E NORTHWEST HWY
STE 111 DALLAS, TX 75218

Enter up to 35 items separated by commas.

Select Search Type: Quick Search | Submit

Help

Product Tracking & Reporting

Home | Search | Reports | Manual Entry | Rates/Commitments | PTR / EDW | USPS Corporate Accounts

January 19, 2022

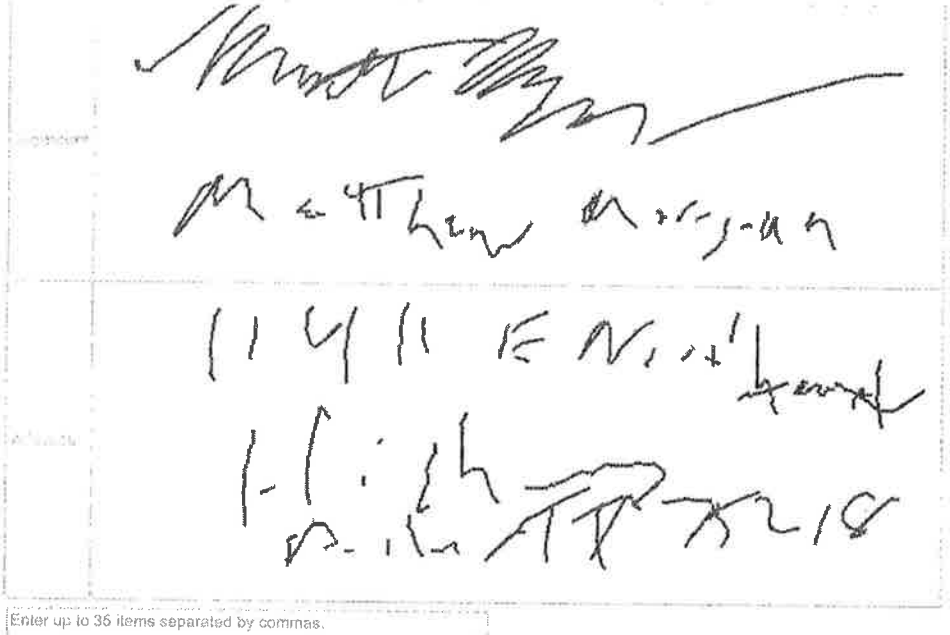
USPS Tracking Intranet

Delivery Signature and Address

Tracking Number: 7020 1290 0000 3631 0129

This item was delivered on 01/19/2022 at 16:24:00

< Return to Tracking Number View



Enter up to 35 items separated by commas.

Select Search Type: Quick Search | Submit

Version: 22.2.1.0.18

Law Offices of Roger Albright, LLC
of counsel to:
SHEILS WINNUBST PC
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1100 ATRIUM II
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RICHARDSON, TEXAS 75080
(972) 644-8181

Roger Albright
roger@sheilswinnubst.com

FACSIMILE (972) 644-8180

February 28, 2022

via email
jennifer.munoz@dallascityhall.com

Hon. Chair and Members
Zoning Board of Adjustment, Panel A
c/o Ms. Jennifer Munoz, Chief Planner/Board Administrator
Current Planning
Department of Sustainable Development and Construction
City of Dallas 1500 Marilla Street, Room 5BN
Dallas, Texas 75201

Re: *BDA 212-028; 11411 E. Northwest Highway, Suite 111*
Appeal of Administrative Official Decision

To the Chair and Members of Panel A:

1. Introduction. We represent Shuffle 214, the Applicant in this appeal from the decision of the Building Official to revoke an existing and validly-issued Certificate of Occupancy ("C.O.") for a use which is clearly permitted by right. We believe this decision has been made in error. Since this is an appeal of an administrative decision no Staff recommendation will be made. Accordingly, we would like to explain the basis for our appeal, supported by the relevant attachments which we will further explain and support at our hearing before you on March 22, 2022.

2. Background. Shuffle 214 submitted an application (attached as **Exhibit 1**) to Building Inspection on April 5, 2021 for a "general remodel for new use C.O.". Shuffle 214 then submitted an application for an "Inside Commercial Amusement, Card Room" use on April 9, 2021 (**Exhibit 2**). This use is allowed by right in the MC-4 zoning classification district in which 11411 E. Northwest Highway is located (*see* **Exhibit 3**).

As requested by City staff, the applicant submitted a Land Use Statement on April 12, 2021 **(Exhibit 4**). Staff then raised questions regarding the impact of the Chapter 47 of the Penal Code. As a result, on June 7, 2021 Shuffle 214 fully responded and filed a more detailed Land Use Statement (**Exhibit 5**). This resolved all of the Building Officials' concerns and a C.O. for a Commercial Amusement (Inside) use was issued on June 22, 2021 (**Exhibit 6**).

3. Location/Revocation. The subject site is located at 11411 E. Northwest Highway, Suite 111, within a larger retail center. There is no issue as to the condition of the building, adequacy of parking, or any other matter other than the legality of the use itself. MC-4 zoning also

allows by right the "Private recreation center, club, or area" use, defined in Sec. 51A-4.208(2) as "An area providing private recreational facilities such as playgrounds, parks, game courts, swimming pools, and playing fields". Nonetheless, Shuffle 214 was informed by letter dated December 17, 2021, that the Building Official, without explanation, had reversed its decision and revoked the Certificate of Occupancy. Apparently, the Building official at some point long past its thorough review of Shuffle 214's application, the issuance of its C.O. and despite no changes in its operation determined that Shuffle 214 was a "Gambling place".

4. Description of Operation of Use. Shuffle 214's expanded Land Use Statement describes in detail the existing business operation, but to summarize briefly, the model is the same as every other approved card room location in Dallas and all other legally-operating card rooms throughout Texas. Entry into the use is by membership only. Guests must sign up for memberships. Time is charged for being seated at a table, *but no "rake" is taken from the pot at all*. In other words, this is in no way anything resembling a casino or gaming-type establishment, much less any kind of "underground" operation, in either of which scenarios the house gets a cut of the pot, that is, a "rake".

5. Not "Gambling" Under State Law. Shuffle 214 is fully confident that its operation as permitted, C.O.d, and ongoing as a Commercial amusement (inside) use is completely legal under relevant Texas law. The applicable state law provision in this instance is Sec. 47.02 of the Texas Penal Code on "Gambling" (Chapter 47 attached as **Exhibit 7)**, which states the following:

Sec. 47.02 GAMBLING.
(a) ***A person*** *commits an offense if he:*

(1) ***makes a bet*** *on the partial or final result of a game or contest or on the performance of a participant in a game or contest;*

(2) makes a bet on the result of any political nomination, appointment, or election or on the degree of success of any nominee, appointee, or candidate; or

(3) ***plays and bets for money or other thing of value*** *at any game played with cards, dice balls, or any other gambling device.*

(b) It is a defense to prosecution under this section that:
(1) the actor engaged in gambling ***in a private place (for example, a private club);***

(2) no person received any economic benefit ***other than personal winnings (the operator of the premises would not a "person" for this purpose, see Subsection (a) above); and***

(3) except for the advantage of skill or luck, the risks of losing and the chances of winning were the same for all participants (also true here).

What we want to strongly emphasize, and what we will discuss at our hearing in connection with applicable Texas statutory and case law that the Applicant's use and operations falls squarely within this safe harbor provision, as evidenced, in part, by similar successful operations of other

locations in Texas.

In addition, this specific business model has been thoroughly reviewed for legality and counsel has found that it is clearly legal under the safe harbor provision. We have attached a lengthy analysis by Kelly, Hart & Hallman, one of the leading firms in Fort Worth and Austin (**Exhibit 8**) and an opinion from Austin-based administrative and regulatory law specialists Rentea & Associates (**Exhibit 9)**. You will, of course, be told something different by the City Attorney's Office, but please be aware that much of what they present to you will be based on very different fact situations, such as the *Gaudio* case where money was collected from players to pay for apartment rental, or Texas Attorney General Opinion GA-0335, where the location in question was a bar/restaurant with a TABC license.

6. Vested Rights Under State Law. We are also aware that consideration has been given to the possibility of amending the *Dallas Development Code* to add a Specific Use Permit requirement for a to-be-defined "poker room"use, as discussed below. Without debating at this time the merits of that effort, our position is quite clear, and is explicitly supported by Texas law: any application for any use, including this use, must be considered and acted upon under the provisions of the *Dallas Development Code* in effect at the time of such application. This appears to have not been done in this instance. This is required by Section 245.002 of the *Texas Local Government Code*, also known as the "Vested Rights" statute, which says:

Sec. 245.002. UNIFORMITY OF REQUIREMENTS.
(a) Each regulatory agency ***shall consider the approval, disapproval, or conditional approval*** *of an application for a permit* ***solely on the basis of any orders, regulations, ordinances, rules, expiration dates, or other properly adopted requirement in effect at the time***:

(1) ***the original application for the permit is filed for review for any purpose,*** *including review for administrative completeness; or*

(2) a plan for development of real property or plat application is filed with a regulatory agency. ***(See Chapter 245 of the Texas Local Government Code, Exhibit 10).***

7. The C.O. was Revoked in Error and Should be Reinstated. Shuffle 214's C.O. was revoked not because of a misunderstanding of the proposed business operation, but more likely for other political reasons such as religious beliefs and Oklahoma Casino lobbying which we will discuss in the public hearing.

A. City Attorney's Original Advice was that This is a Legal Use. Interestingly, it was only after media and political attention beginning last August that the City began to deny poker houses these C.O.s and ultimately, in Shuffle 214's case, revoke their C.O. that had already been issued in 2021. This is not coincidental. These uses have been denied C.O.s, ostensibly on the basis of alleged "illegality", even though the City Attorney personally told the city Council, at the podium in a public meeting that these uses as constituted are legal under applicable Texas law.

B. The City has Completely Reversed its Position. For the last 9 months, this Applicant, in particular, has consistently been completely transparent and above board about their

prospective operation, their business model, and their operational plan and rules. The city of Dallas has reviewed this proposal multiple times by Current Planning Staff, the City Attorney's Office, Building Inspection, and the Dallas Police Department and at every turn allowed this Applicant to proceed at, by the way, its great expense.

8. **Conclusion.** Therefore, we are appealing the action of the Building Official in revoking the C.O., as the existing zoning clearly permits by right the use and the C.O. which was originally properly issued for this legal use. The Board of Adjustment has the power and obligation to overturn the political decision of the Building Official and approve and uphold the issuance of the C.O. pursuant to Sec. 51A-4.703(d)(d) of the *Dallas Development Code,* which says: *(3) The board shall have all the powers of the administrative official on the action appealed from. The board may in whole or in part affirm, reverse, or amend the decision of the official.*

We very much look forward to our opportunity to appear before you at your public hearing on March 22, 2022, at which time we will discuss this matter in additional detail, offer witness testimony, and then respectfully ask you to grant our appeal and uphold the issuance of Shuffle's C.O. Thank you very much.

Sincerely,

/s/ Roger E. Albright

Roger E. Albright

Enclosures
cc: Client

DATE: 04-05-2021

APPLICATION TYPE

REGULAR ○ EXPRESS ◉

PERMIT APPLICATION

PLEASE TYPE OR PRINT CLEARLY

City of Dallas

JOB NO: (OFFICE USE ONLY)

PERMIT NO: (OFFICE USE ONLY)

STREET ADDRESS OF PROPOSED PROJECT	SUITE/BLDG/FLOOR NO	USE OF PROPERTY
11411 E. Northwest Hwy	111	Inside Commercial Amusement

APPLICANT	ADDRESS	CITY	STATE	ZIP CODE
Vickie Rader	3904 Elm Street, Suite B	Dallas	Texas	75226

DBA (IF APPLICABLE)	PHONE NO	E-MAIL ADDRESS (MAY BE USED FOR OFFICIAL COMMUNICATION)
Shuffle 214	(214) 824-7949	vicki@baldwinplanning.com

CONTRACTOR-INDIVIDUAL	CONTRACTOR NUMBER	PIN	COMPANY NAME
	99790	1111	Baldwin Associates

CURRENT HOME REPAIR LICENSE ON FILE?	IF YES, LIST NUMBER	PHONE NO	E-MAIL ADDRESS (MAY BE USED FOR OFFICIAL COMMUNICATION)
○ YES ○ NO			

PROPERTY OWNER (INDIVIDUAL CONTACT)	ADDRESS	CITY	STATE	ZIP CODE
Matt Morgan	11411 E. Northwest 111	Dallas	Texas	

PROPERTY OWNER (COMPANY NAME)	PHONE NO	E-MAIL ADDRESS (MAY BE USED FOR OFFICIAL COMMUNICATION)
Shuffle 214	(512) 423-9881	mkmorgan83@gmail.com

DESCRIPTION OF PROPOSED PROJECT

General remodel for new use CO

VALUATION ($)		CONST AREA (sq ft)	
NEW CONST	29,000	NEW CONST	6,340
MFD OTHER		MFD OTHER	
REMODEL		REMODEL	
TOTAL VALUATION	29,000.00	TOTAL AREA	6,340

PLEASE INDICATE ALL TYPES OF WORK THAT WILL BE PART OF THIS PROJECT BY ~~CHECKING THE APPROPRIATE~~ BOX

☒ BUILDING	☒ PLUMBING	☐ FENCE	☐ DRIVE APPROACH	☐ BACKFLOW	☐ BARRICADE	☐ ENERGY	
☒ ELECTRICAL	☒ FIRE SPRKLR	☐ SIGN	☐ SWIMMING POOL	☐ CUSTOMER SVC	☐ GREEN	☐ PAVING/GRADING	
☒ MECHANICAL	☐ FIRE ALARM	☐ LANDSCAPE	☐ LAWN SPRINKLER	☐ FLAMMABLE LIQUID	☐ OTHER:		

All food service establishments require a grease interceptor to be installed on site. Is there a grease interceptor on site? ○ YES ◉ NO

The following is applicable to all applications for building permits that are accepted and routed for any reviews. As required by Texas Local Government Code Section 214.904, the City of Dallas will grant (Approve) or deny your building permit application to erect or improve a building or other structure no later than the 45th day after the application is submitted. Denial of a permit application due to time constraints may be avoided by agreeing to allow the City the following additional time to review the application:

I hereby agree to a deadline of 14 days to grant or deny the permit after the date of the approval of all of the following reviews, as applicable, where the applicant has provided the plans examiners the requested corrections, plans and actions; and, the contractor has been named on the permit:

Zoning, Building Code, Electrical Code, Plumbing/Mechanical Code, Green Building Code, Health, Historical/Conservation District, Engineering/Flood Plain, Water Utilities, Fire Code, Landscaping and Aviation.

If the permit is granted (*Approved*) within this deadline the City will retain and/or assess all fees. If the permit is denied within this deadline, the City will retain all plan review fees and 20 percent of the permit fees. If the permit application is not granted or denied within the agreed additional time of review, the City will refund any permit fees that have been collected and the City may not collect any permit fees associated with the application.

✓ I AGREE. ○ I DO NOT AGREE.

I UNDERSTAND THAT THIS PERMIT APPLICATION WILL EXPIRE IN 180 DAYS FROM THE APPLICATION DATE. I MAY REQUEST IN WRITING AN ADDITIONAL 180 DAY EXTENSION OF THE PERMIT APPLICATION PRIOR TO THE APPLICATION EXPIRATION. IF THE APPLICATION IS ALLOWED TO EXPIRE, IT MAY ONLY BE REACTIVATED BY THE FILING OF A NEW APPLICATION INCLUDING APPLICABLE PLANS AND FEES

I HAVE CAREFULLY READ THE COMPLETED APPLICATION AND KNOW THE SAME IS TRUE AND CORRECT AND HEREBY AGREE THAT IF A PERMIT IS ISSUED ALL PROVISIONS OF THE CITY ORDINANCES AND STATE LAWS WILL BE COMPLIED WITH WHETHER HEREIN SPECIFIED OR NOT. I AM THE OWNER OF THE PROPERTY OR THE DULY AUTHORIZED AGENT. PERMISSION IS HEREBY GRANTED TO ENTER PREMISES AND MAKE ALL INSPECTIONS. I ALSO AFFIRM THAT THE EMAIL ADDRESS GIVEN ABOVE MAY BE USED FOR OFFICIAL COMMUNICATION CONCERNING THIS APPLICATION AND PERMIT.

APPLICANT'S SIGNATURE		DATE OF APPLICATION SUBMISSION
Vicki Rader	Digitally signed by Vicki Rader Date: 2020.04.16 17:20:38 -05'00'	

FOR OFFICE USE ONLY

STREET ADDRESS OF PROPOSED PROJECT	SUITE/BLDG/FLOOR NO	PROJECT/PERMIT NUMBER

ZONING				BUILDING		MISCELLANEOUS	
LAND USE	TYPE OF WORK	BASE ZONING	PD	CONSTRUCTION TYPE	OCCUPANCY	ACTIVITY	OWN
LOT	BLOCK	REQUIRED PARKING	PROPOSED PARKING	SPRINKLER	OCCUPANT LOAD	FLOOD PLAIN	AIRPORT
LOT AREA	BDA	SUP	RAR	STORIES	DWELLING UNITS	SPECIAL INSPECTIONS	HISTORICAL
DIR	EARLY RELEASE	DEED RESTRICTION	PARKING AGREEMENT	NUMBER BEDROOMS	NUMBER BATHROOMS	DRY	LL

ROUTE TO	REVIEWER	DATE	APPLICATION REMARKS
PRE-SCREEN			
ZONING			
BUILDING			
ELECTRICAL			
PLUMBING/MECHANICAL			
GREEN BUILDING			
HEALTH			
HISTORICAL/CONS DIST			
ENGINEERING			
WATER			
FIRE			
LANDSCAPING			
AVIATION			
OTHER _____			

FEE CALCULATIONS ($)
PERMIT FEE
SURCHARGE
PLAN REVIEW FEE
PREQUALIFICATION REVIEW FEE
EXPRESS PLAN REVIEW HOURLY FEE TOTAL
HEALTH PERMIT APPLICATION FEE
HEALTH PLAN REVIEW FEES
OTHER FEES
OTHER FEES
TOTAL FEES $

PLAN REVIEW NOTES

STAFF AREA	
☐	Approved By: _____
☐	Not Approved

Q-TEAM: *MANDATORY REQUIREMENTS FOR PREQUALIFICATION*

A prequalification Q-TEAM Review is required prior to your application for Q-TEAM Review being accepted. The prequalification allows for review of the "completeness" of documents submitted with the building permit application. The fee associated with this review covers the following tasks with a service level agreement of completion of four (4) working days.

Prequalification Review Fee Based on Square Feet

Square Footage	Maximum Fee
0-10,000	$500
10,001-50,000	$750
50,001-100,000	$1,000
100,001 and greater	$1,250

Review Fee ($1,000/hour) Based on Square Feet

Square Footage	Maximum Fee
0-10,000	$2,000
10,001-50,000	$12,500
50,001-100,000	$27,500
100,001 and greater	$50,000

NOTICE: *The prequalification review **DOES NOT** include review of: Park land dedication, parking analysis, fire alarm, fire sprinkler, signs, pools, detail site review or engineering.*

Address of Submittal: 11411 E. Northwest Hwy #111

Have you held a pre-development meeting for this project?

☐ **Yes** (DEV#_____)/Date (_____)

☒ **No**

Are you platting the property?

☐ **Yes** (S#_____)

☒ **No**

Is there a development plan or Specific Use Permit (SUP) pending for this project?

☐ **Yes** (Please provide a copy of the development plan or the ordinance # for the SUP)

☒ **No**

Execute the remaining information

☐ Review submittal information against the applicable permitting checklists

☐ Provide exiting or life safety plan

☐ Provide a copy of the plat

I, Vicki Rader, have read the above information and acknowledge that I have provided all of the required documents listed above. I understand that if I fail to meet the mandatory requirements for the prequalification Q-TEAM review that **ALL PRE-QUALIFICATION AND REVIEW FEES ARE NONREFUNDABLE**. Further, I understand that in order for a permit to be issued I must comply with all regulatory requirements, construction requirements, and have a legal building site (final plat or approved early release if platting).

Vicki Rader — 4/5/21

(Applicant Signature) (Date)

DATE: 04-09-2021

CO NO: (OFFICE USE ONLY)

CERTIFICATE OF OCCUPANCY APPLICATION

City of Dallas

NAME OF BUSINESS (DBA)			STREET ADDRESS OF BUSINESS	BLDG AND SUITE NUMBER
Shuffle 211			11411 E. Northwest Hwy	111
PROPERTY OWNER			ADDRESS	CITY
Matt Morgan			11411 E. Northwest	Dallas
STATE	ZIP CODE	PHONE NO	E-MAIL ADDRESS	
Texas		(214) 824-7949	mkmorgan83@gmail.com	
MANAGER/OPERATOR OF USE OR BUSINESS			ADDRESS	CITY
Matt Morgan			11411 E. Northwest #111	Dallas
STATE	ZIP CODE	PHONE NO	E-MAIL ADDRESS	
Texas	75235	(214) 824-7949	vicki@baldwinplanning.com	
APPLICANT (if different from manager/operator)			ADDRESS	CITY
Vicki Rader			3904 Elm St., Suite B	Dallas
STATE	ZIP CODE	PHONE NO	E-MAIL ADDRESS	
Texas	75226	(214) 824-7949	vicki@baldwinplanning.com	

DESCRIBE THE PROPOSED USE OF PROPERTY (attach additional sheets if necessary)

Inside Commercial Amusement Card room

What is the square footage of the tenant space or building? 8,340 square feet

(•) YES ( ) NO	Is this a change in use of land, tenant space or building?	*See CO Checklist* for plan submittal requirements.
( ) YES (•) NO	Is the proposed use "personal services" (barber/beauty shop, shoe repair, tailor, instructional arts, laundry/dry cleaning pickup/dropoff, photo studio, handcrafted art work, etc.)?	Provide Personal Services Affidavit executed by business owner, see CO Checklist for additional requirements.
( ) YES (•) NO	Will potentially hazardous foods/open foods be sold and/ or served?	*Food Establishment Permit Application* required (only available from City staff)
( ) YES (•) NO	Will alcohol be sold and/or served?	Provide completed Alcohol Measurement Certification Application Checklist and Alcohol Certification Affidavit Forms
( ) YES (•) NO	Will there be a dance floor?	Annual license fee charged to businesses operating a place where dancing is allowed (subject to approval from Dallas Police Vice Control, call 214-671-3230 for more information. Applications available from Special Collections at 1500 Marilla St, 2DS; M-F, 8 am to 5 pm, or call 214-670-3438.
( ) YES (•) NO	Is the proposed use a doctor's office, dentist office or other medical office or health care office?	Applicant must execute Ambulatory Health Care Facility form attesting to new or pre-exisiting conditions & facts pertaining to the health care model for any doctor's, dentist, or other medical offices (except hospitals, emergency rooms & care clinics).
( ) YES (•) NO	Will you display or offer for sale smoking paraphernalia commonly used, or commonly known to be used, for the inhalation of tobacco or illegal substances (except rolling papers, tobacco cigarettes or cigars)?	If 'YES' then a Specific Use Permit is required; or, if the use is nonconforming then applicant must provide verifiable proof that the that the display or sale or paraphernalia, etc. previously existed. Additionally, you must register under Chapter 12B of the Dallas City Code.

I HAVE CAREFULLY READ THE COMPLETED APPLICATION AND KNOW THE SAME IS TRUE AND CORRECT AND HEREBY AGREE THAT IF A PERMIT IS ISSUED ALL PROVISIONS OF THE CITY ORDINANCES AND STATE LAWS WILL BE COMPLIED WITH WHETHER HEREIN SPECIFIED OR NOT. I AM THE OWNER OF THE PROPERTY OR THE DULY AUTHORIZED AGENT. PERMISSION IS HEREBY GRANTED TO ENTER PREMISES AND MAKE ALL INSPECTIONS. I ALSO AFFIRM THAT THE EMAIL ADDRESS GIVEN ABOVE MAY BE USED FOR OFFICIAL COMMUNICATION CONCERNING THIS APPLICATION AND PERMIT

APPLICANT'S SIGNATURE

Vicki Rader

Digitally signed by Vicki Rader
Date: 2020.03.18 14:45:59 -05'00'

FOR OFFICE USE ONLY

Change in Land Use? ( ) YES ( ) NO **Change in Occupancy?** ( ) YES ( ) NO **Is Use Nonconforming?** ( ) YES ( ) NO

Previous CO Number: _____ **Related Permit Number:** _____ **Related Project Number:** _____

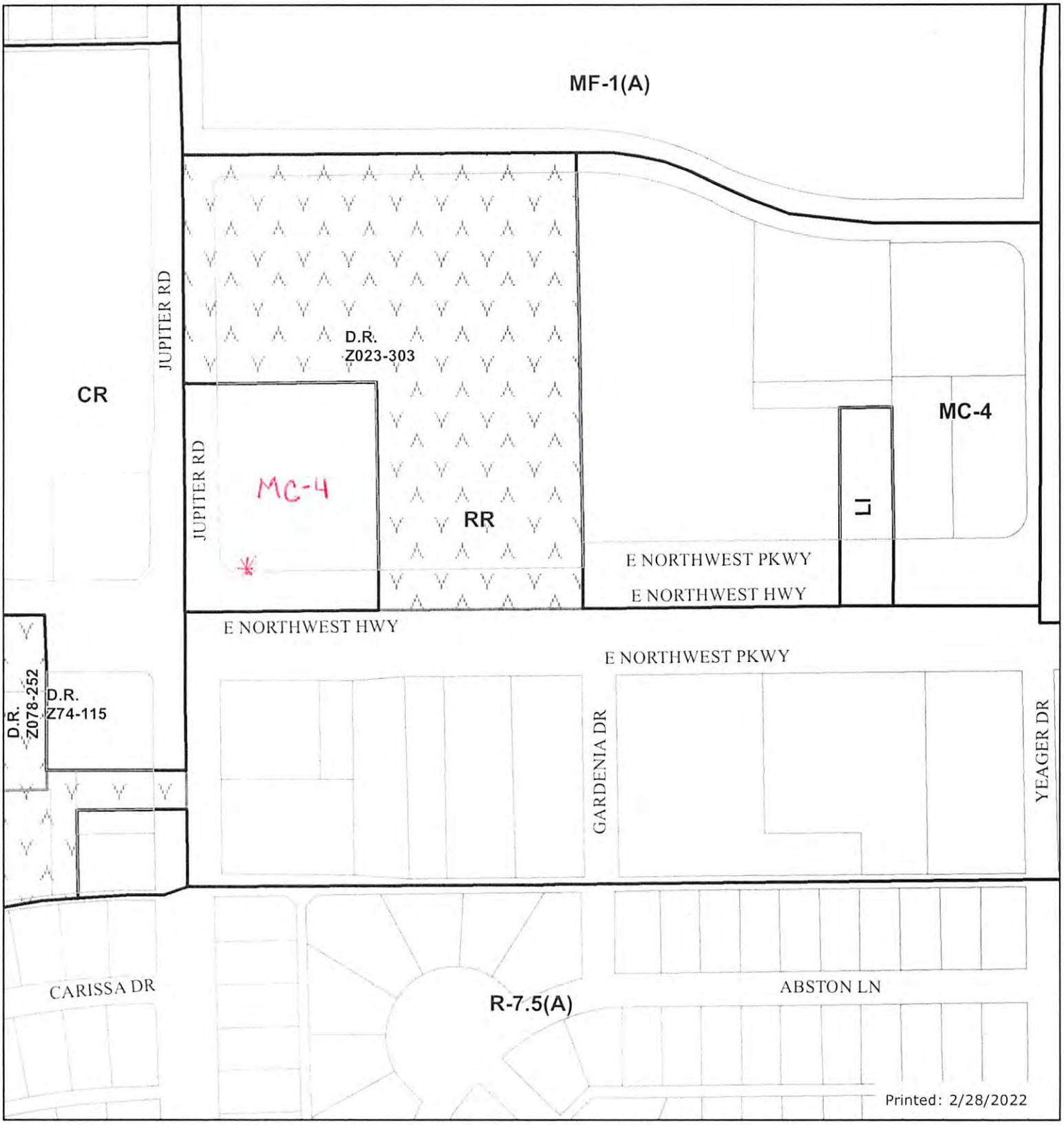
ZONING				BUILDING		MISCELLANEOUS	
LAND USE	BASE ZONING	PD	SUP	CONSTRUCTION TYPE	OCCUPANCY	ACTIVITY	OWN
LOT	BLOCK	REQUIRED PARKING	PROPOSED PARKING	SPRINKLER	OCCUPANT LOAD	FLOOD PLAIN	AIRPORT
LOT AREA	CONSERVATION DIST	PARKING AGREEMENT	DELTA CREDITS	STORIES	DWELLING UNITS	BDA	HISTORIC DISTRICT

ROUTE TO	REVIEWED	DATE	COMMENTS	FEE CALCULATIONS ($)
PRESCREEN				CO APP FEE
ZONING				CE INSP FEE
BUILDING				HEALTH PERMIT APP FEE
CODE				OTHER FEES
OTHER _____				TOTAL FEES $

SUSTAINABLE DEVELOPMENT AND CONSTRUCTION DEPARTMENT • BUILDING INSPECTION DIVISION
OAK CLIFF MUNICIPAL CENTER, 320 E. JEFFERSON BLVD., ROOM 118, DALLAS, TX 75203 • TEL. NO. (214) 948-448

EXHIBIT 2

REV 05-30-2017



Legend

City Limits
School
Floodplain
100 Year Flood Zone
Mill's Creek
Peak's Branch
X Protected by Levee
Parks
railroad
Certified Parcels
Base Zoning
PD193 Oak Lawn
Dallas Environmental Corridors
SPSD Overlay
Deed Restrictions
SUP
Dry Overlay
D
D-1
CP
SP
MD Overlay
Historic Subdistricts
Historic Overlay
Height Map Overlay
CD Subdistricts
PD Subdistricts
PDS Subdistricts
NSO Subdistricts
NSO_Overlay

This data is to be used for graphical representation only. The accuracy is not to be taken/used as data produced by a Registered Professional Land Surveyor (RPLS) for the State of Texas. 'This product is for informational purposes and may not have been prepared for or be suitable for legal, engineering, or surveying purposes. It does not represent an on-the-ground survey and represents only the approximate relative location of property boundaries.' (Texas Government Code § 2051.102)

EXHIBIT 3

1-22

1:2,40

SHUFFLE 214

Land Use Statement

4/12/2021

Regarding the property we have leased located at 11411 E. Northwest Highway #111 Dallas, TX 75218, our intended use is to operate a membership-based private club with normal operating hours of 10am-5am daily. We will not be selling or serving alcohol. Our use and development plans have already been approved by our Landlord.

Regards,

Matthew Morgan
Owner, Shuffle 214
512.423.9881

EXHIBIT
4
1-93

SHUFFLE

Land Use Statement

6/7/2021

Regarding the property we have leased located at 11411 E. Northwest Highway #111 Dallas, TX 75218, our intended use is to operate a membership-based private club with normal operating hours of 10am-5am daily. Our day-to-day business operations involve facilitating the game of poker. We operate as a private club and thus charge a membership fee prior to becoming a member. In doing so, we operate and abide by all local, state and federal laws. Pursuant to Chapter 47 of the Texas Penal Code, we understand and operate our business whereby no person may receive any economic benefit other than personal winnings at our location. Our sister company, Shuffle 512 operates in the exact same manner and has been in operation since June 2018 in Austin, Texas. We are in good standing with the Texas State Comptroller's office and are up to date on all applicable taxes.

No food or beverages will be prepared or sold on site by our business. We will not be selling or serving alcohol. There will be no live entertainment or dancing on site. Live poker will be the game of skill played in our establishment by our members in a social club atmosphere. There will be no game or amusement machines/computers used on site. The product we sell is membership to our social club and members pay for the amount of time they spend in our establishment. Our use and intended plans have been approved by our Landlord prior to leasing the space.

Sincerely,

Matthew Morgan

Owner, Shuffle 214

512.423.9881

NOTARY PUBLIC STATE OF TEXAS
MICHELE STOY
Notary Public, State of Texas
Comm. Expires 07-20-2024
Notary ID 130747076

Michele Stoy
6/8/2021

EXHIBIT
51-94

Certificate of Occupancy

City of Dallas

Address:	**11411 E NORTHWEST HWY Ste:111 75238**
Issued:	**06/22/2021**
Owner:	**MATT MORGAN** **11411 E NORTHWEST HWY Ste:111** **DALLAS,TX**
DBA:	**SHUFFLE#214**
Land Use:	**(7396) COMMERCIAL AMUSEMENT (INSIDE)**
Occupied Portion:	
C.O.#:	**2105031098**

Lot:	1C	Block:	A/8043	Zoning:	RR	PDD:	SUP:
Historic Dist:		Consv Dist:		Pro Park:	61	Req Park: 61	Park Agrmt: N
Dwlg Units:		Stories:		Occ Code:	A3	Lot Area: 260707	Total Area: 6050
Type Const:	IIA	Sprinkler:		Occ Load:		Alcohol: N	Dance Floor:N

Remarks: UPDATED 06/09/2021
TOTAL OL TO BE POSTED = 563 OCCUPANTS
NO COIN-OPERATED MACHINES OR ELECTRONIC GAMES OF AMUSEMENT ON-SITE; NO PREPARING, SERVING OR SELLING OF FOOD OR BEVERAGES ON-SITE

David Session, Building Official

This certificate shall be displayed on the above premise at all times.

Sustainable Development and Construction | Building Inspection Division | 214/948-4480 | www.dallascityhall.com

EXHIBIT 9

7. *Texas Penal Code* Chapter 47.

PENAL CODE

TITLE 10. OFFENSES AGAINST PUBLIC HEALTH, SAFETY, AND MORALS

CHAPTER 47. GAMBLING

Sec. 47.01. DEFINITIONS. In this chapter:

(1) "Bet" means an agreement to win or lose something of value solely or partially by chance. A bet does not include:

(A) contracts of indemnity or guaranty, or life, health, property, or accident insurance;

(B) an offer of a prize, award, or compensation to the actual contestants in a bona fide contest for the determination of skill, speed, strength, or endurance or to the owners of animals, vehicles, watercraft, or aircraft entered in a contest; or

(C) an offer of merchandise, with a value not greater than $25, made by the proprietor of a bona fide carnival contest conducted at a carnival sponsored by a nonprofit religious, fraternal, school, law enforcement, youth, agricultural, or civic group, including any nonprofit agricultural or civic group incorporated by the state before 1955, if the person to receive the merchandise from the proprietor is the person who performs the carnival contest.

(2) "Bookmaking" means:

(A) to receive and record or to forward more than five bets or offers to bet in a period of 24 hours;

(B) to receive and record or to forward bets or offers to bet totaling more than $1,000 in a period of 24 hours; or

(C) a scheme by three or more persons to receive, record, or forward a bet or an offer to bet.

(3) "Gambling place" means any real estate, building, room, tent, vehicle, boat, or other property whatsoever, one of the uses of which is the making or settling of bets, bookmaking, or the conducting of a lottery or the playing of gambling devices.

(4) "Gambling device" means any electronic, electromechanical, or mechanical contrivance not excluded under Paragraph (B) that for a consideration affords the player an opportunity to obtain anything of value, the award of which is determined solely or partially by chance, even though accompanied by some skill, whether or not the prize is automatically paid by the contrivance. The term:

EXHIBIT 7

(A) includes, but is not limited to, gambling device versions of bingo, keno, blackjack, lottery, roulette, video poker, or similar electronic, electromechanical, or mechanical games, or facsimiles thereof, that operate by chance or partially so, that as a result of the play or operation of the game award credits or free games, and that record the number of free games or credits so awarded and the cancellation or removal of the free games or credits; and

(B) does not include any electronic, electromechanical, or mechanical contrivance designed, made, and adapted solely for bona fide amusement purposes if the contrivance rewards the player exclusively with noncash merchandise prizes, toys, or novelties, or a representation of value redeemable for those items, that have a wholesale value available from a single play of the game or device of not more than 10 times the amount charged to play the game or device once or $5, whichever is less.

(5) "Altered gambling equipment" means any contrivance that has been altered in some manner, including, but not limited to, shaved dice, loaded dice, magnetic dice, mirror rings, electronic sensors, shaved cards, marked cards, and any other equipment altered or designed to enhance the actor's chances of winning.

(6) "Gambling paraphernalia" means any book, instrument, or apparatus by means of which bets have been or may be recorded or registered; any record, ticket, certificate, bill, slip, token, writing, scratch sheet, or other means of carrying on bookmaking, wagering pools, lotteries, numbers, policy, or similar games.

(7) "Lottery" means any scheme or procedure whereby one or more prizes are distributed by chance among persons who have paid or promised consideration for a chance to win anything of value, whether such scheme or procedure is called a pool, lottery, raffle, gift, gift enterprise, sale, policy game, or some other name.

(8) "Private place" means a place to which the public does not have access, and excludes, among other places, streets, highways, restaurants, taverns, nightclubs, schools, hospitals, and the common areas of apartment houses, hotels, motels, office buildings, transportation facilities, and shops.

(9) "Thing of value" means any benefit, but does not include an unrecorded and immediate right of replay not exchangeable for value.

Acts 1973, 63rd Leg., p. 883, ch. 399, Sec. 1, eff. Jan. 1, 1974. Amended by Acts 1987, 70th Leg., ch. 313, Sec. 1, 2, eff. Sept. 1, 1987; Acts 1989, 71st Leg., ch. 396, Sec. 1, eff. June 14, 1989; Acts 1993, 73rd

Leg., ch. 774, Sec. 1, eff. Aug. 30, 1993; Acts 1993, 73rd Leg., ch. 900, Sec. 1.01, eff. Sept. 1, 1994; Acts 1995, 74th Leg., ch. 318, Sec. 19, eff. Sept. 1, 1995.

Sec. 47.02. GAMBLING. (a) A person commits an offense if he:

(1) makes a bet on the partial or final result of a game or contest or on the performance of a participant in a game or contest;

(2) makes a bet on the result of any political nomination, appointment, or election or on the degree of success of any nominee, appointee, or candidate; or

(3) plays and bets for money or other thing of value at any game played with cards, dice, balls, or any other gambling device.

(b) It is a defense to prosecution under this section that:

(1) the actor engaged in gambling in a private place;

(2) no person received any economic benefit other than personal winnings; and

(3) except for the advantage of skill or luck, the risks of losing and the chances of winning were the same for all participants.

(c) It is a defense to prosecution under this section that the actor reasonably believed that the conduct:

(1) was permitted under Chapter 2001, Occupations Code;

(2) was permitted under Chapter 2002, Occupations Code;

(3) was permitted under Chapter 2004, Occupations Code;

(4) consisted entirely of participation in the state lottery authorized by the State Lottery Act (Chapter 466, Government Code);

(5) was permitted under Subtitle A-1, Title 13, Occupations Code (Texas Racing Act); or

(6) consisted entirely of participation in a drawing for the opportunity to participate in a hunting, fishing, or other recreational event conducted by the Parks and Wildlife Department.

(d) An offense under this section is a Class C misdemeanor.

(e) It is a defense to prosecution under this section that a person played for something of value other than money using an electronic, electromechanical, or mechanical contrivance excluded from the definition of "gambling device" under Section 47.01(4)(B).

Acts 1973, 63rd Leg., p. 883, ch. 399, Sec. 1, eff. Jan. 1, 1974. Amended by Acts 1981, 67th Leg., 1st C.S., p. 101, ch. 11, Sec. 43, eff. Nov. 10, 1981; Acts 1989, 71st Leg., ch. 957, Sec. 2, eff. Jan. 1, 1990; Acts 1991, 72nd Leg., 1st C.S., ch. 6, Sec. 3; Acts 1993, 73rd Leg., ch. 107,

Sec. 4.04, eff. Aug. 30, 1993; Acts 1993, 73rd Leg., ch. 774, Sec. 2, eff. Aug. 30, 1993. Acts 1993, 73rd Leg., ch. 900, Sec. 1.01, eff. Sept. 1, 1994; Acts 1995, 74th Leg., ch. 76, Sec. 14.53, eff. Sept. 1, 1995; Acts 1995, 74th Leg., ch. 318, Sec. 20, eff. Sept. 1, 1995; Acts 1995, 74th Leg., ch. 931, Sec. 79, eff. June 16, 1995; Acts 1997, 75th Leg., ch. 1256, Sec. 124, eff. Sept. 1, 1997; Acts 2001, 77th Leg., ch. 1420, Sec. 14.834, eff. Sept. 1, 2001.

Amended by:

Acts 2015, 84th Leg., R.S., Ch. 47 (H.B. 975), Sec. 2, eff. January 1, 2016.

Acts 2017, 85th Leg., R.S., Ch. 963 (S.B. 1969), Sec. 2.08, eff. April 1, 2019.

Sec. 47.03. GAMBLING PROMOTION. (a) A person commits an offense if he intentionally or knowingly does any of the following acts:

(1) operates or participates in the earnings of a gambling place;

(2) engages in bookmaking;

(3) for gain, becomes a custodian of anything of value bet or offered to be bet;

(4) sells chances on the partial or final result of or on the margin of victory in any game or contest or on the performance of any participant in any game or contest or on the result of any political nomination, appointment, or election or on the degree of success of any nominee, appointee, or candidate; or

(5) for gain, sets up or promotes any lottery or sells or offers to sell or knowingly possesses for transfer, or transfers any card, stub, ticket, check, or other device designed to serve as evidence of participation in any lottery.

(b) An offense under this section is a Class A misdemeanor.

Acts 1973, 63rd Leg., p. 883, ch. 399, Sec. 1, eff. Jan. 1, 1974. Amended by Acts 1987, 70th Leg., ch. 313, Sec. 3, eff. Sept. 1, 1987; Acts 1993, 73rd Leg., ch. 900, Sec. 1.01, eff. Sept. 1, 1994.

Sec. 47.04. KEEPING A GAMBLING PLACE. (a) A person commits an offense if he knowingly uses or permits another to use as a gambling place any real estate, building, room, tent, vehicle, boat, or other property whatsoever owned by him or under his control, or rents or lets any such property with a view or expectation that it be so used.

(b) It is an affirmative defense to prosecution under this section that:

(1) the gambling occurred in a private place;

(2) no person received any economic benefit other than personal winnings; and

(3) except for the advantage of skill or luck, the risks of losing and the chances of winning were the same for all participants.

(c) An offense under this section is a Class A misdemeanor.

Acts 1973, 63rd Leg., p. 883, ch. 399, Sec. 1, eff. Jan. 1, 1974. Amended by Acts 1977, 65th Leg., p. 667, ch. 251, Sec. 1, eff. Aug. 29, 1977. Acts 1989, 71st Leg., ch. 1030, Sec. 1, eff. Sept. 1, 1989. Acts 1993, 73rd Leg., ch. 900, Sec. 1.01, eff. Sept. 1, 1994.

Sec. 47.05. COMMUNICATING GAMBLING INFORMATION. (a) A person commits an offense if, with the intent to further gambling, he knowingly communicates information as to bets, betting odds, or changes in betting odds or he knowingly provides, installs, or maintains equipment for the transmission or receipt of such information.

(b) It is an exception to the application of Subsection (a) that the information communicated is intended for use in placing a lawful wager under Chapter 2027, Occupations Code, and is not communicated in violation of Section 2033.013, Occupations Code.

(c) An offense under this section is a Class A misdemeanor.

Acts 1973, 63rd Leg., p. 883, ch. 399, Sec. 1, eff. Jan. 1, 1974. Amended by Acts 1993, 73rd Leg., ch. 900, Sec. 1.01, eff. Sept. 1, 1994.
Amended by:

Acts 2017, 85th Leg., R.S., Ch. 963 (S.B. 1969), Sec. 2.09, eff. April 1, 2019.

Sec. 47.06. POSSESSION OF GAMBLING DEVICE, EQUIPMENT, OR PARAPHERNALIA. (a) A person commits an offense if, with the intent to further gambling, he knowingly owns, manufactures, transfers, or possesses any gambling device that he knows is designed for gambling purposes or any equipment that he knows is designed as a subassembly or essential part of a gambling device.

(b) A person commits an offense if, with the intent to further gambling, he knowingly owns, manufactures, transfers commercially, or possesses any altered gambling equipment that he knows is designed for

gambling purposes or any equipment that he knows is designed as a subassembly or essential part of such device.

(c) A person commits an offense if, with the intent to further gambling, the person knowingly owns, manufactures, transfers commercially, or possesses gambling paraphernalia.

(d) It is a defense to prosecution under Subsections (a) and (c) that:

(1) the device, equipment, or paraphernalia is used for or is intended for use in gambling that is to occur entirely in a private place;

(2) a person involved in the gambling does not receive any economic benefit other than personal winnings; and

(3) except for the advantage of skill or luck, the chance of winning is the same for all participants.

(e) An offense under this section is a Class A misdemeanor.

(f) It is a defense to prosecution under Subsection (a) or (c) that the person owned, manufactured, transferred, or possessed the gambling device, equipment, or paraphernalia for the sole purpose of shipping it to another jurisdiction where the possession or use of the device, equipment, or paraphernalia was legal.

(g) A district or county attorney is not required to have a search warrant or subpoena to inspect a gambling device or gambling equipment or paraphernalia on an ocean-going vessel that enters the territorial waters of this state to call at a port in this state.

Acts 1973, 63rd Leg., p. 883, ch. 399, Sec. 1, eff. Jan. 1, 1974. Amended by Acts 1977, 65th Leg., p. 668, ch. 251, Sec. 2, eff. Aug. 29, 1977; Acts 1977, 65th Leg., p. 1865, ch. 741, Sec. 1, eff. Aug. 29, 1977; Acts 1987, 70th Leg., ch. 167, Sec. 5.01(a)(48), eff. Sept. 1, 1987; Acts 1987, 70th Leg., ch. 458, Sec. 1, eff. Sept. 1, 1987; Acts 1989, 71st Leg., ch. 1030, Sec. 2, eff. Sept. 1, 1989; Acts 1991, 72nd Leg., ch. 44, Sec. 1, eff. Aug. 26, 1991; Acts 1991, 72nd Leg., ch. 315, Sec. 1, eff. Sept. 1, 1991; Acts 1991, 72nd Leg., 1st C.S., ch. 6, Sec. 4; Acts 1993, 73rd Leg., ch. 107, Sec. 4.05, eff. Aug. 30, 1993; Acts 1993, 73rd Leg., ch. 284, Sec. 30, eff. Sept. 1, 1993; Acts 1993, 73rd Leg., ch. 900, Sec. 1.01, eff. Sept. 1, 1994.

Sec. 47.07. EVIDENCE. In any prosecution under this chapter in which it is relevant to prove the occurrence of a sporting event, a published report of its occurrence in a daily newspaper, magazine, or other

periodically printed publication of general circulation shall be admissible in evidence and is prima facie evidence that the event occurred.

Acts 1973, 63rd Leg., p. 883, ch. 399, Sec. 1, eff. Jan. 1, 1974. Renumbered from Penal Code Sec. 47.08 and amended by Acts 1993, 73rd Leg., ch. 900, Sec. 1.01, eff. Sept. 1, 1994.

Sec. 47.08. TESTIMONIAL IMMUNITY. (a) A party to an offense under this chapter may be required to furnish evidence or testify about the offense.

(b) A party to an offense under this chapter may not be prosecuted for any offense about which he is required to furnish evidence or testify, and the evidence and testimony may not be used against the party in any adjudicatory proceeding except a prosecution for aggravated perjury.

(c) For purposes of this section, "adjudicatory proceeding" means a proceeding before a court or any other agency of government in which the legal rights, powers, duties, or privileges of specified parties are determined.

(d) A conviction under this chapter may be had upon the uncorroborated testimony of a party to the offense.

Acts 1973, 63rd Leg., p. 883, ch. 399, Sec. 1, eff. Jan. 1, 1974. Renumbered from Penal Code Sec. 47.09 by Acts 1993, 73rd Leg., ch. 900, Sec. 1.01, eff. Sept. 1, 1994.

Sec. 47.09. OTHER DEFENSES. (a) It is a defense to prosecution under this chapter that the conduct:

(1) was authorized under:

(A) Chapter 2001, Occupations Code;

(B) Chapter 2002, Occupations Code;

(C) Chapter 2004, Occupations Code;

(D) Subtitle A-1, Title 13, Occupations Code (Texas Racing Act); or

(E) Chapter 280, Finance Code;

(2) consisted entirely of participation in the state lottery authorized by Chapter 466, Government Code; or

(3) was a necessary incident to the operation of the state lottery and was directly or indirectly authorized by:

(A) Chapter 466, Government Code;

(B) the lottery division of the Texas Lottery Commission;

(C) the Texas Lottery Commission; or

(D) the director of the lottery division of the Texas Lottery Commission.

(b) It is an affirmative defense to prosecution under Sections 47.04, 47.06(a), and 47.06(c) that the gambling device, equipment, or paraphernalia is aboard an ocean-going vessel that enters the territorial waters of this state to call at a port in this state if:

(1) before the vessel enters the territorial waters of this state, the district attorney or, if there is no district attorney, the county attorney for the county in which the port is located receives notice of the existence of the device, equipment, or paraphernalia on board the vessel and of the anticipated dates on which the vessel will enter and leave the territorial waters of this state;

(2) at all times while the vessel is in the territorial waters of this state all devices, equipment, or paraphernalia are disabled, electronically or by another method, from a remote and secured area of the vessel in a manner that allows only the master or crew of the vessel to remove any disabling device;

(3) at all times while the vessel is in the territorial waters of this state any disabling device is not removed except for the purposes of inspecting or repairing the device, equipment, or paraphernalia; and

(4) the device, equipment, or paraphernalia is not used for gambling or other gaming purposes while the vessel is in the territorial waters of this state.

Added by Acts 1993, 73rd Leg., ch. 900, Sec. 1.01, eff. Sept. 1, 1994. Amended by Acts 1995, 74th Leg., ch. 76, Sec. 14.54, eff. Sept. 1, 1995; Acts 1997, 75th Leg., ch. 111, Sec. 1, eff. May 16, 1997; Acts 1997, 75th Leg., ch. 1035, Sec. 55, eff. June 19, 1997; Acts 1999, 76th Leg., ch. 844, Sec. 1, eff. Sept. 1, 1999; Acts 2001, 77th Leg., ch. 1420, Sec. 14.835, eff. Sept. 1, 2001.

Amended by:

Acts 2015, 84th Leg., R.S., Ch. 47 (H.B. 975), Sec. 3, eff. January 1, 2016.

Acts 2017, 85th Leg., R.S., Ch. 963 (S.B. 1969), Sec. 2.10, eff. April 1, 2019.

Acts 2017, 85th Leg., R.S., Ch. 978 (H.B. 471), Sec. 5, eff. November 7, 2017.

Sec. 47.10. AMERICAN DOCUMENTATION OF VESSEL REQUIRED. If 18 U.S.C. Section 1082 is repealed, the affirmative defenses provided by Section 47.09(b) apply only if the vessel is documented under the laws of the United States.

Added by Acts 1989, 71st Leg., ch. 1030, Sec. 4, eff. Sept. 1, 1989. Renumbered from Penal Code Sec. 47.12 by Acts 1990, 71st Leg., 6th C.S., ch. 12, Sec. 2(27), eff. Sept. 6, 1990. Renumbered from Penal Code Sec. 47.13 and amended by Acts 1993, 73rd Leg., ch. 900, Sec. 1.01, eff. Sept. 1, 1994.

Sec. 47.11. DEPOSITS IN CERTAIN ACCOUNTS NOT CONSIDERATION. For purposes of this chapter, opening or making a deposit in a savings account or other savings program subject to a savings promotion raffle under Chapter 280, Finance Code, does not constitute consideration.

Added by Acts 2017, 85th Leg., R.S., Ch. 978 (H.B. 471), Sec. 6, eff. November 7, 2017.

KELLY HART

ANDREW WEBER
andrew.weber@kellyhart.com

TELEPHONE: (512) 495-6451
FAX: (512) 495-6401

March 29, 2018

The Honorable Ken Paxton
Office of the Attorney General
Attn: Opinion Committee
P.O. Box 12548
Austin, Texas 78711-2548

Re: RQ-0209-KP Regarding Texas Penal Code Chapter 47

Dear General Paxton:

I write on behalf of Texas Card House ("TCH"). TCH advocates for maintaining a legal landscape for the facilitation of private poker playing. To this end, I address the Opinion Request submitted by the Honorable Geanie Morrison on January 26, 2018.

I. Operational Background—TCH

TCH is the premier private card club in the State of Texas. The first of its kind, TCH was founded in 2014 and runs two successful facilities in North and South Austin. Since its founding, TCH has led the industry in maintaining a high-end environment designed to attract an exclusive private membership of card-playing aficionados. Part of what attracts TCH's members to this facility is that TCH has taken the following measures to ensure its operations fall soundly within the letter and spirit of the law:

- **Club Amenities**: TCH caters to individuals seeking to enjoy a variety of activities, including poker playing. In addition to facilitating neutral professional dealers and poker tables, TCH also provides members with billiards games, big-screen televisions playing sports and entertainment programs, and private event spaces. The membership's exclusive access to these amenities not only justifies the cost of the membership dues and hourly fees, it also ensures the club does not base its revenue on taking a "rake." Moreover, there is no time-based seat rental at TCH. Members are charged for the entire time they use the facilities, regardless of whether they play poker or pool—or watch television. This ensures the club's revenues are completely divorced from a "rake," whether defined as "a fee or a percentage of the value at risk," or by a "time collection" mechanism. Moreover, this ensures the revenues are not derived from gaming—the

AUSTIN OFFICE | 303 COLORADO STREET, SUITE 2000 | AUSTIN, TX 78701 | TELEPHONE: (512) 495-6400 | FAX: (512) 495-6401
FORT WORTH OFFICE | 201 MAIN STREET, SUITE 2500 | FORT WORTH, TX 76102 | TELEPHONE: (817) 332-2500 | FAX: (817) 878-9280
NEW ORLEANS OFFICE | 400 POYDRAS STREET, SUITE 1812 | NEW ORLEANS, LA 70130 | TELEPHONE: (504) 522-1812 | FAX: (504) 522-1813
BATON ROUGE OFFICE | 301 MAIN STREET, SUITE 1600 | BATON ROUGE, LA 70801 | TELEPHONE: (225) 381-9643 | FAX: (225) 336-9763
MIDLAND OFFICE | 508 W. WALL STREET, SUITE 444 | MIDLAND, TX 79701 | TELEPHONE: (432) 683-4(518
Kelly Hart & Hallman, a Limited Liability Partnership | www.kellyhart.com

EXHIBIT 8

club's revenue is tied to the amount of time a member spends in the club, regardless of what the member spends her/his time doing.

- **Private Membership**: TCH is a private social club. The public is restricted from access to the club's amenities by a lobby in which TCH processes membership applications and collects dues. The only way to proceed through the separated lobby is to become member in good standing, which includes applying, paying dues and receiving membership approval. Strict adherence to this policy ensures that the club remains a "private place" as defined by Texas Penal Code § 47.01(8).

- **Membership Dues and Personal Winnings Are Entirely Separate**: All monies wagered at TCH are between and settled directly by the club's private members. The billing occurs away from the tables to ensure there is no link between access to the club and the players' earnings. There is no "house"—only a professional poker dealer who is a salaried employee prohibited from taking tips for dealing or dealing hands for himself. Once members are inside TCH, all money exchanged stays on the table between participants. This ensures TCH receives no "economic benefit" from the members' personal winnings as required by Texas Penal Code § 47.02(b)(2). The club's only economic benefit derives from private-club membership fees and hourly onsite fees.

- **Chances of Winning are the Same for All Participants**: TCH only facilitates poker games in which the chances for any player to win are equal. None of the games played at TCH have "house odds," where there is an inherent advantage for some participants versus others. TCH offers no "poker insurance" which could skew the odds in favor of the participant. These measures ensure that the "chances for any player to win are equal except for the advantage of skill or luck" in a manner that conforms with Texas Penal Code § 47.02(b)(3).

II. Applicability of "Social Gambling Defense" to TCH Operations

With this business model in mind, I turn to the question presented to you: "Are poker gambling enterprises that charge membership or other fees or receive other compensation from gamblers playing poker—but do not receive a "rake"—permitted under Texas Law?" Chairman Morrison recognized, more specifically, that the permissibility of these operations turns on the application of the "social gambling defense" to both "gambling" under section 47.02 of the Texas Penal Code and "keeping a gambling place" under section 47.04 of the Texas Penal Code. The "social gambling defense" applies when:

(1) the actor engaged in gambling in a private place, or the gambling itself occurred in a private place;

(2) no person received any economic benefit other than personal winnings; and

(3) except for the advantage of skill or luck, the risks of losing and the chances of winning were the same for all participants.

Tex. Penal Code §§ 47.02(b), 47.04(b). Given the parameters discussed above, TCH operates in a manner that satisfies all three of these elements. Thus, both the players and TCH function legally under the "social gambling defense."

A. The Gambling Occurs in a Private Place.

As noted above, TCH is not open to the public. A lobby shields the club's amenities from public view and the general public is allowed absolutely no access to poker or any other club amenity without the acceptance of a membership application and the payment of a membership fee. A membership committee meets once a month and approves and/or removes any memberships, which limits the ability of the general public from accessing the club off the street. For these reasons, TCH satisfies the statutory definition of "private place." *See* Tex. Penal Code § 47.01 (defining "private place" as "a place to which the public does not have access").

1. "Bona Fide Social Clubs" Are Not Public Places According to Established Precedent.

For over a century, Texas courts have held that playing cards in a "bona fide" club in which no one "but members and their guests could enter there, or share its privileges" does not constitute playing in a "public place." *Koenig v. State*, 26 S.W. 835, 839 (1894); *see also Grant v. State*, 27 S.W. 127, 127–28 (1894) (recognizing that a social club in which "no one but its members or invited guests was permitted to visit it" was not a "public place"). Recognizing the reality that these decisions are entirely on point and favorable to private poker clubs, opponents have suggested that "earlier cases which had permitted gambling in certain social clubs [were] (sic) no longer entirely valid with the enactment of the 1973 Penal Code." *See* March 1, 2018 Letter form Locke Lord LLP. This position is not accurate.

Opponents cite the State Bar Commentary adopted with the passage of the 1973 Penal Code for the proposition that pre-enactment caselaw is "no longer entirely valid." *See* State Bar Committee on Revision of the Penal Code, A Proposed Revision of the Penal Code at 330 (Final Draft October 1970) ("[T]he committee's main concern is to prohibit social gambling in public places ... the defense is not extended to clubs and locations that are only ***nominally private*** and to which, the public, ***in fact***, has access.") (emphasis added). The AG construed this commentary when asked to opine "as to whether quarters of fraternal and veterans' organizations and private clubs are 'private places' within section 47.02(b) of the Penal Code." Tex. Att'y Gen. Op. No. H-489 (1975). In so doing, the AG determined that fact-finding was required to determine the degree to which the public had access to the fraternal and veterans' organizations. *Id.* Nowhere in this opinion did the AG suggest that the newly-enacted Penal Code invalidated caselaw pre-dating enactment. On the contrary, the AG has cited pre-1973 opinions in all relevant opinions construing Chapter 47 of the Texas Penal Code.[1]

[1] *See* Tex. Att'y Gen. Op. No. DM-0344 (1995) (opining on whether persons may play and bet on card games using computers with modems or other transmission devices and citing *Comer v. State*, 10 S.W. 106 (1889) and *Heath v. State*, 276 S.W.2d 534 (Tex. Crim. App. 1955) for the proposition that "whether a place is private for [online gaming] purposes has been determined by the scope of access by others;" also citing *Morgan v. State*, 60 SW. 763, 764 (Tex. Crim. App. 1901) for proposition that a private

2. Whether a Place is Public or Only "Nominally Private" Requires Fact Finding Beyond the Scope of This Opinion.

Chairman Morrison's request offers only two assumptions that speak to the first element of the "social gambling defense": advertising to the public and conducting business in a commercial, non-residential area. But TCH engages in many measures to ensure the club remains private—none of which are addressed in Chairman Morrison's hypothetical. Regardless, because no single factor can dispositively make a place "nominally private," the AG should decline to engage in the fact-specific inquiry involved under the first element of the "social gambling defense" altogether. *See* Tex. Att'y Gen. Op. No. JM-1267 (1990) (questions of fact cannot be resolved in the opinion process); Tex. Att'y Gen. Op. No. H-489 (1975) ("In our opinion, whether quarters of private clubs ... are 'private places' for purposes of establishing one element of the [social gambling] defense ... depends on whether such quarters are in fact places to which the public does not have access, and are not only nominally private.") (emphasis in original). Without this fact, the AG should decline to answer the question presented, or should at least assume TCH does not conduct business in a public place.

B. Players Receive No Economic Benefit Other Than Personal Winnings.

The crux of Chairman Morrison's request is whether the "social gambling defense" is foreclosed when an entity facilitating a private poker game receives "economic benefit" that is entirely unrelated to the players' "personal winnings." The opposition encourages the AG to interpret the second "economic benefit" element of the defense broadly to encompass economic benefits to all "persons"—regardless of whether they are playing poker. This extension would necessarily include the private membership dues and hourly fees charged to access the club's amenities within the undefined term, "economic benefit." But this is an unreasonable extension of the term "economic benefit" for the following reasons.

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residence was not "private place" if public had access to gambling there); *see also* Tex. Att'y Gen. Op. No. KP-0057 (2016) (opining on two questions involving fantasy sports leagues and citing *City of Wink v. Griffith Amusement Co.*, 100 S.W.2d 695, 701 (Tex. 1936) (articulating elements necessary to constitute a "lottery" and for proposition that participation in contests that charge nothing to participate and pay nothing to winners involves no consideration and no bet, and as a result cannot constitute illegal gambling in Texas); also citing *Odle v. State*, 139 S.W.2d 595, 597 (Tex. Crim. App. 1940), *Melton v. State*, 124 S.W. 910, 911 (Tex. Crim. App. 1910), and *Mayo v. State*, 82 S.W. 515, 516 (Tex. Crim. App. 1904) for proposition that "the legal meaning of the term 'bet' is the mutual agreement and tender of a gift of something valuable, which is to belong to one of the contending parties, according to the result of the trial of chance or skill, or both combined"); Tex. Att'y Gen. Op. No. DGA-335 (2005) (opining on whether a business that holds an on-premises alcoholic beverage permit may host a poker tournament under two specific fact scenarios and citing *Odle*, 139 S.W.2d at 597 for proposition that legal meaning of bet includes a combination of skill and chance) and *Adams v. Antonio*, 88 S. W.2d 503,505 (Tex. Civ. App.—Waco 1935, writ ref d) for proposition that gaming statute was violated in instance in which chance predominates over skill).

1. The Unambiguous Plain Language of the "Economic Benefit" Element Applies Only to a Person's "Personal Winnings."

First, "economic benefit" is an undefined term, so the fundamental goal "is to ascertain and give effect to the Legislature's intent." *Cadena Comercial USA Corp. v. Texas Alcoholic Beverage Comm'n*, 518 S.W.3d 318, 325 (Tex. 2017). "Where text is clear, text is determinative of that intent." *Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 437 (Tex. 2009). Statutory interpretation should "look to and rely on the plain meaning of a statute's words as expressing legislative intent unless a different meaning is supplied, is apparent from the context, or the plain meaning of the words leads to absurd or nonsensical results." *Cadena*, 518 S.W.3d 325 (citing *Crosstex Energy Servs., L.P. v. Pro Plus, Inc.*, 430 S.W.3d 384, 389-90 (Tex. 2014)). "Words and phrases shall be read in context and construed according to the rules of grammar and common usage." *Id.*

Here, the text could not be more clear: "economic benefit" references "personal winnings." *See* Tex. Penal Code § 47.02(b)(2) ("no person received any economic benefit **other than personal winnings**" (emphasis added). The only person who enjoys "personal winnings" in poker, at least under the TCH model, is the player, not the club operator. Thus, as a matter of plain language interpretation, the unambiguous terms in section (b)(2) apply narrowly to the "economic benefit" of the poker player.

Opponents challenge this narrow construction by arguing that the term "participant" would have been used had the Legislature intended to restrict "economic benefit" only to poker players. But the goal "when construing a statute is to recognize that the words the Legislature chooses should be the surest guide to legislative intent." *Entergy*, 282 S.W.3d at 437. Here, rather than using the term "participant" in subsection (b)(2), the Legislature chose to modify the term "person receiv[ing] any economic benefit" with a narrowing limitation—"other than personal winnings." This confirms the Legislature's intent to apply "economic benefit" to a narrower category than to all persons generally. *See Cadena*, 518 S.W.3d at 328 ("[W]e presume the Legislature chooses a statute's language with care, including each word chosen for a purpose, while purposefully omitting words not chosen.").

Cadena is instructive on construing a statute that contains a "narrowing modifier" similar to the "other than personal winnings" language used in subsection (b)(2). There, the Supreme Court of Texas was asked to interpret Texas's "tied house" statutes, which prohibit a person with "an interest in the business of a ... brewer" from owning "a direct or indirect interest in the business, premises, equipment, or fixtures of a retailer." *Id.* at 328-330 (quoting Tex. Alco. Bev. Code § 102.07(a)). The issue was whether "interest" should be construed broadly or narrowly when used in the sentence, "interest in the business of a brewer." *Id.* at 327-28.

On the outset, the *Cadena* court noted that the term "interest," "without a modifier, could in the abstract be so broad as to be vague and ambiguous." *Id.* at 327. The same is true here, where the possibility that "economic benefit" could run to all persons without limitation would be equally vague and ambiguous. The Supreme Court's answer to this possibility was that "when interpreting broad, context-sensitive terms such as 'interest,' we must be sensitive to the

context." *Id.* at 328. In the alcoholic beverages context, the Supreme Court noted that the term "interest" was "then narrowed by the phrase 'in the business of a brewer.'" *Id.* at 328. The Court then limited the term "interest" with the plain meaning of the term "brewer" to derive a contextualized definition that "meshes with both the plain language and context of the statute's words, as well as the Legislature's policy of strict separation between the tiers of the industry." *Id.* at 328–29.

The steps the *Cadena* court used to interpret "interest" in the alcoholic beverages context should apply similarly in the social gambling context. Just as the plain language of the term "brewer" was used to give contextualized meaning to the otherwise-expansive term, "interest" in *Cadena*, the plain language of the term "personal winnings" also gives context to the term "economic benefit." "Personal winnings" applies only to those playing poker. And the very enactment of a "social gambling defense" demonstrates the Legislature's intent to carve a distinct subset of "social gamblers" from otherwise-illegal gambling. The only way to give effect to this defense is to recognize that "other than personal winnings" necessarily refers to those of the social gambler, whose "economic benefit" the modifier was intended to limit.

2. Extending "Economic Benefit" To All Persons Generally Is Unreasonable.

To interpret the "economic benefit" element as broadly as opponents suggest would swallow the entire "social gambling defense" in a manner that extends the definition beyond a logical or reasonable limit. *But see In re Blair*, 408 S.W.3d 843, 851 (Tex. 2013) ("We will not read a statute to draw arbitrary distinctions resulting in unreasonable consequences when there is a linguistically reasonable alternative."). Recently, you opined that people who wager on a player's performance as part of a fantasy football league do not qualify for the "actual contestant exception," which carves "actual contestants in a bona fide contest for the determination of skill" from the definition of "bet." *See* Tex. Att'y Gen. Op. No. KP-0057 (2016) (quoting Tex. Penal Code § 47.01(1)(B)). You refused to read the "actual contestant exception" in the Penal Code so broadly because such an interpretation "would have that exception swallow the rule." *Id.*

Interpreting the "economic benefit" exception so broadly would likewise "swallow the rule." Under the opponents' unreasonable construction, the "social gambling defense" would be unavailable if any money exchanged hands for any purpose, without regard to that exchange's relation to the gambling. If the "social gambling defense" is foreclosed whenever any "person" receives any money whatsoever from TCH—whether it be the landlord, utility company, or vendors servicing the club—this is yet another case where the exception—the "economic benefit" exclusion—would swallow the rule—the "social gambling defense."[2]

[2] Other supporters have mentioned the absurd results that would flow from such an interpretation, including making illegal the friendly apartment game of poker, the country club poker table, or the fraternity poker night. *See, e.g.*, February 28, 2018 Letter from Blizzard & Zimmerman.

3. The Last Antecedent Doctrine Also Encourages a Narrow Construction of "Economic Benefit."

Moreover, the only way to give effect to the qualifier, "other than personal winnings" is to apply it to the immediately preceding phrase, "economic benefit." *See Entergy*, 282 S.W.3d at 442 ("[W]e do not interpret a statute in a manner that renders parts of it meaningless."). Courts have interpreted "other than" clauses similar to "other than personal winnings" under the "last antecedent doctrine:"

> Under the last antecedent doctrine, where no contrary intention appears, relative and qualifying words, phrases, and clauses are to be applied to the immediately preceding words or phrase. Such words, phrases, and clauses are not to be construed as extending to or modifying others which are more remote ....

In re Guardianship of Finley, 220 S.W.3d 608, 615 (Tex. App.—Texarkana 2007, no pet.) (quoting 82 C.J.S. Statutes § 333 (1999)). *In re Finley* also involved a statute in which one side argued that the term "appointed under the laws of a jurisdiction **other than this state**" applied broadly to three listed exceptions within the guardianship section of the Texas Probate Code—husband and wife, joint managing conservators, and coguardians. *Id.* at 614-15. Citing the "last antecedent doctrine" to discern legislative intent, the *Finley* court held that the "other than" term had to modify only the last of the three exceptions, or else, the three exceptions would collapse into one:

> If the phrase "appointed under the laws of a jurisdiction other than this state" means to qualify two or more people already appointed elsewhere as guardians, then the phrase "a husband and wife" is rendered redundant with the later phrase "coguardians." .... As we are to presume that the entire statute is intended to be effective, we should not construe a statute in such a way as to render the inclusion of one part of it meaningless.

Id. at 616 (citing Tex. Gov't Code Ann. § 311.021(2)). Because a construction that applies "economic benefit" to all "persons" and not just social gamblers renders the "other than personal winnings" qualifier meaningless, this is not a reasonable construction and should be rejected. *See Entergy*, 282 S.W.3d at 441–42 (recognizing that the qualifier "either separately or through the use of subcontractors" in the Texas Labor Code modifies the term "general contractor" and would be rendered meaningless if the term "general contractor" were given a restrictive meaning).

4. Assuming Both Broad and Narrow Applications Are Reasonable, Statutory Construction Aids Compel the Narrow Construction of "Economic Benefit."

Even assuming you find both interpretations of the term "economic benefit" to be reasonable, the following aids to statutory construction compel the conclusion that the Legislature intended for "economic benefit" to apply narrowly to social gamblers:

> In construing a statute, whether or not the statute is considered ambiguous on its face, a court may consider among other matters the: (1) object sought to be attained; (2) circumstances under which the statute was enacted; (3) legislative history; (4) common law or former statutory provisions, including laws on the same or similar subjects; (5) consequences of a particular construction; (6) administrative construction of the statute; and (7) title (caption), preamble, and emergency provision.

HCBeck, Ltd. v. Rice, 284 S.W.3d 349, 356 (Tex. 2009) (quoting Tex. Gov't Code § 311.023).

First, the "object sought to be attained is to provide a legal mechanism for "social gambling," or, as State Bar Committee called it, "the friendly poker game":

> This section prohibits every form of gambling, but provides a defense for the "friendly poker game."
>
> * * *
>
> The elements of the defense are designed to exclude any form of exploitative or commercialized gambling. The evidence must show that no participant received an economic benefit other than winnings; therefore, if one party gets a special cut from each pot or charges for the privilege of using the facilities, none of the participants can rely on the defense.
>
> * * *
>
> If the "odds" of the game are stacked in favor of one party, Subsection (b)(3) excludes the defense. However, the equal risks and chances requirement of Subsection (b)(3) refers only to the rules of the game, not to the advantages that accrue to a skilled player. Therefore, a game which ensures a profit to the house or banker, regardless of the luck or skill involved, is not a "friendly" game to which the defense applies: but the presence of a superior, even professional player, who the skill and luck, does not vitiate the defense.

State Bar Committee on Revision of the Penal Code, A Proposed Revision of the Texas Penal Code at 329 (Final Draft, October 1970) (emphasis added). Certainly, interpreting the statute in a manner that would do away with the defense for the "friendly poker game" entirely would not satisfy the "object sought to be obtained."

Second, the "circumstances under which the statute was enacted" and the "legislative intent" factors also warrant in favor of a narrow interpretation of "economic benefit." In 1973, the Legislature enacted a "social gambling defense" for the first time, adopting the proposed language from the State Bar in total with the above-quoted commentary. *See Adley v. State*, 718 S.W.2d 682, 684–85 (Tex. Crim. App. 1985) (discussing history of gambling legislation and

pointing out that the "social gambling defense" was not available in pre-1973 legislation). This commentary confirms that the Legislature intended to apply the "economic benefit" consideration only to ***participants*** in the game of poker—not to the facilitator of the premises.

Later, the Legislature adopted additional commentary which directly addressed the perceived "defective" subsection (b)(2), and recognized the legislative intent to apply the "economic benefit" term only to gambling participants:

> Unfortunately, the statement of the [social gambling] defense is defective in this section, but hopefully the courts will interpret it according to the legislature's clear intent—as if it read: (b) It is a defense to prosecution under this section that ... (2) no person gambling there received any economic benefit other than personal winnings.

Seth S. Searcy III& James R. Patterson—Practice Commentary—1973, Tex, Penal Code § 4704 (Vernon 1989) (attached as Exhibit A to March 1, 2018 Letter from Locke Lorde LLP). These two commentaries—adopted at varying times throughout the history of Chapter 47—confirm that the narrower interpretation was intended.

Third, a narrower construction of "economic benefit" also prevails after considering the "common law or former statutory provisions" alongside the "consequences of a particular construction." Tex. Gov't Code § 311.023. As all parties have recognized, the "social gambling defense" was enacted for the first time in 1973, and the "economic benefit" element of the defense has never been amended. *See* Acts 1973, 63rd Leg., p. 883, ch. 399, § 1, eff. Jan. 1, 1974. Certainly, a broad "economic benefit" construction that swallows the defense in its entirety would not have been the intent of the Legislature, considering that it has never opted to do away with the defense explicitly, even though it has amended section 47.02 (offense for gambling) nine times and section 47.04 (offense for keeping a gambling place) three times since the statutes' 1973 enactment.

5. Opponents' Arguments For A Broad Construction of "Economic Benefit" Are Contrary to Prior Precedent and Expressions of Legislative Intent.

Despite the fact that the only reasonable interpretation of the "economic benefit" portion of the "social gambling defense" is a narrow construction that applies only to the poker player, opponents assert two unavailing arguments in favor of a broader interpretation.

First, opponents contend that previous bills have been introduced to add "participant" in place of "person" in a manner that would correct the "defective" portion of the defense. If the Legislature truly intended to apply "economic benefit" to only gambling participants, opponents contend, it surely would have passed legislation clarifying that intent. This argument is unavailing because courts consider neither failed legislation nor legislative inaction when interpreting statutes. *See Entergy*, 282 S.W.3d at 471 (Willett, J., Concurring) ("As non-adoption infers nothing authoritative about an earlier statute's meaning, we do not consult failed

bills to divine what a previous Legislature intended."); *see also Dutcher v. Owens*, 647 S.W.2d 948, 950 (Tex. 1983) (warning against gleaning legislative intent from failed bills: "Any such inference would involve little more than conjecture."); *Tex. Employment Comm'n v. Holberg*, 440 S.W.2d 38, 42 (Tex. 1969) ("[W]e attach no controlling significance to the Legislature's failure to enact the proposed amendment").

Second, opponents contend that the above-quoted State Bar Commentary indicates the Legislature's intent to exclude facilitators like TCH from the "social gambling defense" because they "charge for the privilege of using the facilities." But the State Bar Commentary clearly limits the scope of applicability to "parties" to the poker game. *See* State Bar Commentary at 329 ("[I]f **one party** gets a special cut from each pot **or charges for the privilege of using the facilities**, none of the participants can rely on the defense."). TCH, by contrast, is not a "party" to the poker game that "charges for the privilege of using the facilities" because it is not a "player" at all. TCH does not participate in poker play, nor do its dealers.

For these reasons, TCH does not receive "economic benefit other than personal winnings" in a manner that forecloses the "social gambling defense."

C. Except for the advantage of skill or luck, the risks of losing and the chances of winning were the same for all participants.

As discussed above, the only games played at TCH are those in which the chances for any player to win are equal. None of the games played at TCH have "house odds," and indeed, no dealers participate in the games by dealing themselves a hand. TCH allows no players to bet with "poker insurance," as this activity could be perceived as creating better odds for some players over others. For these reasons, the "chances for any player to win are equal except for the advantage of skill or luck." Tex. Penal Code § 47.02(b)(3).

D. The Scope of the Question Presented is Limited to the Applicability of the "Social Gambling Defense."

In a last-ditch effort to undermine these legal social gambling establishments, opponents have suggested that the activities of enterprises like TCH also run afoul of several other gambling statutes that do not have an accompanying "social gambling defense." Opponents have suggested that facilitators of private social gambling venues possibly violate Texas Penal Code § 47.03 (creating a misdemeanor offense for a person who "operates or participates in the earnings of a gambling place"); Tex. Penal Code § 47.05 (creating a misdemeanor offense for a person who "knowingly communicates information as to bets"); and Tex. Penal Code § 47.06(b) (creating a misdemeanor offense for a person who "knowingly owns, manufactures, transfers commercially, or possesses any altered gambling equipment that he knows is designed for gambling purposes").

Because Chairman Morrison's request does not ask the AG to construe these statutes or interpret the statutory definitions of "gambling place," "bet" or "gambling equipment," applying Chairman Morrison's hypothetical to these laws goes far beyond the opinion process—and

certainly beyond this request. But assuming the AG wishes to construe these statutes as well, these three statutes to not apply to TCH because TCH is not a "commercial gambler." Chapter 47 was enacted to "distinguish between the social gambler and the commercial gambler." *Adley*, 718 S.W.2d at 684–85. TCH merely facilitates a private social space in a manner no different than a country club or private dining facility. The mere fact that the poker players bet amongst themselves in this private facility does not turn TCH into an "individual[] who engage[s] in gambling commercially, or, as the Practice Commentary notes, the 'exploitive gambler.'" *Id.*

I sincerely hope that after consideration of the above analysis, you will conclude that these establishments, when properly run, are compliant with Texas law. On behalf of TCH, thank you for your consideration of this matter.

Sincerely,

Andrew Weber

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TO: TEXAS CARD HOUSE ("TCH" or "Client")
RE: APPLICABILITY OF THE STATUTORY DEFENSES IN THE TEXAS PENAL CODE TO YOUR OPERATIONS

Dear Client,

You have asked me to give you my legal opinion on the applicability of the Texas Penal Code, ("Code") to the operations of a 'member only' social club, that allows, *inter alia*, for members to play the game of poker.

I. FACTUAL ASSUMPTIONS

There are a number of factual assumptions upon which this opinion is based. Specifically, it is understood that; (a) the social club, ("club") is a 'members only' club, which restricts access to the general public, and requires pre-approval, payment of a membership fee, and which membership is subject to cancellation for failure to remain in good standing, as per the club's internal rules and regulations; (b) any fee charged is for the use of the entire facility, whether or not the member plays the game of poker; (c) the dealer(s) provided by the club, are employees of the club, are not allowed to accept tips, or other compensation, from any personal winnings of

any of the participants in a poker game[1]; (d) there is no "house" as the term is used in the gaming industry, and the "house" or club, does not take what is commonly known as a "rake"; (e) other than the skill or luck of those participating in a game of poker, the chances of winning or losing, are the same for each participant; and (f) the club does not derive any economic benefit from the personal winnings of any participant in a game of poker.

II. HISTORY AND THE STATUTORY DEFENSE TO ILLEGAL GAMBLING

In 1974, the Texas Legislature enacted the Texas Penal Code, and in doing so, made various changes in the law pertaining to gambling. Prior to 1974, the Penal Code criminalized gambling in separate and distinct offenses for all the various forms of gambling. The statutes were confusing to say the least. In enacting Chapter 47 of the new Code, the legislature sought to simplify the law. More importantly, the legislature, for the first time, sought to decriminalize social gambling and provide minimal penalties for the individual who utilized the services of the professional gambler. See generally practice commentary to Chapter 47, V.T.C.A. Penal Code, § 47.01, et seq.[2]

The statutory defense ("defense") to illegal gambling, can be found in two separate sections of the Code, specifically, sections 47.02(b)[3] and 47.04(b)[4].

The elements of the defenses are identical in both sections, and will therefore be discussed together in this opinion. Specifically, the defenses provide as follows:

"(b) It is a defense to prosecution under this section that:
(1) the actor engaged in gambling in a private place;

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[1] The term "poker game" includes all aspects thereof, including, any one hand, the wager, and aspect of skill and/or luck.

[2] *Adley v. State*, 718 S.W.2d 682, 683 (Tex. Crim. App. 1985)

[3] Applies to the prohibition against Gambling.

[4] Applies to the prohibition against Keeping a Gambling Place.

(2) no person received any economic benefit other than personal winnings; and
(3) except for the advantage of skill or luck, the risks of losing and the chances of winning were the same for all participants."

The applicable rules and principals of statutory construction provides that:

Our fundamental goal when reading statutes "is to ascertain and give effect to the Legislature's intent." *Tex. Mut. Ins. Co. v. Ruttiger*, 381 S.W.3d 430, 452 (Tex. 2012). To do this, we look to and rely on the plain meaning of a statute's words as expressing legislative intent unless a different meaning is supplied, is apparent from the context, or the plain meaning of the words leads to absurd or nonsensical results. *Crosstex Energy Servs., L.P. v. Pro Plus, Inc.*, 430 S.W.3d 384, 389–90 (Tex. 2014). Words and phrases "shall be read in context and construed according to the rules of grammar and common usage." *Id.* (citing Tex. Gov't Code § 311.011). We presume the Legislature "chooses a statute's language with care, including each word chosen for a purpose, *326 while purposefully omitting words not chosen." *TGS–NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 439 (Tex. 2011). In that vein, we take statutes as we find them and refrain from rewriting the Legislature's text. *Entergy Gulf States v. Summers*, 282 S.W.3d 433, 443 (Tex. 2009).

With these basic principals in mind, I will discuss each of the three elements and apply them to your club's operations.

Before doing so, it is important to note that each element is directly related to, and only applicable to, the act of gambling. The importance of this, will become evident in the analysis below.

III. PRIVATE PLACE.

The Code defines a "public place" at section 47.01(8) as follows:

*"(8) "Private place" means a place to which **the public does not have access**, and excludes, among other places, streets, highways, restaurants, taverns, nightclubs, schools, hospitals, and the common areas of apartment houses, hotels, motels, office buildings, transportation facilities, and shops." (emphasis added)*

Although the determination of whether a place is private or public, necessarily depends on a factual analysis, it is my opinion that your club does not allow access, for the use of its facilities, to the general public, and therefore qualifies as private place. I do not believe that it is only

"nominally private" as suggested by Attorney General John Hill in his opinion H-489, but to the contrary, is more akin to the description and analysis in the case of *Grant v. State*, 33 Tex. Crim. 527, 27 S.W. 127 (1894).[5]

IV. ECONOMIC BENEFIT FROM PERSONAL WINNINGS.

First, it must be noted that the term "economic benefit" is not defined in the Code. However, it must also be noted that the term is restricted to "personal winning". It cannot therefore logically follow, that any economic benefit received by the club, from a person, before that person participates in a poker game, qualifies for consideration. Stated differently, the payments received by the club, as described in the factual assumption section, above, are not the type of economic benefit addressed in this element of the defense.

The inquiry has to be limited to the use of the winnings while the game is in progress. The club is clearly prohibited from taking a "rake"[6] or allowing the dealers from being tipped, directly from winnings[7], during the actual game. Stated differently, only the actual players, or participants in the game, can derive an economic benefit from any bet placed or hand played. Since the club itself is not a player, or participant, and does not share in any economic benefit derived from any bet or hand played, it does qualify for this element of the defense.

How the winnings are used after the game is concluded, cannot logically be the concern of the legislature or the subject of this element of the defense. Such an extension of this element, would

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[5] "*The rooms of a commercial club, to which only the club members and invited visitors are admitted, except when the club has under discussion some question affecting the public interest, are not a public place, within the meaning of the statute prohibiting card playing in public places.*"

[6] See Attorney General Opinion, KP-0057.

[7] In my opinion, tipping from a source other than winnings obtained from any hand played, is permissible. The best way to accomplish that, is to make tipping chips available for purchase before the member starts to play, and visually distinguish those chips from the ones used to place

lead to the absurd result that the winnings can never be used, for any purpose. For example, an absurd result would be to deny the existence of this element of the defense, if a player uses his/her winnings to purchase gas on the way home from the club. Or buy milk for his/her children. Absurd examples like this, are obviously endless, and clearly not intended by the legislature,

Some have cited the State Bar Commentary adopted with the passage of the 1973 Penal Code,[8] to suggest an expansive and all encompassing reading of this element of the defense. However, a close reading of the commentary, reveals the following language: "the evidence must show that **no participant**, received an economic benefit, other than winnings..."(emphasis added)

This language makes it clear that this element of the defense applies only to participants in the actual game, and does not extend to the club, the gas station or the grocery store.

V. CHANCE OF WINNING AND LOSING, MUST BE THE SAME FOR ALL PARTICIPANTS

This is the easiest element to address. Since there are no "house odds", and the only participants in any game or hand, are the actual players, the chances of winning or losing are clearly only the factors of the skill or luck of the individual players.

VI. CONCLUSION.

It must be noted that there is no definitive authority that answers the issues discussed here. It must also be noted that the particular facts and circumstances, as they exist, or as they are found

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a wager, or bet.

[8] See State Bar Committee on Revision of the Penal Code, A Proposed Revision of the Penal Code, (Final Draft October 1970)

to exist, by a trier of fact, i.e. judge or jury, in the event of a prosecution or other action involving your club's operations, will determine whether your club is or is not entitled to the statutory defenses discuss in this opinion.

Therefore, my opinion has to be qualified, however, as of now, based on the facts and circumstances as I understand them, and based on the materials research and identified herein, it is my opinion that your club meets all the elements of the statutory defenses set out in the Code, and that based on the existence of those defenses, the club is not operating or keeping an illegal gambling place.[9]

Respectfully submitted

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Board Certified Administrative Law
Texas Board of Legal Specialization

[9] This opinion is for the use of Texas Card House, ("TCH"), and its owners, officers, directors, and members. It may be distributed by TCH, to whomever it deems appropriate, however, it may not be relied upon by such other recipient(s), without the express written permission of Bogdan Rentea.

10. *Texas Local Government Code* Chapter 245.

LOCAL GOVERNMENT CODE

TITLE 7. REGULATION OF LAND USE, STRUCTURES, BUSINESSES, AND RELATED ACTIVITIES

SUBTITLE C. REGULATORY AUTHORITY APPLYING TO MORE THAN ONE TYPE OF LOCAL GOVERNMENT

CHAPTER 245. ISSUANCE OF LOCAL PERMITS

Sec. 245.001. DEFINITIONS. In this chapter:

(1) "Permit" means a license, certificate, approval, registration, consent, permit, contract or other agreement for construction related to, or provision of, service from a water or wastewater utility owned, operated, or controlled by a regulatory agency, or other form of authorization required by law, rule, regulation, order, or ordinance that a person must obtain to perform an action or initiate, continue, or complete a project for which the permit is sought.

(2) "Political subdivision" means a political subdivision of the state, including a county, a school district, or a municipality.

(3) "Project" means an endeavor over which a regulatory agency exerts its jurisdiction and for which one or more permits are required to initiate, continue, or complete the endeavor.

(4) "Regulatory agency" means the governing body of, or a bureau, department, division, board, commission, or other agency of, a political subdivision acting in its capacity of processing, approving, or issuing a permit.

Added by Acts 1999, 76th Leg., ch. 73, Sec. 2, eff. May 11, 1999.
Amended by:

Acts 2005, 79th Leg., Ch. 6 (S.B. 848), Sec. 1, eff. April 27, 2005.

Sec. 245.002. UNIFORMITY OF REQUIREMENTS. (a) Each regulatory agency shall consider the approval, disapproval, or conditional approval of an application for a permit solely on the basis of any orders, regulations, ordinances, rules, expiration dates, or other properly adopted requirements in effect at the time:

(1) the original application for the permit is filed for review for any purpose, including review for administrative completeness; or

EXHIBIT 10

(2) a plan for development of real property or plat application is filed with a regulatory agency.

(a-1) Rights to which a permit applicant is entitled under this chapter accrue on the filing of an original application or plan for development or plat application that gives the regulatory agency fair notice of the project and the nature of the permit sought. An application or plan is considered filed on the date the applicant delivers the application or plan to the regulatory agency or deposits the application or plan with the United States Postal Service by certified mail addressed to the regulatory agency. A certified mail receipt obtained by the applicant at the time of deposit is prima facie evidence of the date the application or plan was deposited with the United States Postal Service.

(b) If a series of permits is required for a project, the orders, regulations, ordinances, rules, expiration dates, or other properly adopted requirements in effect at the time the original application for the first permit in that series is filed shall be the sole basis for consideration of all subsequent permits required for the completion of the project. All permits required for the project are considered to be a single series of permits. Preliminary plans and related subdivision plats, site plans, and all other development permits for land covered by the preliminary plans or subdivision plats are considered collectively to be one series of permits for a project.

(c) After an application for a project is filed, a regulatory agency may not shorten the duration of any permit required for the project.

(d) Notwithstanding any provision of this chapter to the contrary, a permit holder may take advantage of recorded subdivision plat notes, recorded restrictive covenants required by a regulatory agency, or a change to the laws, rules, regulations, or ordinances of a regulatory agency that enhance or protect the project, including changes that lengthen the effective life of the permit after the date the application for the permit was made, without forfeiting any rights under this chapter.

(e) A regulatory agency may provide that a permit application expires on or after the 45th day after the date the application is filed if:

(1) the applicant fails to provide documents or other information necessary to comply with the agency's technical requirements relating to the form and content of the permit application;

(2) the agency provides to the applicant not later than the 10th business day after the date the application is filed written notice of the failure that specifies the necessary documents or other information and the

date the application will expire if the documents or other information is not provided; and

(3) the applicant fails to provide the specified documents or other information within the time provided in the notice.

(f) This chapter does not prohibit a regulatory agency from requiring compliance with technical requirements relating to the form and content of an application in effect at the time the application was filed even though the application is filed after the date an applicant accrues rights under Subsection (a-1).

(g) Notwithstanding Section 245.003, the change in law made to Subsection (a) and the addition of Subsections (a-1), (e), and (f) by S.B. No. 848, Acts of the 79th Legislature, Regular Session, 2005, apply only to a project commenced on or after the effective date of that Act.

Added by Acts 1999, 76th Leg., ch. 73, Sec. 2, eff. May 11, 1999.
Amended by:

Acts 2005, 79th Leg., Ch. 6 (S.B. 848), Sec. 2, eff. April 27, 2005.

Sec. 245.003. APPLICABILITY OF CHAPTER. This chapter applies only to a project in progress on or commenced after September 1, 1997. For purposes of this chapter a project was in progress on September 1, 1997, if:

(1) before September 1, 1997:

(A) a regulatory agency approved or issued one or more permits for the project; or

(B) an application for a permit for the project was filed with a regulatory agency; and

(2) on or after September 1, 1997, a regulatory agency enacts, enforces, or otherwise imposes:

(A) an order, regulation, ordinance, or rule that in effect retroactively changes the duration of a permit for the project;

(B) a deadline for obtaining a permit required to continue or complete the project that was not enforced or did not apply to the project before September 1, 1997; or

(C) any requirement for the project that was not applicable to or enforced on the project before September 1, 1997.

Added by Acts 1999, 76th Leg., ch. 73, Sec. 2, eff. May 11, 1999.

Sec. 245.004. EXEMPTIONS. This chapter does not apply to:

(1) a permit that is at least two years old, is issued for the construction of a building or structure intended for human occupancy or habitation, and is issued under laws, ordinances, procedures, rules, or regulations adopting only:

(A) uniform building, fire, electrical, plumbing, or mechanical codes adopted by a recognized national code organization; or

(B) local amendments to those codes enacted solely to address imminent threats of destruction of property or injury to persons;

(2) municipal zoning regulations that do not affect landscaping or tree preservation, open space or park dedication, property classification, lot size, lot dimensions, lot coverage, or building size or that do not change development permitted by a restrictive covenant required by a municipality;

(3) regulations that specifically control only the use of land in a municipality that does not have zoning and that do not affect landscaping or tree preservation, open space or park dedication, lot size, lot dimensions, lot coverage, or building size;

(4) regulations for sexually oriented businesses;

(5) municipal or county ordinances, rules, regulations, or other requirements affecting colonias;

(6) fees imposed in conjunction with development permits;

(7) regulations for annexation that do not affect landscaping or tree preservation or open space or park dedication;

(8) regulations for utility connections;

(9) regulations to prevent imminent destruction of property or injury to persons from flooding that are effective only within a flood plain established by a federal flood control program and enacted to prevent the flooding of buildings intended for public occupancy;

(10) construction standards for public works located on public lands or easements; or

(11) regulations to prevent the imminent destruction of property or injury to persons if the regulations do not:

(A) affect landscaping or tree preservation, open space or park dedication, lot size, lot dimensions, lot coverage, building size, residential or commercial density, or the timing of a project; or

(B) change development permitted by a restrictive covenant required by a municipality.

Added by Acts 1999, 76th Leg., ch. 73, Sec. 2, eff. May 11, 1999. Amended by Acts 2003, 78th Leg., ch. 646, Sec. 1.

Amended by:

Acts 2005, 79th Leg., Ch. 31 (S.B. 574), Sec. 1, eff. September 1, 2005.

Sec. 245.005. DORMANT PROJECTS. (a) After the first anniversary of the effective date of this chapter, a regulatory agency may enact an ordinance, rule, or regulation that places an expiration date on a permit if as of the first anniversary of the effective date of this chapter: (i) the permit does not have an expiration date; and (ii) no progress has been made towards completion of the project. Any ordinance, rule, or regulation enacted pursuant to this subsection shall place an expiration date of no earlier than the fifth anniversary of the effective date of this chapter.

(b) A regulatory agency may enact an ordinance, rule, or regulation that places an expiration date of not less than two years on an individual permit if no progress has been made towards completion of the project. Notwithstanding any other provision of this chapter, any ordinance, rule, or regulation enacted pursuant to this section shall place an expiration date on a project of no earlier than the fifth anniversary of the date the first permit application was filed for the project if no progress has been made towards completion of the project. Nothing in this subsection shall be deemed to affect the timing of a permit issued solely under the authority of Chapter 366, Health and Safety Code, by the Texas Commission on Environmental Quality or its authorized agent.

(c) Progress towards completion of the project shall include any one of the following:

(1) an application for a final plat or plan is submitted to a regulatory agency;

(2) a good-faith attempt is made to file with a regulatory agency an application for a permit necessary to begin or continue towards completion of the project;

(3) costs have been incurred for developing the project including, without limitation, costs associated with roadway, utility, and other infrastructure facilities designed to serve, in whole or in part, the project (but exclusive of land acquisition) in the aggregate amount of five percent of the most recent appraised market value of the real property on which the project is located;

(4) fiscal security is posted with a regulatory agency to ensure performance of an obligation required by the regulatory agency; or

(5) utility connection fees or impact fees for the project have been paid to a regulatory agency.

Added by Acts 1999, 76th Leg., ch. 73, Sec. 2, eff. May 11, 1999.
Amended by:

Acts 2005, 79th Leg., Ch. 31 (S.B. 574), Sec. 1, eff. September 1, 2005.

Sec. 245.006. ENFORCEMENT OF CHAPTER. (a) This chapter may be enforced only through mandamus or declaratory or injunctive relief.

(b) A political subdivision's immunity from suit is waived in regard to an action under this chapter.

(c) A court may award court costs and reasonable and necessary attorney's fees to the prevailing party in an action under this chapter.

Added by Acts 1999, 76th Leg., ch. 73, Sec. 2, eff. May 11, 1999.
Amended by:

Acts 2005, 79th Leg., Ch. 31 (S.B. 574), Sec. 1, eff. September 1, 2005.

Acts 2017, 85th Leg., R.S., Ch. 264 (H.B. 1704), Sec. 1, eff. May 29, 2017.

Sec. 245.007. CONSTRUCTION AND RENOVATION WORK ON COUNTY-OWNED BUILDINGS AND FACILITIES IN CERTAIN COUNTIES. (a) This section applies only to a building or facility that is owned by a county with a population of 3.3 million or more and is located within the boundaries of another political subdivision.

(b) A political subdivision may not require a county to notify the political subdivision or obtain a building permit for any new construction or any renovation of a building or facility owned by the county if the construction or renovation work is supervised and inspected by an engineer or architect licensed in this state.

(c) This section does not exempt a county from complying with the building standards of the political subdivision during the construction or renovation of the building or facility.

Added by Acts 2005, 79th Leg., Ch. 532 (H.B. 960), Sec. 1, eff. June 17, 2005.

City of Dallas

May 6, 2022

Via Email: ***Jennifer.munoz@dallascityhall.com***
Via Email: ***LaTonia.jackson@dallascityhall.com***
Dallas Board of Adjustment
c/o Jennifer Muñoz & LaTonia Jackson
Administrator & Secretary to Board of Adjustment
1500 Marilla St., 5BN
Dallas, Texas 75201

Re: BDA 212-028; Appeal of Building Official's decision revoking certificate of occupancy for poker gambling facility d/b/a Shuffle 214 ("Applicant") at 11411 E. Northwest Highway, Suite 111 Dallas, Texas (the "Property")

City's Amended Written Response

Dear Board Members:

This letter and the attached materials are the City's amended written response to the above-listed Board of Adjustment appeal by the Applicant, now set for hearing on Tuesday, May 17, 2022, at 11:00 a.m. This is an appeal from the revocation of Applicant's certificate of occupancy ("CO") on December 12, 2021, which CO was originally issued 6 months prior on June 22, 2021. The City urges the Board of Adjustment to affirm the Building Official's decision to revoke Applicant's CO because Applicant's use of the Property to operate a **commercial gambling business** featuring poker betting violates state law. Applicant's poker/gambling business specifically violates Texas Penal Code §47.04(a) which prohibits keeping a gambling place or operating a business featuring gambling with cards.

Texas Penal Code §47.04(a) (**See Exhibit 1**) states a criminal offense titled: **"Keeping a Gambling Place"** which section says**: "A person commits an offense if he knowingly uses or permits another to use as a gambling place any real estate, building, … or other property … under his control … with a view or expectation that it be so used**." Texas Penal Code §47.04(b) states: **"It is an affirmative defense to prosecution under this section that:**

(1) **the gambling occurred in a private place**;

(2) **no person received any economic benefit** other than personal winnings; and

(3) except for the advantage of skill or luck, the risks of losing and the chances of winning are **the same for all participants.**

Texas Penal Code §2.04(d) (**See Exhibit 2**) provides that if the existence of an **affirmative defense** is raised by the defendant/respondent then **"the defendant must prove the affirmative defense by a preponderance of the evidence."**

In this appeal Applicant tries to negate or disprove that Applicant is **"Keeping a Gambling Place"** by proving all three elements of the affirmative defense by a preponderance of the evidence. If Applicant fails to prove by a preponderance of the evidence ALL three of the above listed elements of the affirmative defense set forth in subsection 47.04(b) then Applicant fails to satisfy its burden of proof and the affirmative defense fails.

Applicant fails to satisfy its burden of proof under the affirmative defense because: 1) the gambling encouraged, permitted, and facilitated by Applicant does not occur in a **private place** (but instead occurs in a public place where people can enter for a modest fee); and 2) many persons receive an **economic** benefit from Applicant's commercial operations of its business as the owners and operators collect fees and charges thereby receiving revenues (or economic benefits) and many others derive income or economic benefits from Applicant's commercial operations – wholly separate and apart from the **personal winnings** of the **participants** in the gambling activities. A commercially operated gambling establishment generates **economic benefits** for the owners and operators of the business which are wholly separate and apart from the "**personal winnings**" of the participants in the gambling business. Applicant's gambling business operations fail both the "**private place**" and the "**no person received any economic benefit**" elements of the affirmative defense. Therefore, Applicant's gambling business is illegal under Texas law and the revocation of Applicant's CO was proper since the CO was issued in error to a business operating in violation of Texas law.

Applicant's operation of its gambling business also violates Texas Penal Code §47.03 **(See Exhibit 3**) titled **"Gambling Promotion"** which states" "A person commits an offense if he intentionally or knowingly … (1) operates or participates in the earnings of a gambling place." The facts and the evidence prove that Applicant and its owners operate and participate in the earnings of a gambling place. The elements to prove the criminal offense of "gambling promotion are: 1) a person 2) intentionally or knowingly 3) operates or participates in the earnings of a gambling place." See *Baxter v. State*, 66 S.W. 3d 494, 503 (Tex. App.—Austin 2001, pet. ref'd). **(See Exhibit 4)**. The offense of "Gambling Promotion" under Texas Penal Code §47.03(a)(1) does not provide for any affirmative defenses. See *Baxter*, 66 S.W. 3d at 502 (affirmative defenses such as those provided under 47.02(b) and 47.04(b) regarding "private place" and "no person received any economic benefit" are not applicable to an offense under Section 47.03). Other gambling statutes, such as 47.02(b) and 47.04(b), provide for an affirmative defense to gambling if it can be shown that the gambling occurred in a "private place", and that "no person received any economic benefit other than personal winnings, however no such affirmative defense is available to the offense of gambling promotion under Texas Penal Code §47.03. See *State v. Amvets Post No. 80*, 541 S.W. 2d 481, 483 (Tex. Civ. App.—Dallas 1976, no writ). **(See Exhibit 5)**.

The Dallas City Code provides: a building official *shall* revoke a certificate of occupancy if it determines the certificate was issued in error and *shall* deny any application for which the certificate "requested does not comply with the codes, the Dallas Development Code…or any county, state, or federal laws or regulations." *See* Dallas, Tex., Administrative Procedures of the Construction Codes, Chapter 52 §§ 306.5(1), 306.13(1) (2005) (emphasis added). The City urges

the Board of Adjustment to recognize the Building Official was complying with city and state law in revoking the CO issued in error to Applicant.

The Building Official's erroneous issuance of a CO to Applicant does not validate or legalize Applicant's unlawful operations. Chapter 52 of the Dallas Administrative Procedures for the Construction Codes states as follows at section **306.11 Validity**: **(See Exhibit 6)**

> **The issuance of a certificate of occupancy does not grant any vested right or give authority to violate any provision of the codes, … other city ordinances, rules, or regulations, or any county, state, or federal laws or regulations. Any certificate of occupancy presuming to give authority to violate any provision of the codes, the Dallas Development Code, other city ordinances, rules, or regulations, or any county, state, or federal laws or regulations shall be void ab initio. The issuance of a certificate shall not prevent the building official from later requiring the correction of errors in any information, plans, … or from preventing a use or occupancy in violation of the codes … other city ordinances, rules, or regulations, or any county, state, or federal laws or regulations."**

The Building Official's revocation of the CO erroneously issued to Applicant should be affirmed because Applicant's operations violate the Texas Penal Code as explained above.

I. BACKGROUND

A. Revocation of Applicant's certificate of occupancy

Applicant's CO was issued on June 22, 2021. A land use statement dated June 7, 2021, (copy attached as **Exhibit 7)** was submitted with the Application.

By letter dated December 17, 2021, Applicant's CO was revoked by Assistant Building Official Megan Wimer ("Building Official"). A copy of the revocation is attached as **Exhibit 8**. The CO was revoked in accordance with Section 306.13(1) of Chapter 52: Administrative Procedures for the Construction Codes of the City of Dallas, a copy of which is attached as **Exhibit 9**. That section states:

> "The building official shall revoke a certificate of occupancy if the building official determines: 1) the certificate of occupancy is issued in error."

The Building Official determined upon review that the application and related materials showed that the Property's use was in violation of the Texas Penal Code §47.04, "Keeping a Gambling Place," and therefore revoked the CO. The notice of revocation attached as Exhibit 8 was mailed to an incorrect address, so Applicant's appeal is deemed timely even though the appeal was not filed until more than 30 days after the mis-directed notice of revocation was issued.

B. Statement provided by Applicant shows Applicant operated a gambling place.

A land use statement dated June 7, 2021 submitted by Matthew Morgan on behalf of Applicant, (**Exhibit 7**) states that the only significant activity taking place at Applicant's facility

on the Property was poker betting and gambling. There was no food or alcohol sold on site and no coin-operated machines on site. Poker and gambling were the only activities on the Property. The fee to become a member, or the fee to enter the Property was not specified as a daily, weekly, monthly, or annual fee. The land use statement states: "members pay for the amount of time they spend in our establishment." The hours of operations are noted as being from 10 a.m. to 5 a.m. daily (Monday-Sunday).

C. Poker games operated as a business or commercial activity where there is any economic benefit to any person involved in the business (other than personal winnings to the participants in the cards games) are illegal in Texas.

Under Texas law, poker games or tournaments with bets and money changing hands in a commercial establishment where there is *any* economic benefit to *any* person or entity other than the personal winnings of the players are illegal – regardless of whether the activity occurs in a so-called "private" club and regardless of whether or not the "house" takes any portion of the betting pools or pots in each poker game. If the house, host, or location where the poker players play charges any door fee, chair fee, membership fee (whether a daily, weekly, hourly, or annual fee), or derives any economic benefit of any kind from hosting the poker games then the activity is illegal because it constitutes "keeping a gambling place," made unlawful by Texas Penal Code §47.04. Applicant appears to believe that if it operates its business as a "private club" charging membership fees or a "fee to enter" and the house does not take a cut of the pot (or take a rake), the poker business would be legal, but Applicant is mistaken. Applicant's proposed use clearly violates Texas law against commercialized gambling, therefore the Building Official properly revoked Applicant's CO.

D. The City's enforcement of state gambling laws is consistent with that of other jurisdictions.

Though there are a few locations in Texas where these types of poker rooms have been operating seemingly without enforcement to date, most jurisdictions view these operations as illegal gambling establishments and either shut them down after they begin operating or deny their ability to open in the first place.

In Houston, the Harris County District Attorney has stated that these types of clubs are clearly illegal, and several clubs were raided and shut down in 2019. The City of Plano issued certificates of occupancy to two poker rooms in 2017, only to have them promptly shut down by the police department or face prosecution for illegal gambling. The COs were issued because the Plano City Attorney took the position that the issuance of the CO concerned the land use only and did not take a position on the legality of the operation itself. The Plano Police Department subsequently determined the use was illegal gambling and maintains that position today, a position supported by the Collin County District Attorney. The Dallas Police Department raided and shut down CJ's Card House in 2017. In 2018 two poker houses opened in Corpus Christi and shut down two months later after the police chief and county district attorney expressed concerns about their legality. In McKinney a poker house shut down voluntarily in 2017 after police warned they would enforce gambling laws, including arresting the owner. Most recently, in March of this year, a poker room operating the same model as Shuffle 214 and Texas Card House, was shut down by law enforcement in Smith County. The Smith County District Attorney specifically said "Any

gambling with economic benefit to the business is illegal." Other cities, including Fort Worth, Abilene, and Amarillo have denied applications from poker houses seeking to open up similar operations.

II. DISCUSSION AND ARGUMENT

A. Texas law prohibits gambling or keeping a gambling place (a gambling business).

In Texas, commercialized gambling is illegal unless the gambling activity is specifically authorized by an amendment to the Texas Constitution (as is the case with the Texas Lottery and pari-mutual betting at state-authorized and licensed horse and dog racing tracks). No provision of the Texas Constitution authorizes the operation of a gambling business featuring poker and similar games. Contrary to Applicant's bold and erroneous assertion, Texas law does not allow or authorize the operation of a poker business, and the Texas legislature could not authorize operation of a poker business without an amendment to the Texas Constitution.

In *City of Fort Worth v. Rylie*, 602 S.W. 3d 459, 461 (Tex. 2020) the Texas Supreme Court wrote:

> For as long as the State of Texas has been the State of Texas, its citizens have elected to constitutionally outlaw most types of "lotteries". Contrary to the term's popular understanding, a "lottery" includes not just contests involving scratch-off tickets and numbered ping-pong balls, but a wide array of activities that involve, at a minimum, (1) the payment of "consideration" (2) for a "chance" (3) to win a "prize". Since its ratification in 1876 our current constitution has affirmatively required the legislature to "pass laws prohibiting" lotteries. Tex. Const.. art. III, § 47. *** To fulfill its constitutional obligation, the legislature has enacted statutes making it a criminal offense to engage in or promote most forms of gambling." *Id.* at 460-61.

In *Rylie* the Court also stated: "If the legislature exercises power the constitution says it doesn't have – that is, if it permits lotteries when it only has the power to prohibit them – we take the constitution's word over that of the legislature." *Id.* at 467. "When the Constitution provides and commands that a thing shall be done, the matter must be done as directed, and neither the Legislature, Executive, nor the courts have authority to set aside the [constitutional] mandates." *Id.* at 468, citing *Ferguson v. Wilcox*, 28 S.W. 2d 526, 533 (Tex. 1930). "If the legislature were permitting activities the constitution requires it to prohibit, that action would be *ultra vires* and cannot be allowed to stand, no matter the Operators' good-faith reliance on those actions." *Rylie*, 602 S.W.3d at 468.

Chapter 47 of the Texas Penal Code declares gambling illegal in Texas. Texas Penal Code §47.04(a) (copy attached as **Exhibit 1**) provides that a person commits the offense of keeping a gambling place if he knowingly uses or permits another to use as a gambling place any real estate, building, room, or other property whatsoever under his control with an expectation that the property will be used as a gambling place. Texas Penal Code §47.02(a)(3) (copy attached as **Exhibit 10**) provides that a person commits the offense of gambling if he plays or bets for money or other thing of value at any game played with cards or any other gambling device. Under

§47.04(b) of the Texas Penal Code, it is an affirmative defense to prosecution for keeping a gambling place if:

(1) the gambling occurred in a **private place**;
(2) **no person received any economic benefit** other than personal winnings; ***and***
(3) except for the advantage of skill or luck, the risks of losing and the chances of winning were the same for all participants.

(c) An offense under this section is a Class A misdemeanor. (*emphasis added)*

In order to benefit from the affirmative defense, the Applicant must prove all three elements of the defense listed above. The Applicant fails to prove the defense if *any* person receives "any economic benefit" from the gambling activity "other than personal winnings." This defense was designed and intended to allow (or not criminalize) the conduct where a person in their private home or similar "private place" invites friends over to play poker and make bets, where the host does not charge any fees (no membership fees, no "fee to enter," no chair fees, and no hourly fees) for hosting the event and "no person received any economic benefit other than personal winnings." The affirmative defense was not designed or intended to allow a commercial business to operate a poker club or poker room and sell so-called memberships (so it can call itself a "private" club) or collect fees or charges of any kind that results in the operator gaining an "economic benefit," which defeats the affirmative defense. The Applicant's operations on the site are clearly illegal as the house obtains an "economic benefit" by collecting membership fee**s** and entrance fees. According to the Practice Commentary with section 47.02(b)—"The elements of the defense in Subsection (b) are designed to exclude any form of exploitative or commercialized gambling… therefore, if one party … charges for the privilege of using the facilities none of the participants can rely on the defense." Where the operator, such as the Applicant here, "charges for the privilege of using the facilities"— the fees Applicant charges would defeat or fail the affirmative defense because these fees and charges are a prerequisite for patrons to use the facilities. Therefore, Applicant's certificate of occupancy was properly revoked.

B. Applicant's use is a commercial poker room, and it is not a "private place" under Texas gambling law.

Applicant's land use statement (**Exhibit 7**) makes no attempt to minimize the gambling aspect of its business operation where poker and gambling is the exclusive focus of the business. Calling it a "private club" and requiring persons to pay a membership or entrance fee does not qualify the business as a "private place" under Chapter 47 of the Texas Penal Code. The definition of "private place" for purposes of the defense to keeping a gambling place is narrowly construed to exclude any place that the public has access to and instead applies to friendly poker games among friends such as in someone's private home. A location where dozens or hundreds of people gather daily to play poker and make bets is not a "private place" even if there is a modest entrance fee or charge to enter, like a club. For the affirmative defense to apply, the poker game must both occur in **a private place** *and* there can be **no economic benefit to any person other than personal winnings**. Applicant fails to meet either of these 2 elements of the affirmative defense, therefore Applicant's use of the Property is in violation of Texas law and Applicant's certificate of occupancy was properly revoked.

III. LEGAL AUTHORITY

A. Texas case law supports the Building Official's decision because the requirement that "no person received any economic benefit" is construed broadly.

In *Gaudio v. State*, No. 05-91-01862-CR, 1994 WL 67733 (Tex. App.—Dallas, March 7, 1994, writ ref'd) (copy attached as **Exhibit 11)** the jury convicted the defendant of unlawfully keeping a gambling place. On appeal, the defendant argued that the affirmative defense to prosecution applied. The defendant rented an apartment where a group of friends gathered three nights a week to play poker. A dealer was hired to deal the cards and a waitress was hired to serve food and drinks during the games. The group agreed to cut from the betting pot from each hand to pay (or reimburse defendant) for the expenses defendant incurred in keeping the apartment to play poker. *Id.* at 1. The winner of each hand tipped the dealer, as the main source of the dealer's compensation. *Id.* at 1.

At trial, the jury decided that elements (1) and (3) of the affirmative defense were established (i.e., the apartment was a "private place" where a small group of friends gathered to play poker three nights a week and the risks of losing were the same for all participants). On appeal the State agreed that the evidence supported the jury's findings on these two elements. *Id*. at 2. The jury concluded that the defendant had failed to satisfy his burden to show the second element of his defense (i.e., that "no person received any economic benefit other than personal winnings").

On appeal, the court noted that the dealer and the waitress had received an "economic benefit" as they were paid for their services to the poker players, which defeated the affirmative defense and was sufficient evidence to affirm the jury verdict and conviction. *Id*. at 2. The court stated: "Based on the plain language of the statute *no person* can receive an economic benefit. … In this case the waitress and dealer received tips from the players. The receipt of money as tips is an economic benefit." (emphasis in original). The court also noted that even if the "economic benefit" element were viewed to mean that the host or sponsor of the "gambling place" can establish the defense as long as the host/sponsor does not receive "any economic benefit other than personal winnings," then the defendant had still derived an "economic benefit" because the rent for the apartment, which defendant was legally obligated to pay, was paid or reimbursed by others, constituting an "economic benefit" and defeating the defense, so defendant's conviction was affirmed. *Id*. at 3.

Miller v. State, 874 S.W. 2d 908 (Tex. App.—Houston (1st Dist.,1994, pet. denied) (copy attached as **Exhibit 12**) interprets the second "economic benefit" element of the section 47.02(b)(2) affirmative defense. ***Id.*** at 910. In *Miller*, the jury convicted Miller of gambling when he visited a gambling place to gamble. *Id.* at 910-12. At this gambling place, a person received an "economic benefit other than personal winnings" when the owner(s) and investor(s) in the gambling place had an agreement to split the profits from the games. *Id.* at 912. Given this context, the court stated: "'any economic benefit' would certainly include the sharing of profits by the owner of the house … and his partner." *Id*. at 912. The court noted that "received" under the statute would always include the time period the gambling activity was ongoing. *Id.* at 912. *Miller* illustrates that when owners, operators, or others receive revenue generated by the gambling business they receive an economic benefit from keeping a gambling place, which is unlawful and

defeats the affirmative defense. In *Miller* the lake house where the gambling business operated was owned by Mr. Ford. Ford's business partner was Mr. Chapman. Ford and Chapman split the profits from the gambling games 50-50. The court concluded that both Chapman and Ford had received an economic benefit from the gambling activity other than personal winnings. *Id*. at 912. Consequently, the affirmative defense was defeated and could not be established for Miller's defense to the gambling charges.

In *Miller* the court stated: "The elements of the defense in subsection (b) [the affirmative defense] are designed to exclude any form of exploitative or commercialized gambling … therefore, if one party charges for the privilege of using the facilities, none of the participants can rely on the defense." *Id*. at 912. The *Miller* decision endorses the Texas Penal Code's definition of "benefit" "as anything reasonably regarded as economic gain or advantage, including benefit to any other person in whose welfare the beneficiary is interested." *See* Texas Penal Code §1.07(7). The Penal Code provides no definition of "economic," however the lack of a definition for the term "economic" in the Penal Code does not make the statute vague. *Id.* at 911. Thus, the court in *Miller* turned to section 311.011(a) of the Texas Government Code, which states "words or phrases must be read in the context in which they are used and construed according to the rules of grammar and common usage." *Id. Miller* stands for the proposition that when the owner(s), operators or employees of a poker gambling business receive funds generated by the business as compensation for their work or services then the affirmative defense is defeated and the poker is illegal gambling.

B. Texas Attorney General opinions support the Building Official's decision.

The Texas Attorney General has also provided some guidance on these issues. Texas Attorney General Opinion No. GA-0335 (2005) addresses the question whether it would be lawful for a bar/restaurant to host an on-premises poker tournament where: 1) participants pay a modest or nominal entry fee; and 2) the house intends to take no cut of the entry fee of each player and the entire prize pool generated by the number of players times each player's entry fee will be paid out to the winning players at the end of the night. After analyzing relevant factors, the Opinion concludes: "…a bar or restaurant that hosts a Texas Hold-Em poker tournament would violate the prohibition against "keeping a gambling place." Texas Penal Code §47.04(a). This Opinion makes clear that even if the house takes no cut of the entry fee paid by each player and the entire prize pool is fully disbursed to the winning players, that fact or structure does not protect the host from the offense of "keeping a gambling place."

The Applicant's land use statement (See **Exhibit 7**) makes it clear that Applicant intends to collect membership or entry fees from patrons. As a result of the collection of fees or charges of any kind, Applicant derives an economic benefit from the operations of the poker business. Furthermore, any employees who are paid or tipped to work at Applicant's poker business derive an economic benefit from their employment.

Texas Attorney General Letter Opinion dated November 3, 1990 (LO-90-88) addresses whether a person located in Texas can call another state to play lottery games or other games of chance which would be illegal in Texas and pay for the wagers or bets by using a credit card. The Opinion states: **"In the situation you describe, the caller would either use a credit card or a**

900-number. Those transactions would generate an economic benefit to a third party. Therefore, the second prong of the defense set out above would not be satisfied." *Id*. at 1. As demonstrated by this opinion, the requirement of the affirmative defense that "no person received any economic benefit" is viewed very broadly. Texas law prohibiting gambling is written in such a way that gambling cannot be operated as a business without violating the law, because when poker games are operated as a business then some persons will receive an economic benefit other than personal winnings. If a poker game is played in the host's home where there are no fees charged by the host, and no employees are paid to work at the games (so there is no business or commercial aspect to the activity), then the affirmative defense might be available. The affirmative defense is not intended to allow a commercial poker room to operate and collect revenues or receive any economic benefit.

Texas Attorney General Opinion No. DM-344 (1995) addresses whether two or more persons, each using a separate personal computer in a private place, play a card game with each other and bet on the outcome of the game**s** would constitute illegal gambling. The opinion further explores what might constitute "private place" for purposes of the defense to prosecution under Chapter 47 of the Penal Code. The opinion states whether a place is private is determined by the scope of access by others, and even a place traditionally viewed as private, such as a residence, would not be a private place for the purpose of the defense if the public had access to gamble there.

Texas Attorney General Opinion No. GA-0358 (2005) addresses whether the legislature, in the absence of a constitutional amendment, may authorize the creation of county gaming districts on a local option basis to administer a state video lottery. In finding that the legislature may not authorize such creation without a constitutional amendment, the opinion clearly states: "It is well established that the legislature may not authorize an action (such as gambling) that the Texas Constitution prohibits." *Id.* at 2. Article III, section 47(a) of the Texas Constitution requires the legislature to "pass laws prohibiting lotteries and gift enterprises." The historical meaning of the term "lotteries " under the constitution, on the basis of long-standing decisions of the Texas Supreme Court and Texas Court of Criminal Appeals, is that any game that contains the elements of prize, chance, and consideration constitutes a "lottery" and constitutes gambling which is against state law and policy. The opinion concludes that the legislature may not, absent a constitutional amendment, authorize the creation of county gaming districts on a local option basis. *Id.* at 2. In regard to Applicant's situation, this opinion means that the legislature could not authorize poker gambling being operated as a business without first obtaining a constitutional amendment authorizing the gambling activity, as was done in order for the State to enact the Texas Lottery and legalized betting at authorized horse racing and dog racing tracks. There is no constitutional amendment or authority which allows or enables commercialized gambling in a poker house or poker establishment.

IV. CONCLUSION

The Building Official correctly determined that Applicant's use (operating poker games and similar games and collecting membership fees and "fees to enter" or "fees to play") constituted illegal gambling in violation of Texas law, so Applicant's CO was properly revoked. Not only does Applicant's business derive an economic benefit from the poker games and gambling on the Property, but the business also does not constitute a "private place" because a private club is not synonymous with a "private place" under the affirmative defense to Texas laws prohibiting

gambling. Furthermore, Applicant's gambling business violates Texas law prohibiting "Gambling Promotion" under Texas Penal Code §47.03. For Applicant's offense of "gambling promotion" under Section 47.03 the affirmative defense under 47.04(b) is not available. The Board should reject Applicant's appeal and affirm the Building Official's correct revocation of Applicant's certificate of occupancy.

We look forward to answering any questions you might have about anything in this submission.

Sincerely,

Gary R. Powell
Senior Assistant City Attorney

Charlotta S. Riley
Senior Assistant City Attorney

GRP
Attachments

Texas Penal Code

§ 47.04
Keeping a Gambling Place

(a) A person commits an offense if he knowingly uses or permits another to use as a gambling place any real estate, building, room, tent, vehicle, boat, or other property whatsoever owned by him or under his control, or rents or lets any such property with a view or expectation that it be so used.

(b) It is an affirmative defense to prosecution under this section that:

(1) the gambling occurred in a private place;

(2) no person received any economic benefit other than personal winnings; and

(3) except for the advantage of skill or luck, the risks of losing and the chances of winning were the same for all participants.

(c) An offense under this section is a Class A misdemeanor.

Acts 1973, 63rd Leg., p. 883, ch. 399, Sec. 1, eff. Jan. 1, 1974. Amended by Acts 1977, 65th Leg., p. 667, ch. 251, Sec. 1, eff. Aug. 29, 1977. Acts 1989, 71st Leg., ch. 1030, Sec. 1, eff. Sept. 1, 1989. Acts 1993, 73rd Leg., ch. 900, Sec. 1.01, eff. Sept. 1, 1994.

Texas Penal Code

§ 2.04
Affirmative Defense

(a) An affirmative defense in this code is so labeled by the phrase: “It is an affirmative defense to prosecution . . . .”

(b) The prosecuting attorney is not required to negate the existence of an affirmative defense in the accusation charging commission of the offense.

(c) The issue of the existence of an affirmative defense is not submitted to the jury unless evidence is admitted supporting the defense.

(d) If the issue of the existence of an affirmative defense is submitted to the jury, the court shall charge that the defendant must prove the affirmative defense by a preponderance of evidence.

Acts 1973, 63rd Leg., p. 883, ch. 399, Sec. 1, eff. Jan. 1, 1974. Amended by Acts 1993, 73rd Leg., ch. 900, Sec. 1.01, eff. Sept. 1, 1994.

EXHIBIT
2
BDA 212-028

Texas Penal Code

§ 47.03
Gambling Promotion

(a) A person commits an offense if he intentionally or knowingly does any of the following acts:

(1) operates or participates in the earnings of a gambling place;

(2) engages in bookmaking;

(3) for gain, becomes a custodian of anything of value bet or offered to be bet;

(4) sells chances on the partial or final result of or on the margin of victory in any game or contest or on the performance of any participant in any game or contest or on the result of any political nomination, appointment, or election or on the degree of success of any nominee, appointee, or candidate; or

(5) for gain, sets up or promotes any lottery or sells or offers to sell or knowingly possesses for transfer, or transfers any card, stub, ticket, check, or other device designed to serve as evidence of participation in any lottery.

(b) An offense under this section is a Class A misdemeanor.

Acts 1973, 63rd Leg., p. 883, ch. 399, Sec. 1, eff. Jan. 1, 1974. Amended by Acts 1987, 70th Leg., ch. 313, Sec. 3, eff. Sept. 1, 1987; Acts 1993, 73rd Leg., ch. 900, Sec. 1.01, eff. Sept. 1, 1994.

66 S.W.3d 494
Court of Appeals of Texas,
Austin.

Larry Dale BAXTER, Appellant,
v.
The STATE of Texas, Appellee.

Nos. 03–01–0061–CR, 03–01–0062–CR.
|
Dec. 20, 2001.

Synopsis
Defendant was convicted in the 119th Judicial District Court, Tom Green County, Thomas J. Gossett, J., of engaging in organized criminal activity and of gambling promotion. Defendant appealed. The Court of Appeals, Carl E.F. Dally, J., held that: (1) evidence was sufficient to support conviction; (2) trial court's error, in admitting into evidence an affidavit for a search warrant and the search warrant over defendant's timely hearsay objection, did not constitute reversible error; and (3) defendant was not entitled to voir dire the venire on affirmative defenses contained in statutory sections prohibiting the offenses of keeping a gambling place and gambling.

Affirmed.

West Headnotes (19)

[1] **Gaming and Lotteries** Promotion of gambling
Racketeer Influenced and Corrupt Organizations Evidence

Evidence was sufficient to support conviction for engaging in organized criminal activity and gambling promotion; defendant, along with three coperpetrators, conducted craps games in a building where bets were made and settled, defendant furnished free drinks and barbecue to those who participated in the dice games at the building, defendant used a dice table similar to those used in well known casinos, many citizens in the community participated in the dice games conducted by defendant, and large amounts of money were bet and lost. V.T.C.A., Penal Code §§ 47.03(a)(1), 71.01(a)(2).

[2] **Criminal Law** Statement of grounds

Identifying challenged evidence as hearsay or as calling for hearsay should be regarded by courts at all levels as a sufficiently specific objection, except under the most unusual circumstances. Rules of Evid., Rule 103(a)(1); Rules App.Proc., Rule 33.1(a)(1)(A), (a)(2)(A).

1 Cases that cite this headnote

[3] **Criminal Law** Written statements
Criminal Law Hearsay

Admitting in evidence an affidavit for a search warrant over objection has generally been considered error and often reversible error.

[4] **Criminal Law** Written statements
Criminal Law Judicial acts, proceedings, and records

An exception that allows search warrants or affidavits to be admissible over a hearsay objection occurs when a defendant disputes the existence of a warrant and a warrant exists, and thus, the warrant may be admitted before the jury.

1 Cases that cite this headnote

[5] **Criminal Law** Written statements
Criminal Law Judicial acts, proceedings, and records

An exception that allows search warrants or affidavits to be admissible over a hearsay objection occurs when a defendant makes probable cause an issue before a jury, and thus, the warrant or affidavit evidence is then admissible.

2 Cases that cite this headnote

[6] **Criminal Law** Necessity and scope of proof

The violation of a rule of evidence in the admission of evidence is considered non-constitutional error. Rules App.Proc., Rule 44.2.

1 Cases that cite this headnote

[7] **Criminal Law** Exclusion of improper evidence

The erroneous exclusion of defensive evidence is not constitutional error if the trial court's ruling merely offends the rules of evidence. Rules App.Proc., Rule 44.2.

[8] **Criminal Law** Prejudice to Defendant in General

A defendant's substantial rights are affected, and thus, constitutional error has been committed, when an error has had a substantial and injurious effect or influence in determining the jury's verdict. Rules App.Proc., Rule 44.2.

1 Cases that cite this headnote

[9] **Criminal Law** Prejudice to Defendant in General

A criminal conviction should not be overturned for non-constitutional error if the appellate court, after examining the record as a whole, has fair assurance that the error did not influence the jury, or had but slight effect. Rules App.Proc., Rule 44.2.

5 Cases that cite this headnote

[10] **Criminal Law** Prejudice to rights of party as ground of review

In assessing the likelihood that a jury's decision was adversely affected by a trial court error, the appellate court should consider everything in the record, including any testimony or physical evidence admitted for the jury's consideration, the nature of the evidence supporting the verdict, the character of the alleged error and how it might be considered in connection with other evidence in the case. Rules App.Proc., Rule 44.2.

5 Cases that cite this headnote

[11] **Criminal Law** Prejudice to rights of party as ground of review

In assessing the likelihood that the jury's decision was adversely affected by a trial court error, a reviewing court might consider the jury instruction given by the trial judge, the State's theory and any defensive theories, closing arguments and even voir dire, if material to appellant's claim. Rules App.Proc., Rule 44.2.

4 Cases that cite this headnote

[12] **Criminal Law** Hearsay
Criminal Law Documentary and demonstrative evidence

Trial court's error in admitting into evidence an

affidavit for a search warrant and the search warrant over defendant's timely hearsay objection, did not constitute reversible error; record did not show that the jurors ever knew the contents of the affidavit and warrant other than through defense counsel's extended, penetrating, caustic cross-examination of the affiant and another police officer, and only defense used affidavit during trial and in jury argument. Rules App.Proc., Rule 44.2.

2 Cases that cite this headnote

[13] **Criminal Law** Restriction to special purpose in general

Defendant was not entitled to limiting instruction regarding the admission into evidence of the search warrant affidavit and the search warrant; affidavit and warrant were not admissible for a limited purpose. Rules of Evid., Rule 105(a).

[14] **Indictments and Charging Instruments** Gambling offenses
Jury Personal opinions and conscientious scruples

In prosecution for engaging in organized criminal activity and gambling promotion, defendant was not entitled to voir dire the venire on affirmative defenses contained in statutory sections prohibiting the offenses of keeping a gambling place and gambling; offenses of keeping a gambling place and gambling each provided for an additional element not required for the violation of gambling promotion, and thus, offenses of keeping a gambling place and gambling were not lesser included offenses of gambling promotion. Vernon's Ann.Texas C.C.P. art. 37.09; V.T.C.A., Penal Code §§ 47.02–47.04.

[15] **Criminal Law** Exclusion of improper evidence

In prosecution for engaging in organized criminal activity and gambling promotion, offered testimony from former county attorney, which concerned the affirmative defenses for the offense of keeping a gambling place, was properly excluded; offenses of keeping a gambling place and gambling were not lesser included offenses of gambling promotion, and offered testimony did not concern a pure question of law. Vernon's Ann.Texas C.C.P. art. 37.09; V.T.C.A., Penal Code §§ 47.02–47.04.

1 Cases that cite this headnote

[16] **Criminal Law** Objections and disposition thereof

Trial court did not abuse its discretion in refusing to allow defense counsel to interrogate juror who had indicated that the fact he knew several witnesses was affecting him as a juror; record that was made on jury voir dire did not indicate that either the prosecutors or defense counsel informed prospective jurors who might be witnesses, and prospective jurors were never asked whether the witnesses who might testify would affect juror's fairness and impartiality.

[17] **Criminal Law** Parties Entitled to Allege Error

Not having used diligence during voir dire to determine whether the witnesses expected to testify would cause any prospective juror to be prejudiced or biased, a defendant cannot complain of such prejudice or bias on appeal.

[18] **Criminal Law** Necessity of Motion for New Trial or in Arrest

A motion for a new trial is not a requisite for raising a point on appeal; however, a motion for new trial is sometimes a necessary step to adduce facts of a matter not otherwise shown in the record. Rules App.Proc., Rule 21.3(g).

[19] **Criminal Law** Proceedings at trial in general

A motion for new trial is especially necessary when there is a claim of jury misconduct to adduce facts not otherwise shown in the record so as to raise point on appeal.

Attorneys and Law Firms

***496** Brian W. Wice, Houston, for appellant.

Idolina Garcia McCullough, Asst. Atty. Gen., William F. Lewis Jr., Austin, for appellee.
Before Chief Justice ABOUSSIE, Justices B.A. SMITH and DALLY.*

Opinion

CARL E.F. DALLY, Justice.

Appellant Larry Dale Baxter was convicted, in a jury trial, of the offenses of engaging in organized criminal activity and of gambling promotion. *See* Tex. Pen.Code Ann. §§ 71.02(a)(2) (West Supp.2002), 47.03(a)(1) (West 1994). The trial court assessed appellant's punishment for engaging in organized criminal activity at confinement in a state jail facility for a period of two years and a fine of $500; imposition of sentence was suspended and appellant was granted community supervision for two years and ordered to pay his fine and costs. The trial court assessed appellant's punishment for gambling promotion at confinement in the county jail for a period of one year and a fine of $500; imposition of sentence was suspended and appellant was granted community supervision for one year and ordered to pay his fine and costs.

Appellant asserts that the evidence is insufficient to support the jury's verdicts and that the trial court erred in admitting inadmissible evidence, in excluding admissible evidence, in improperly curtailing jury voir dire, in charging the jury, and in refusing to allow a sitting juror to be interrogated. The judgments will be affirmed.

Sufficiency of Evidence

In his sixth and seventh points of error, appellant insists that the evidence is insufficient to support the jury's verdicts. In reviewing the legal sufficiency of the evidence, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. ***497** *Jackson v. Virginia,* 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *Patrick v. State,* 906 S.W.2d 481, 486 (Tex.Crim.App.1995); *Aiken v. State,* 36 S.W.3d 131, 132 (Tex.App.—Austin 2000, pet. ref'd). The standard of review is the same whether the evidence is direct or circumstantial, or both. *See* *Kutzner v. State,* 994 S.W.2d 180, 184 (Tex.Crim.App.1999); *Banda v. State,* 890 S.W.2d 42, 50 (Tex.Crim.App.1994).

A person commits the offense of engaging in organized criminal activity if, with the intent to establish, maintain, or participate in a combination or the profits of a combination, he commits or conspires to commit any gambling offense punishable as a Class A misdemeanor. Tex. Pen.Code. Ann. § 71.02(a)(2) (West Supp.2002). "Combination" means three or more persons who collaborate in carrying on criminal activities. *Id.* § 71.01(a). A person commits the Class A misdemeanor offense of gambling promotion if he intentionally or knowingly operates or participates in the earnings of a gambling place. *Id.* § 47.03(a)(1)(d) (West 1994). "Gambling Place" means any real estate, building, room, tent, vehicle, boat, or other property whatsoever, one of the uses of which is the making or settling of bets. *Id.* § 47.01(3). "Bet" means any agreement to win or lose something of value solely or partially by chance. *Id.* § 47.01(1) (West Supp.2001).

In appellate cause number 3–01–00061–CR, the indictment charged that on or about May 6, 1999, appellant

> did then and there, with intent to establish, maintain, or participate in a combination or in the profits of a combination, said combination consisting of LARRY DALE BAXTER, SHANNON CARPENTER, CINDY RICHARDS, AND JERRY DEAN CLEMENTS, who collaborated in carrying on the hereinafter described criminal activity, commit the offense of Gambling Promotion, to-wit: by operating and participating in the earnings of a gambling place, namely: a building located at 1601 Harrison, San Angelo, Texas, by then and there making and settling of bets.

[1] A San Angelo Police SWAT team executed a search warrant and searched the house located at 1601 Harrison, in the city of San Angelo. When they entered the house, the officers found a craps table, dozens of dice, thousands of dollars in cash, and a notebook keeping account of debts. One of the windows was boarded up so the craps table could not be seen from outside the house. Signs posted inside the home declared "no checks, no credit, cash only."

Evidence shows that appellant assisted by Clements, Carpenter, and Richards conducted craps games in the building located at 1601 Harrison in San Angelo, where bets were made and settled. Appellant furnished free drinks and barbecue to those who participated in the dice games. Appellant used a dice table similar to those used in well known casinos. Many citizens in the community participated in the dice games conducted by appellant and the other alleged individuals. Large amounts of money—thousands of dollars—were bet and lost. To prove appellant guilty of the offense charged, it was not necessary to show that he profited from the games. However, there is ample evidence that he did.

The jury as the trier of fact could rationally find from the direct and circumstantial evidence, viewed in the light most favorable to the prosecution, that appellant was guilty, beyond a reasonable doubt, of intentionally participating in a combination with Clements, Carpenter, and Richards to commit the Class A misdemeanor gambling offense of gambling promotion by intentionally and knowingly using the place alleged where bets were made and ***498** settled. The evidence is sufficient to support the jury's verdict finding appellant guilty of engaging in organized criminal activity. Appellant's sixth point of error is overruled.

In appellate cause number 3–01–00062–CR, it was charged that on or about March 31, 1999, appellant,

> did then and there, with intent to establish, maintain, or participate in a combination or in the profits of a combination, said combination consisting of LARRY DALE BAXTER, JERRY DEAN CLEMENTS, AND ROBERT FAIRCHILD, who collaborated in carrying on the hereinafter described criminal activity, commit the offense of GAMBLING PROMOTION, to-wit: by operating and participating in the earnings of a gambling place, namely: a building located at 1122 E. 22nd, San Angelo, Texas, by then and there making and settling of bets.

This case was tried jointly with cause number 3–01–00061–CR. The jury found appellant guilty of the lesser included offense of gambling promotion. The evidence is amply sufficient for the jury to rationally find beyond a reasonable doubt that appellant used a building located at 1122 E. 22nd in San Angelo to intentionally or knowingly operate a gambling place where bets were made and settled. Appellant's seventh point of error is overruled.

Admission of Affidavit for Search Warrant

[2] In his first point of error, appellant asserts that the trial court erred in admitting in evidence, over his objection, an affidavit for a search warrant and the warrant. During the testimony of the State's first witness, San Angelo police officer Dick Brock, it was established that Brock had drafted and executed an affidavit and obtained from a magistrate a warrant to search the house at 1601 South Harrison in San Angelo. The State offered and the court admitted in evidence the affidavit and the warrant over appellant's timely hearsay objection. An objection that proffered evidence is "hearsay" is sufficiently specific to require appellate review. *See* Tex.R. Evid. 103(a)(1); Tex.R.App. P. 33.1(a)(1)(A), (2)(A); *Lankston v. State,* 827 S.W.2d 907, 910 (Tex.Crim.App.1992).1

[3] [4] [5] Admitting in evidence an affidavit for a search warrant over objection has generally been considered error and often reversible error.2 The Court of Criminal

Appeals has observed that "[t]aking note of the number of instances in which this court has found it necessary to reverse ***499** judgments of conviction on account of the reception in evidence of the recital of facts embraced in the affidavit for the search warrant, the continued frequency with which the error is repeated is the subject of wonder." *Hamilton v. State,* 120 Tex.Crim. 154, 48 S.W.2d 1005, 1006 (1932). Many cases have found that the admission in evidence of affidavits for search warrants over objection constitutes error. *See Figueroa v. State,* 473 S.W.2d 202, 204 (Tex.Crim.App.1971); *Tucker v. State,* 170 Tex.Crim. 113, 339 S.W.2d 64, 64 (1960); *Zorn v. State,* 167 Tex.Crim. 502, 321 S.W.2d 90, 90 (1959); *Hicks v. State,* 167 Tex.Crim. 115, 318 S.W.2d 652, 652 (1958); *Dillon v. State,* 108 Tex.Crim. 642, 2 S.W.2d 251, 251 (1928); *Pratt v. State,* 748 S.W.2d 483, 484 (Tex.App.—Houston [1st Dist.] 1988, pet. ref'd). The admission of the affidavit and warrant, over appellant's objection, was error. We must decide whether the error is reversible error. Cases decided before the adoption of the Rules of Appellate Procedure were said to turn on the facts of each particular case. *See Figueroa,* 473 S.W.2d at 204; *Hamilton,* 48 S.W.2d at 1005; *see Tomas Torres v. State,* 552 S.W.2d 821, 824 (Tex.Crim.App.1977); *Doggett v. State,* 530 S.W.2d 552, 556–57 (Tex.Crim.App.1975).

[6] [7] The Rules of Appellate Procedure now provide the rule for determining reversible error. *See* Tex.R.App. P. 44.2. Other than constitutional error, any error must be disregarded unless it affects substantial rights of the defendant. *Id.* 44.2(b). The violation of a rule of evidence in the admission of evidence, as in this case, is considered non-constitutional error. *See Johnson v. State,* 967 S.W.2d 410, 417 (Tex.Crim.App.1998); *King v. State,* 953 S.W.2d 266, 271 (Tex.Crim.App.1997); *Tate v. State,* 988 S.W.2d 887, 890 (Tex.App.-Austin 1999, pet. ref'd). Similarly, the erroneous exclusion of defensive evidence is not constitutional error if the trial court's ruling merely offends the rules of evidence. *See Miller v. State,* 42 S.W.3d 343, 346 (Tex.App.—Austin 2001, no pet.).

[8] [9] [10] [11] A defendant's substantial right is affected when the error had a substantial and injurious effect or influence in determining the jury's verdict. *Morales v. State,* 32 S.W.3d 862, 867 (Tex.Crim.App.2000) (citing *King v. State,* 953 S.W.2d 266, 271 (Tex.Crim.App.1997)). A criminal conviction should not be overturned for non-constitutional error if the appellate court, after examining the record as a whole, has fair assurance that the error did not influence the jury, or had but slight effect. *Id.* (citing *Johnson v. State,* 967 S.W.2d 410, 417 (Tex.Crim.App.1998)). In assessing the likelihood that the jury's decision was adversely affected by the error, the appellate court should consider everything in the record, including any testimony or physical evidence admitted for the jury's consideration, the nature of the evidence supporting the verdict, the character of the alleged error and how it might be considered in connection with other evidence in the case. The reviewing court might also consider the jury instruction given by the trial judge, the State's theory and any defensive theories, closing arguments and even voir dire, if material to appellant's claim. *Id.* (citing *Llamas v. State,* 12 S.W.3d 469, 471 (Tex.Crim.App.2000)).

[12] The affidavit that was erroneously admitted in evidence was a seven-page instrument comprised of hearsay received by the affiant between December 11, 1997 and May 5, 1999. Much of the information was second-hand and third-hand hearsay coming from unnamed informers. However, the record affirmatively shows by a statement of defense counsel at the charging conference that to that point the affidavit had not been published to the jury. The record does not show that the jurors ever ***500** knew the contents of the affidavit and warrant other than through defense counsel's extended, penetrating, caustic cross-examination of the affiant Brock and another police officer. Defense counsel cross-examined the affiant Brock and police officer Dennis McGuire, one of Brock's informers, concerning the information contained in the affidavit. Counsel elicited testimony and admissions from the officers casting substantial doubt about the truthfulness of a considerable part of the information included in the affidavit.[3] Then in closing argument, defense counsel argued at length that Brock's affidavit contained thirty-one lies which the defense had exposed during cross-examination of Brock. In part defense counsel argued:

> [Y]ou saw Detective Brock up here showing you a list of so many lies that it was embarrassing. I mean, he took a sworn document—and when I say sworn to, people, I mean these judges have to rely on that they're telling the truth.... And what is so frightening about what Detective Brock brought you is after he knew it was all lies, after we went over ... thirty-one of them, that he—through his investigation, he found out that they were lies.... When faced with all these lies in the sworn document that he'd given the Judge, what did he say? Well, I still believe my old snitch.... Can you throw all these names in here and slander all these people? How about this list of people?

Defense counsel then named a number of citizens about whom he had cross-examined Brock because they had been named in the affidavit as participants in the alleged unlawful dice games. Counsel stressed that among these citizens named were a former Tom Green County elected official and a prominent lawyer practicing in San Angelo. Counsel continued:

> I don't think it's okay to slander and just make up stuff and take some old boy that's on felony probation, try to work out a deal with him, get him to tell you some lies so you can get a search warrant. Because you know what, people, the Judge doesn't issue a search warrant unless he finds probable cause. If all that stuff was in there was true, they'd have had probable cause. If there was a door man, somebody taking money at the door, then you got an illegal game if you're charging, the house has an advantage.... The house has an advantage, it's an illegal game. That's all over that affidavit, that's all over Brock's testimony. Because if what Brock told that Judge was true, what Larry did was against the law....
>
> [The magistrate signed the warrant] because he believed Brock would do what's right and tell him the truth. And not only did Brock lie to him about what he put in there, but he doesn't even have the respect for you to come in here and say, "I'm sorry about that. You know, I—he gave me that information, I put it in there, I found out it was wrong. I wish I'd have known it was wrong." Well, what's Dick supposed to do? How about investigate it? How about these dates these games are going on? How about go down and look and see if Baxter was even there? He's on duty.
>
> Then it gets worse, if it can. After you take this search warrant that slanders all these good people over here in San Angelo, then he calls in what, a SWAT team. A SWAT team to go into a private home where guys are throwing some dice and having a beer. Would ***501** the Judge have let him go in there if he'd have known the truth? Nah, no way. No Judge would ever in the world have signed that warrant. But Brock lied to him.

Appellant offered no testimony in his defense. However, throughout the trial, in voir dire, in cross-examination, and in closing jury argument, appellant presented a consistent defensive theory. Appellant maintained there was no evidence he was acting in an unlawful combination as alleged and that the dice games were fair and not unlawful. The defense attempted to show this by cross-examination and argued that: (1) Brock had only read about dice games in a book and did not understand dice games, (2) Brock lied at least thirty-one times in the affidavit by which he obtained a search warrant, (3) Brock slandered many upstanding citizens in the community by falsely swearing they had participated in unlawful dice games, (4) Brock was playing "supercop" by calling in a SWAT team to serve the search warrant, and (5) the machine gun carrying, hooded, combat attired SWAT team raided a friendly dice game "on a beautiful afternoon in May" when some "buddies" were having barbecue and "pitching dice."

The State unwisely offered in evidence the affidavit and the search warrant and the trial court erred in admitting them. However, it was only the defense that used the affidavit during trial and in jury argument. Defense counsel adroitly used the affidavit in cross-examination and in his closing jury argument.

After examining the entire record, we conclude that there is little likelihood that the error had a substantial and injurious effect or influence on the jury's verdict; from our review of the record, we have fair assurance that the error did not influence the jury or had but slight effect. Appellant's first point of error is overruled.

Limiting Instruction

[13] In his fourth point of error, appellant complains that the trial court erred in denying his request for a limiting instruction as to State's Exhibit 37, the search warrant and affidavit. When the search warrant affidavit and warrant were admitted in evidence over appellant's objection, appellant did not ask for a limiting instruction. Apparently, appellant took the sound position that the affidavit and warrant were not admissible for any purpose. However, after testimony was closed, appellant filed a written request asking the trial court to instruct the jury that: "The search warrant and its contents are not offered for the truth of the matter asserted. The contents and the statements contained therein are not evidence and should not be considered by you for any purpose. The search warrant is in evidence solely to show that a search warrant existed on May 6, 1999."

At the charging conference, defense counsel suggested, that rather than giving his requested charge, the trial court reconsider and change its ruling admitting this evidence. Defense counsel pointed out that, "I feel like if [this evidence] is removed from evidence at this time, it hasn't been published to the jury," the error in admitting the evidence would be cured. Counsel suggested the court could reopen for the purpose of changing its ruling and

withdraw the erroneously admitted evidence. The State voiced an objection that when the affidavit and search warrant were offered, counsel made no objection to the affidavit but objected that the whole document [affidavit and warrant] was hearsay. Further, the State reminded the court that it was the defense counsel who had used the contents of the affidavit to extensively cross-examine the State's witnesses. Also, the State argued that appellant ***502** had waived any claim that the evidence was admissible for only a limited purpose by not making that objection at the time the evidence was admitted. The court concluded, perhaps erroneously, that it could not reopen for the purpose of changing the ruling because both sides had closed.

Appellant's requested charge was not included in the court's jury charge. On appeal, the State urges that appellant was not entitled to a limiting charge because he did not ask for it when the evidence was admitted. The State cites *Hammock v. State,* 46 S.W.3d 889, 894 (Tex.Crim.App.2001), a case decided after the trial of the instant case. *Hammock* interprets Rule of Evidence 105(a)[4] and holds that a defendant is not entitled to a jury instruction limiting consideration of evidence unless he requested a limiting instruction at the time the evidence was admitted.

In this case, the affidavit and warrant were not admissible for any purpose; they were not admissible for a limited purpose. Their admission was error, but we have fully considered the error and found it harmless. Because the affidavit and warrant were not admissible for a limited purpose in this case, the trial court did not err in failing to give the requested charge. Appellant's fourth point of error is overruled.

Voir Dire on Lesser Included Offenses

In his second point of error, appellant asserts that the trial court erred in refusing to permit him to voir dire the venire on the affirmative defenses contained in Sections 47.02 and 47.04 of the Penal Code. *See* Tex. Pen.Code Ann. §§ 47.02(b) (West Supp.2001),[5] 47.04(b) (West 1994).[6]

The underlying offense with which appellant was charged in these cases, we reiterate, was Section 47.03(a)(1) of the Penal Code. *See* Tex. Pen.Code Ann. § 47.03(a)(1) (West 1994). Section 47.03(a)(1) does not provide for any affirmative defenses. It has been recognized that Sections 47.02, 47.03, and 47.04 have different purposes and that the legislature sought to decriminalize social gambling and to provide minimal penalties for the individual who utilizes the services of a professional gambler. *See Adley v. State,* 718 S.W.2d 682, 683 (Tex.Crim.App.1985); *Henderson v. State,* 661 S.W.2d 721, 724–26 (Tex.Crim.App.1983). Also, affirmative defenses such as these provided for in Sections 47.02 and 47.04 are not applicable to Section 47.03. *See State v. Amvets Post Number 80,* 541 S.W.2d 481, 483 (Tex.Civ.App.—Dallas 1976, no writ). However, ***503** the gist of appellant's argument is that the offenses of keeping a gambling place prohibited by Section 47.04 and gambling prohibited by Section 47.02 are lesser included offenses of gambling promotion prohibited by Section 47.03. Therefore, appellant argues he was entitled to voir dire the jury on the lesser included offenses and the affirmative defenses provided for those offenses. *See* *Santana v. State,* 714 S.W.2d 1, 10 (Tex.Crim.App.1986).

An offense is a lesser included offense if:

> (1) it is established by proof of the same or less than all the facts required to establish the commission of the offense charged;
>
> (2) it differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property, or public interest suffices to establish its commission;
>
> (3) it differs from the offense charged only in the respect that a less culpable mental state suffices to establish its commission; or
>
> (4) it consists of an attempt to commit the offense charged or an otherwise included offense.

Tex.Code Crim. Proc. Ann. art. 37.09 (West 1981). We must then determine whether gambling and keeping a gambling place are lesser included offenses of gambling promotion.

The elements of gambling promotion are: (1) a person, (2) intentionally or knowingly, (3) operates or participates in the earnings of a gambling place. *See* Tex. Pen.Code Ann. § 47.03(a)(1) (West 1994).[7]

The elements of gambling are: (1) a person, (2) intentionally or knowingly, (3) plays and bets for money or other thing of value at any game played with dice. *See* Tex. Pen.Code Ann. § 47.02(a)(3) (West Supp.2001).[8]

The elements of keeping a gambling place are: (1) a person, (2) knowingly, (3) uses a gambling place or permits another to use as a gambling place, (4) real estate, building, room, tent, vehicle, boat, or other property

whatsoever, (5) owned by him or under his control or rents or lets such property with the intent that it be so used. *See* Tex. Pen.Code Ann. § 47.04(a) (West 1994).[9]

[14] A violation of § 47.04 requires the additional element not required by § 47.03 that the person own, lease, or let the place where gambling occurs. A violation of § 47.02 requires the additional element not required by § 47.03 that the person himself play and bet for money or other thing of value at any game played with dice.

Because the offenses prohibited by Section 47.02 and 47.04 each provide for an ***504** additional element not required for the violation of Section 47.03, keeping a gambling place and gambling are not lesser included offenses of gambling promotion. The trial court did not err in refusing to allow defense counsel to voir dire the jury on the affirmative defenses provided for Sections 47.02 and 47.04. Appellant's second point of error is overruled.

Excluded Testimony

[15] In his third point of error, appellant complains that the trial court erred in excluding testimony of Adam Morriss, a former county attorney, (in another county—not Tom Green county) concerning the affirmative defenses of keeping a gambling place provided in Section 47.04. Because the offenses prohibited by Sections 47.04 and 47.02 are not lesser included offenses of the offense prohibited by Section 47.03, the court did not err in disallowing the proffered testimony. Moreover, because the testimony offered concerned a pure question of law, the trial court did not err in disallowing the testimony.[10] *See Dickerson v. DeBarbieris,* 964 S.W.2d 680, 690 (Tex.App.—Houston [14th Dist.] 1998, no pet.); *Lyondell Petrochemical Co. v. Fluor Daniel, Inc.,* 888 S.W.2d 547, 554 (Tex.App.—Houston [1st Dist.] 1994, writ denied). Appellant's third point of error is overruled.

Juror Not Questioned

[16] In his fifth point of error, appellant insists that the trial court erred in denying his "request to question a juror who indicated that the fact he knew several witnesses was 'affecting' him as a juror." On the second day of trial, the trial court told counsel that the bailiff had informed the court that one of the jurors had told the bailiff that "he [the juror] knows the witnesses who have been present [sic] and that it is affecting him as a juror." Defense Counsel asked to have the juror questioned. The trial court refused counsel's request. On appeal, appellant contends that "[a]ppellant's timely request to interrogate the juror to determine whether his knowledge of the State's witnesses was 'affecting him as a juror' called into question his ability to be fair and impartial...." Appellant argues: "During voir dire, the prosecutor asked if anyone knew any State's witnesses. (5 RR at 16–18).(5 RR at 16–18). While several panelists noted they knew some State's witnesses, none indicated their ability to be fair and impartial was affected by their knowledge. (5 RR at 17–23).(5 RR at 17–23)." Appellant is mistaken. On the pages of the record indicated, the prospective jurors were not asked if they knew the witnesses who might testify. On the pages of the record indicated, the prospective jurors were asked whether they knew Jerry Dean Clements, Shannon Carpenter, or Robert Fairchild. These three individuals were alleged to have collaborated with appellant in committing the offense of gambling promotion, but none of these three individuals testified in the trial of these cases. Also, on the pages of the record designated, prospective jurors were asked by the prosecutor whether they knew attorneys Adam Morriss and Melvin Gray. Although Gray's name was mentioned during trial, he was not called as a witness and did not testify. Morriss did not testify before the jury; Morriss was called as a witness by defense counsel and testified out of the presence of the jury on a bill of exception for the defense.

***505** [17] We have examined the record made on jury voir dire and have been unable to find where either the prosecutors or defense counsel informed the prospective jurors who might be witnesses. The prospective jurors were never asked whether the witnesses who might testify would affect the juror's fairness and impartiality. Not having used diligence during voir dire to determine whether the witnesses expected to testify would cause any prospective juror to be prejudiced or biased, appellant cannot now complain. *See* *Gonzales v. State,* 3 S.W.3d 915, 917 (Tex.Crim.App.1999); *Armstrong v. State,* 897 S.W.2d 361, 363–64 (Tex.Crim.App.1995).

The State, in its brief, argues that the juror who said he was "affected" by the witnesses who had testified was the same juror who had told the trial court after he had been selected as a juror that his service on the jury would interfere with his planned vacation. From our inspection of the record, we cannot determine whether this was true or not. Counsel has not designated where we can find, and we cannot find, the name or any identification of either the juror whose vacation plans would be interfered with or the juror who said he was "affected" by the witnesses

who had testified.

[18] [19] It is also important to note that appellant did not file a motion for new trial and obtain a hearing in an attempt to complete the record on the issue he has now presented on appeal. A motion for new trial is not a requisite for raising a point on appeal; however, a motion for new trial is sometimes a necessary step to adduce facts of a matter not otherwise shown in the record. *See* Tex.R.App. P. 21.2; 43 George E. Dix & Robert O. Dawson, *Texas Practice: Criminal Practice and Procedure* § 41.01 (2d ed.2001). This is especially necessary when there is a claim of jury misconduct. *See id.;* Tex.R.App. P. 21.3(g); *Armstrong*, 897 S.W.2d at 363. Because of the state of the record before us, we are unable to say that the trial court abused its discretion in refusing to allow defense counsel to interrogate the juror. Appellant's fifth point of error is overruled.

The judgments are affirmed.

All Citations

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Footnotes

* Before Carl E.F. Dally, Judge (retired), Court of Criminal Appeals, sitting by assignment. *See* Tex. Gov't Code Ann. § 74.003(b) (West 1998).

1 "Identifying challenged evidence as hearsay or as calling for hearsay should be regarded by courts at all levels as a sufficiently specific objection, except under the most unusual circumstances [citation omitted]. Indeed, it is difficult to know how much more specific such an objection could be under most circumstances." *Lankston v. State,* 827 S.W.2d 907, 910 (Tex.Crim.App.1992); *Cofield v. State,* 891 S.W.2d 952, 954 (Tex.Crim.App.1994). Appellant preserved for appellate review the matter about which he complains.

2 There are exceptions in which search warrants or affidavits may be admissible over a hearsay objection. When a defendant disputes the existence of a warrant and a warrant exists, the warrant may be admitted before the jury. *See Sallings v. State,* 789 S.W.2d 408, 416–17 (Tex.App.Dallas 1990, pet. ref'd). Also, if a defendant makes probable cause an issue before a jury, hearsay evidence is admissible. *See Juarez v. State,* 758 S.W.2d 772, 774 n. 1 (Tex.Crim.App.1988); *Murphy v. State,* 640 S.W.2d 297, 299 (Tex.Crim.App.1982); *Adams v. State,* 552 S.W.2d 812, 814 n. 1 (Tex.Crim.App.1977); *Roberts v. State,* 545 S.W.2d 157, 159 (Tex.Crim.App.1977); *Lacy v. State,* 424 S.W.2d 929, 931 (Tex.Crim.App.1967). In the instant case, appellant did not claim the officers did not have a warrant and did not make probable cause an issue before the jury.

3 We have taken into account a defendant's right to meet, destroy, or explain improperly admitted evidence. *See Leday v. State,* 983 S.W.2d 713, 719 (Tex.Crim.App.1998); *Thomas v. State,* 572 S.W.2d 507, 512 (Tex.Crim.App.1978).

4 **Rule 105. Limited Admissibility**

(a) Limiting Instruction. When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly; but, in the absence of such request the court's action in admitting such evidence without limitation shall not be a ground for complaint on appeal.

Tex.R. Evid. 105(a).

5 (b) It is a defense to prosecution under this section that:

(1) the actor engaged in gambling in a private place

(2) **no person** received any **economic benefit** other than personal winnings; and

(3) except for the advantage of skill or luck, the risks of losing and the chances of winning were the same for all

participants.
Tex. Pen.Code Ann § 47.02(b) (West Supp.2001).

6 (b) It is an affirmative defense to prosecution under this section that:
(1) the gambling occurred in a private place;
(2) no person received any economic benefit other than personal winnings; and
(3) except for the advantage of skill or luck, the risks of losing and the changes of winning were the same for all participants.
Id. § 47.04(b) (West 1994).

7 **§ 47.03 Gambling Promotion**
(a) A person commits an offense if he intentionally or knowingly does any of the following acts:
(1) operates or participates in the earnings of a gambling place;
Tex. Pen.Code. Ann. § 47.03(a)(1) (West 1994).

8 **§ 47.02 Gambling**
(a) A person commits an offense if he:
(3) plays and bets for money or other thing of value at any game played with cards, dice, balls, or any other gambling device.
Tex. Pen.Code Ann. § 47.02(a)(3) (West Supp.2001).

9 **§ 47.04. Keeping a Gambling Place**
(a) A person commits an offense if he knowingly uses or permits another to use as a gambling place any real estate, building, room, tent, vehicle, boat, or other property whatsoever owned by him or under his control, or rents or lets any such property with a view or expectation that it be so used.
Tex. Pen.Code Ann. § 47.04(a) (West 1994).

10 The witness was asked, "And what would your testimony be to what these affirmative defenses are?" The witness answered: "Well, the same as outlined in 47.04, subsection B, (1) the gambling occurred in a private place, (2) no person received any economic benefit other than personal winnings, and (3) except for the advantage of skill or luck, the risk of losing and the chances of winning are the same for all participants."

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541 S.W.2d 481
Court of Civil Appeals of Texas,
Dallas.

The STATE of Texas, Appellant,
v.
AMVETS POST NUMBER 80 et al., Appellees.

No. 19024.
|
Aug. 5, 1976.

Synopsis

District attorney brought suit on behalf of State to restrain veterans organization and its officers and members from operating bingo games, in which participants paid for privilege of playing and prizes were determined by chance. The 162nd District Court, Dallas County, Dee Brown Walker, J., granted temporary injunction restraining operation of games insofar as persons other than members of organization and their families were allowed to participate, but otherwise denied relief sought, and State appealed. The Court of Civil Appeals, Guittard, J., held that bingo game was illegal lottery, whether or not restricted to members and their families, regardless of percentage of revenues used for charitable purposes, and even if no individual received any benefit other than personal winnings.

Reversed and rendered.

Procedural Posture(s): On Appeal; Motion for Preliminary Injunction.

West Headnotes (4)

[1] Gaming and Lotteries Lotteries and raffles
Gaming and Lotteries Bingo

Bingo game operated by veterans organization in which players purchased bingo cards from organization for a fixed charge, in which mechanical device selected numbers for bingo cards at random and in which cash prizes ranged from $35 to $500, was a scheme or procedure whereby one or more prizes were distributed by chance among persons who had paid or promised consideration for a chance to win anything of value and was therefore an illegal "lottery," even if game was restricted to members and their families, regardless of percentage of revenues used for charitable purposes, and even if no individual received any benefit other than personal winnings. Vernon's Ann.Civ.St. art. 4667; V.T.C.A., Penal Code §§ 47.01(6), 47.03, 47.03(a)(5).

6 Cases that cite this headnote

[2] Gaming and Lotteries Lotteries and raffles
Gaming and Lotteries Bingo

Bingo game operated by veterans organization constituted an illegal lottery despite fact that game was restricted to members and their families, where organization realized financial gain from the game. V.T.C.A., Penal Code §§ 47.01(6), 47.03(a)(5).

5 Cases that cite this headnote

[3] Gaming and Lotteries Lotteries and raffles

A gain is no less a gain if it is contributed to charity, and consequently, a lottery is no less a lottery if the proceeds are used for charitable purposes.

2 Cases that cite this headnote

[4] Gaming and Lotteries Lotteries and raffles

A game otherwise qualifying as a lottery cannot escape condemnation as an illegal lottery on the ground that no individual receives any benefit other than personal winnings or on ground that risk of losing and chance of winning is the same for all participants. V.T.C.A., Penal Code §§ 47.02(b), 47.03, 47.04(b).

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1 Cases that cite this headnote

transfers any card, stub, ticket, check, or other device designed to serve as evidence of participation in any lottery.

Attorneys and Law Firms

***482** Henry Wade, Dist. Atty., Edgar A. Mason, Asst. Dist. Atty., Dallas, for appellant.

Opinion

GUITTARD, Justice.

The district attorney brought this suit on behalf of the State under Tex.Rev.Civ.Stat.Ann. art. 4667 (Vernon Supp.1975) to restrain Amvets Post Number 80 and its officers and members from operating bingo games in which the participants pay for the privilege of playing and prizes are determined by chance. The trial court granted a temporary injunction restraining the defendants from operating the games insofar as persons other than Amvet members and their families are allowed to participate, but the court otherwise denied the relief sought. From this denial the State appeals. We hold that the game is an illegal lottery, whether or not restricted to members and their families, and, therefore, that the State is entitled to the broader injunction.

[1] The term 'lottery' is denied in Tex. Penal Code Ann. s 47.01(6) (Vernon 1974) as follows:

> 'Lottery' means any scheme or procedure whereby one or more prizes are distributed by chance among persons who have paid or promised consideration for a chance to win anything of value, whether such scheme or procedure is called a pool, lottery, raffle, gift, gift enterprise, sale, policy game, or some other name.

Tex. Penal Code Ann. s 47.03 (Vernon 1974) provides that a person commits an offense if he intentionally or knowingly . . .

> (5) for gain, sets up or promotes any lottery or sells or offers to sell or knowingly possesses for transfer, or

The undisputed facts bring the case squarely within the definition of a 'lottery' in s 47.01(6). The players purchase bingo cards from the Post for a fixed charge. The object of the game is to cover the numbered spaces on the card in a designated pattern as numbers are selected at random by a mechanical device and called out to the players. The first player to complete the pattern receives a cash prize ranging from $35 to $500, depending upon the pattern designated. From this evidence it is clear that the game is, in the words of the statute, a 'scheme or procedure whereby one or more prizes are distributed by chance among persons who have paid or promised consideration for a chance to win anything of value.'

[2] [3] Denial of the broader injunction sought cannot be justified on the theory that if the game is restricted to members and their families it is not operated 'for gain,' as prohibited by s 47.03(5). The trial court expressly found and recited in its order that the Post realizes a financial gain. ***483** The evidence shows that the games are held three times a week and are undertaken for the express purpose of raising money. The revenues are used for the Post's general operating expenses as well as for charitable contributions. Obviously such proceeds are a regular and an expected part of the scheme. Cf. Wink v. Griffith Amusement Co., 129 Tex. 40, 100 S.W.2d 693 (1936). Even if all the proceeds were contributed to charity, the game would still be an enterprise undertaken 'for gain.' A gain is no less a gain if it is contributed to charity. Consequently, a lottery is no less a lottery if the proceeds are used for charitable purposes. See Tussey v. State, 494 S.W.2d 866 (Tex.Crim.App.1973).

[4] Neither can such a game escape condemnation as a lottery on the ground that no individual received any benefit other than personal winnings. Other gambling statutes provide for a defense if the accused shows that the gambling occurred in a private place, that no person received any economic benefit other than personal winnings, and that the risk of losing and the chance of winning was the same for all participants. Tex.Penal Code Ann. ss 47.02(b), 47.04(b) (Vernon 1974). No such defense is provided to the charge of operating a lottery under s 47.03.

Accordingly, we reverse the order of the district court

insofar as it denies the complete relief sought by the State and we issue our temporary injunction restraining Amvets Post Number 80 and its officers and members from setting up, operating or promoting for gain bingo games or any other lottery scheme whereby one or more prizes are distributed by chance among persons paying for the privilege of participating, whether or not the participants are limited to members of the Post and their families, until a final order in this cause is issued by the trial court.

We observe, however, that we can find no good reason why the State should have sought a temporary injunction rather than an early setting on a permanent injunction. Such an early setting on the merits would avoid duplication of effort both in the trial court and on appeal, and would cause little more disruption of the docket than a hearing on an application for temporary injunction. See Southwest Weather Research, Inc. v. Jones, 160 Tex. 104, 327 S.W.2d 417, 421—22 (1959).

Reversed and rendered.

All Citations

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306.7 Certificate of occupancy. A certificate of occupancy must contain the following information:

1. The address of the structure or land.

2. The name and address of the owner of the structure and land.

3. The name and address of the operator of the use or occupancy.

4. The use and occupancy, in accordance with the provisions of the *Dallas Building Code* or the *Dallas Existing Building Code*, whichever applies, and the *Dallas Development Code*.

5. The certificate of occupancy number.

6. The zoning district where the structure of land is located.

7. Identification of any required city, county, state, or federal license, permit, or registration to operate the use or occupancy. (Ord. 26029; 26579)

306.8 Partial certificate of occupancy. A partial certificate of occupancy may be issued by the building official for the use or occupancy of a portion of a structure prior to the completion of the entire structure. (Ord. 26029; 26579)

306.9 Temporary certificate of occupancy. A temporary certificate of occupancy may be issued by the building official for the temporary use or occupancy of a portion of a structure. The building official shall set a time period during which the temporary certificate of occupancy is valid. When the temporary certificate of occupancy expires, the holder must obtain a certificate of occupancy authorizing the use or occupancy or cease the use or occupancy. The building official may grant one or more extensions of the temporary certificate of occupancy for periods not to exceed 30 days. If a request for extension is made by the applicant or the applicant's agent, the request must be in writing and made within the time period sought to be extended. (Ord. 26029; 26579)

306.10 Posting. The certificate of occupancy shall be posted in a conspicuous place in the premises and shall not be removed except by the building official. (Ord. 26029; 26579)

306.11 Validity. The issuance of a certificate of occupancy does not grant any vested right or give authority to violate any provision of the codes, the *Dallas Development Code*, other city ordinances, rules, or regulations, or any county, state, or federal laws or regulations. Any certificate of occupancy presuming to give authority to violate any provision of the codes, the *Dallas Development Code*, other city ordinances, rules, or regulations, or any county, state, or federal laws or regulations shall be void *ab initio*. The issuance of a certificate of occupancy shall not prevent the building official from later requiring the correction of errors in any information, plans, diagrams, computations, specifications, or other data or supporting documents, or from preventing a use or occupancy in violation of the codes, the *Dallas Development Code*, other city ordinances, rules, or regulations, or any county, state, or federal laws or regulations. (Ord. 26029; 26579)

SHUFFLE 214

Land Use Statement

6/7/2021

Regarding the property we have leased located at 11411 E. Northwest Highway #111 Dallas, TX 75218, our intended use is to operate a membership-based private club with normal operating hours of 10am-5am daily. Our day-to-day business operations involve facilitating the game of poker. We operate as a private club and thus charge a membership fee prior to becoming a member. In doing so, we operate and abide by all local, state and federal laws. Pursuant to Chapter 47 of the Texas Penal Code, we understand and operate our business whereby no person may receive any economic benefit other than personal winnings at our location. Our sister company, Shuffle 512 operates in the exact same manner and has been in operation since June 2018 in Austin, Texas. We are in good standing with the Texas State Comptroller's office and are up to date on all applicable taxes.

No food or beverages will be prepared or sold on site by our business. We will not be selling or serving alcohol. There will be no live entertainment or dancing on site. Live poker will be the game of skill played in our establishment by our members in a social club atmosphere. There will be no game or amusement machines/computers used on site. The product we sell is membership to our social club and members pay for the amount of time they spend in our establishment. Our use and intended plans have been approved by our Landlord prior to leasing the space.

Sincerely,

Matthew Morgan

Owner, Shuffle 214

512.423.9881

MICHELE STOY
Notary Public, State of Texas
Comm. Expires 07-20-2024
Notary ID 130747078

Michele Stoy
6/8/2021

EXHIBIT
7
BDA 212-028

CITY OF DALLAS

December 17, 2021

CERTIFIED MAIL NO. 7020 1290 0000 3631 0129

Matthew Morgan, Owner
11411 W. Northwest Highway #111
Dallas, TX 75218

RE: Revocation of Certificate of Occupancy No. 2105031098 for a commercial amusement (inside) use, dba Shuffle 214 at 11411 W. Northwest Highway #111 ("the Property")

Dear Mr. Crow:

This letter is to inform you that the above-referenced certificate of occupancy issued on June 22, 2021 is hereby revoked. The building official is required to revoke a certificate of occupancy if he or she determines that it was issued in error.[1]

Upon rereview of the attached land use statement submitted with the certificate of occupancy application, it has been determined that the described operations violate Texas Penal Code Section 47.04, "Keeping a Gambling Place." Therefore, Certificate of Occupancy No. 2003031040 was issued in error.

Any use operating on the Property without a certificate of occupancy is an illegal land use that must immediately cease operating.[2] The commercial amusement (inside) use may not operate until a new certificate of occupancy is issued that complies with all relevant codes. Pursuant to Paragraph (1) of Section 306.5, "Denial," of Chapter 52, "Administrative Procedures for the Construction Codes," of the Dallas City Code, the building official shall deny an application for a certificate of occupancy if the building official determines that the certificate of occupancy requested does not comply with the codes, the Dallas Development Code, other city ordinances, rules, or regulations, or any county, state, or federal laws or regulations.

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1 Paragraph (1) of Section 306.13, "Revocation of Certificate of Occupancy," of Chapter 52, "Administrative Procedures for the Construction Codes," of the Dallas City Code.

2 Section 51A-1.104, "Certificate of Occupancy," of Chapter 51A of the Dallas Development Code; Subsection 306.1, "Use or Occupancy," of Chapter 52, "Administrative Procedures for the Construction Codes," of the Dallas City Code.

CITY OF DALLAS

This decision is final unless appealed to the Board of Adjustment in accordance with Section 51A-4.703 of the Dallas Development Code before the 20th day after written notice of the above action.[3] If you have any questions, please contact me at 214-948-4501.

Sincerely,

Megan Wimer, AICP, CBO, Assistant Building Official
Building Inspection Division

cc: Dr. Eric Johnson, Chief of Economic Development and Neighborhood Services
David Session, CBO, Interim Building Official
Tammy L. Palomino, First Assistant City Attorney
Major Devon Palk, Dallas Police Department
Lieutenant Lisette Rivera, Dallas Police Department

[3] Section 51A-4.703(a)(2), "Board of Adjustment Hearing Procedures," of Chapter 51A of the Dallas Development Code.

306.12 Voiding of certificate of occupancy.

306.12.1 Void *ab initio*. A certificate of occupancy shall be void *ab initio* if the use or occupancy authorized by that certificate of occupancy is not commenced before the 120th day after the date of its issuance unless one or more extensions are granted under Subsection 306.12.2, in which case the certificate of occupancy shall be void *ab initio* if the use or occupancy is not commenced during the extended time period(s). (Ord. 26029; 26579)

306.12.2 Extensions of time. The building official may grant one or more extensions of time for periods not exceeding 120 days each if the building official finds that circumstances beyond the control of the holder of the certificate of occupancy have prevented the use or occupancy from being commenced. If a request for extension is made by the applicant or the applicant's agent, the request must be in writing and made within the time period sought to be extended. (Ord. 26029; 26579)

306.12.3 Void. A certificate of occupancy shall be void if:

1. A specific use permit required by the *Dallas Development Code* to operate the use or occupancy expires; or

2. A compliance date for the use or occupancy set by ordinance or the board of adjustment in accordance with the *Dallas Development Code* has passed. (Ord. 26579)

306.13 Revocation of certificate of occupancy. The building official shall revoke a certificate of occupancy if the building official determines that:

1. the certificate of occupancy is issued in error;

2. the certificate of occupancy is issued on the basis of false, incomplete, or incorrect information supplied;

3. a use or occupancy is being operated in a manner that is a substantial danger of injury or an adverse health impact to any person or property and is in violation of the codes, the *Dallas Development Code*, other city ordinances, rules, or regulations, or any county, state, or federal laws or regulations;

4. the structure or portion of the structure is a substantial danger of injury or an adverse health impact to any person or property and is in violation of the codes, the *Dallas Development Code*, other city ordinances, rules, or regulations, or any county, state, or federal laws or regulations;

5. a required city, county, state, or federal license, permit, or registration to operate the use or occupancy has not been issued, has been revoked, or has expired;

Texas Penal Code

§ 47.02 Gambling

(a) A person commits an offense if he:

(1) makes a bet on the partial or final result of a game or contest or on the performance of a participant in a game or contest;

(2) makes a bet on the result of any political nomination, appointment, or election or on the degree of success of any nominee, appointee, or candidate; or

(3) plays and bets for money or other thing of value at any game played with cards, dice, balls, or any other gambling device.

(b) It is a defense to prosecution under this section that:

(1) the actor engaged in gambling in a private place;

(2) no person received any economic benefit other than personal winnings; and

(3) except for the advantage of skill or luck, the risks of losing and the chances of winning were the same for all participants.

(c) It is a defense to prosecution under this section that the actor reasonably believed that the conduct:

(1) was permitted under Chapter 2001 (Bingo), Occupations Code;

(2) was permitted under Chapter 2002 (Charitable Raffles), Occupations Code;

(3) was permitted under Chapter 2004 (Professional Sports Team Charitable), Occupations Code;

(4) consisted entirely of participation in the state lottery authorized by the State Lottery Act (Chapter 466 (State Lottery), Government Code);

(5) was permitted under Subtitle A-1, Title 13, Occupations Code (Texas Racing Act); or

(6) consisted entirely of participation in a drawing for the opportunity to participate in a hunting, fishing, or other recreational event conducted by the Parks and Wildlife Department.

(d) An offense under this section is a Class C misdemeanor.

(e) It is a defense to prosecution under this section that a person played for something of value other than money using an electronic, electromechanical, or mechanical contrivance excluded from the definition of “gambling device” under Section 47.01 (Definitions)(4)(B).

Acts 1973, 63rd Leg., p. 883, ch. 399, Sec. 1, eff. Jan. 1, 1974. Amended by Acts 1981, 67th Leg., 1st C.S., p. 101, ch. 11, Sec. 43, eff. Nov. 10, 1981; Acts 1989, 71st Leg., ch. 957, Sec. 2, eff. Jan. 1, 1990; Acts 1991, 72nd Leg., 1st C.S., ch. 6, Sec. 3; Acts 1993, 73rd Leg., ch. 107, Sec. 4.04, eff. Aug. 30, 1993; Acts 1993, 73rd Leg., ch. 774, Sec. 2, eff. Aug. 30, 1993. Acts 1993, 73rd Leg., ch. 900, Sec. 1.01, eff. Sept. 1, 1994; Acts 1995, 74th Leg., ch. 76, Sec. 14.53, eff. Sept. 1, 1995; Acts 1995, 74th Leg., ch. 318, Sec. 20, eff. Sept. 1, 1995; Acts 1995, 74th Leg., ch. 931, Sec. 79, eff. June 16, 1995; Acts 1997, 75th Leg., ch. 1256, Sec. 124, eff. Sept. 1, 1997; Acts 2001, 77th Leg., ch. 1420, Sec. 14.834, eff. Sept. 1, 2001.

Amended by:

Acts 2015, 84th Leg., R.S., Ch. 47 (H.B. 975), Sec. 2, eff. January 1, 2016.

Acts 2017, 85th Leg., R.S., Ch. 963 (S.B. 1969), Sec. 2.08, eff. April 1, 2019.

Location: `https://texas.public.law/statutes/tex._penal_code_section_47.02`

Original Source: Section 47.02 — Gambling, `http://www.statutes.legis.state.tx.us/Docs/PE/htm/PE.47.htm#47.02` (last accessed Jun. 7, 2021).

1994 WL 67733
Only the Westlaw citation is currently available.

Court of Appeals of Texas, Dallas.

Richard Anthony GAUDIO, Appellant,
v.
The STATE of Texas, Appellee.

No. 05-91-01862-CR.
|
March 7, 1994.

On Appeal from the 204th Judicial District Court Dallas County, Trial Court Cause No. F91-23691-Q.

Before LAGARDE, BURNETT and ROSENBERG, JJ.

LAGARDE, Justice.

OPINION

***1** A jury convicted appellant of unlawfully keeping a gambling place. The trial court set punishment at two year's confinement, probated for three years, and a $1,000 fine. Appellant contends that the evidence is insufficient to support his conviction and that the trial court erred in denying his motion to suppress. We overrule appellant's points of error and affirm the trial court's judgment.

SUFFICIENCY OF THE EVIDENCE

At trial, appellant presented evidence on the statutory affirmative defense to unlawfully keeping a gambling place. Appellant had to prove by a preponderance of the evidence that: (1) the gambling occurred in a private place; (2) no one received an economic benefit other than personal winnings; and (3) there was an equal chance of winning in poker. The jury found that appellant received an economic benefit, thereby finding that appellant failed to prove his affirmative defense.

Appellant argues that the jury's finding that he received an economic benefit is against the great weight and preponderance of the evidence. He asserts, therefore, that the evidence is insufficient to support his conviction. The State argues that the evidence supports the jury's finding on economic benefit.

A. Relevant Facts

A group of friends gathered at an apartment rented by appellant to play poker three nights a week. The group agreed to cut the betting pot from each hand to pay for the expenses connected with keeping the apartment to play poker. The group hired a dealer to deal the cards. They also hired a waitress who served food and drinks during the games. Police executed a search warrant at the apartment during a poker game and arrested appellant.

The evidence on economic benefit was not disputed. The dealer testified to the following facts: he dealt the cards at the poker games three nights a week; he cut money from the betting pots to pay the expenses of maintaining the apartment; he gave the money to appellant; the winner of each hand tipped him for his services; and he would play poker from time to time.

Defense witnesses testified to the following facts: appellant volunteered to lease the apartment in his name; cuts were taken from the poker pot to pay expenses; the expenses included the apartment's rent, the telephone, playing cards, poker chips, food, alcohol and cigarettes; everyone agreed to paying the expenses from the cuts from the betting pot; and once they covered expenses there were no more cuts to the betting pot.

B. Standard of Review

The Texas Constitution authorizes a court of appeals to review factual sufficiency questions on a defendant's affirmative defense. *Meraz v. State*, 785 S.W.2d 146,

EXHIBIT
11
BDA 212-028

154 (Tex. Crim. App. 1990). When a court of appeals is called upon to examine whether an appellant proved his affirmative defense, the correct standard of review is whether after considering all the evidence relevant to the issue at hand, the judgment is so against the great weight and preponderance of the evidence so as to be manifestly unjust. *See* *Meraz*, 785 S.W.2d at 155.

***2** Appellant argues that the great weight and preponderance of the evidence shows that he proved his affirmative defense, thus the State failed in its burden to prove the elements of the offense beyond a reasonable doubt. However, at the foundation of every affirmative defense is the practical, if not technical, necessity of the defendant acknowledging that he committed the otherwise illegal conduct. *Meraz*, 785 S.W.2d at 153. Therefore, proof of an affirmative defense does not necessarily mean there was insufficient evidence to support the conviction.

C. Applicable Law

The penal code defines the offense of unlawfully keeping a gambling place and the affirmative defense to the offense as follows:

(a) a person commits an offense if he knowingly uses or permits another to use as a gambling place any real estate, building, room, tent, vehicle, boat, or other property whatsoever owned by him or under his control, or rents, or lets any such property with a view or expectation that it be so used.

(b) it is an affirmative defense to prosecution under this section that:

(1) the actor engaged in gambling in a private place

(2) *no person* received any economic benefit other than personal winnings; and

(3) except for the advantage of skill or luck, the risks of losing and the chances of winning were the same for all participants.

(Emphasis added.) TEX. PENAL CODE ANN. § 47.04 (Vernon 1989). The practice commentary following section 47.04 states:

Unfortunately the statement of the defense is defective in this section, but hopefully the courts will interpret it according to the legislature's clear intent-as if it read:

(b) It is a defense to prosecution under this section that:

* * *

(2) *no person gambling there* received any economic benefit other than personal winnings....

(Emphasis added.) Seth S. Searcy III & James R. Patterson, Practice Commentary, TEX. PENAL CODE ANN. § 47.04 (Vernon 1989).

The penal code defines benefit as anything reasonably regarded as economic gain or advantage, including benefit to any other person in whose welfare the beneficiary is interested. TEX. PENAL CODE ANN. § 1.07 (Vernon 1989).

The penal code does not define economic. When a statute does not define the language it uses, the courts should interpret the statute using the common usage of the word. *Campos v. State*, 623 S.W.2d 657, 658 (Tex. Crim. App. 1981); TEX. GOV'T CODE ANN. § 311.011 (Vernon 1988). Economic means of or pertaining to the production, development, and management of material wealth or finances. THE AMERICAN HERITAGE DICTIONARY (1991).

D. Application of Law to Facts

The jury found that the apartment was a private place and that poker is a game with an equal chance of winning except for the advantage of skill or luck. TEX. PENAL CODE ANN. § 47.04(b)(1), and (3). The State and appellant agree that the evidence supports those jury findings. The testimony on economic benefit is undisputed.

***3** Based on the plain language of the statute *no person* can receive an economic benefit. If we apply the plain language of the statute, the jury's finding is not against the great weight and preponderance of the evidence. In this case the waitress and dealer received tips from the players. The receipt of money as tips is an economic benefit.

If we interpret the statute as the practice commentary

suggests, i.e., that *no person gambling there* received an economic benefit, the evidence still supports the jury's finding. The dealer received money as a tip for each hand he dealt. He played poker with the others from time to time. The dealer's tips were an economic benefit *to a person gambling there*. Therefore, someone who gambled at the apartment received an economic benefit other than personal winnings.

Even if we interpret section 47.04, as appellant argues, to mean only the defendant cannot receive an economic benefit, the jury's finding that appellant received an economic benefit is not against the great weight and preponderance of the evidence. Appellant did not dispute that he was the lessee on the lease for the apartment. The State and appellant introduced evidence that the players paid the rent from cuts of the betting pots.

As lessee, appellant was legally obligated to pay the rent on the apartment. Paying the rent from the money cut from the betting pots relieved appellant of this legal obligation. We conclude that paying rent that another is legally obligated to pay is an economic benefit to that person.

The jury's finding that appellant received an economic benefit is not against the great weight and preponderance of the evidence. We overrule appellant's first point of error.

MOTION TO SUPPRESS

Appellant contends that the trial court should have suppressed all evidence and testimony resulting from the search warrant in this case. Appellant argues that the affidavit supporting the warrant does not provide probable cause for the warrant. Appellant claims that the affidavit is inadequate because it does not state the basis of the informant's knowledge.

The State contends that the affidavit provides probable cause for the warrant, arguing that independent corroboration by the police overcame any defects in the affidavit. Alternatively, the State argues that the doctrine of curative admissibility cures any error. Finally, the State argues that the failure to suppress the evidence is harmless under rule 81(b)(2) of the rules of appellate procedure. TEX. R. APP. P. 81(b)(2).

A. Relevant Facts

Sergeant Nelson testified that a confidential informant told him that people were gambling on a regular basis at 4043 Harvest Hill Road in apartment ## 2164. Apartment # 2164 was the apartment rented by appellant where the group gathered to play poker. Nelson and other officers conducted surveillance to confirm the informant's information. For approximately one month the officers conducted surveillance of the apartment three nights a week.

***4** The affidavit filed by Nelson to get the search warrant contained the following statements:
1. Affiant talked with a confidential informant who is known to the affiant. The affiant first talked to the informant one month before and was told that the informant had found and had personal knowledge that appellant was keeping the apartment as a gambling place. The informant stated that appellant is conducting a gambling operation and is receiving a fee for his services.

2. The informant stated appellant operates a gambling place on Monday, Thursday, and Saturday nights, beginning at approximately 8:00 p.m. and continuing past midnight.

3. Based on the information supplied by the informant, affiant conducted surveillance. Affiant observed several persons, some of which are known gamblers, entering the apartment.

4. The affiant has personally verified the address and has observed persons known to affiant as gamblers enter the apartment. The people are allowed entrance after recognition by someone inside the apartment.

5. On two different occasions, Nelson has observed people sitting around a table inside the apartment. The confidential informant stated the poker table is located in the living room area.

6. The informant states that the betting pot on the table is cut by the dealer of the cards.

7. This informant is known to the affiant and has on previous occasions given information to affiant regarding the violations of gambling laws of the State of texas and on each and every occasion this information has been confirmed and found to be true and correct. The informant has furnished information to the affiant within the past year which has led to the arrest of numerous persons for illegal gambling offenses.

B. Applicable Law

A search warrant must be based upon probable cause. U.S. CONST. amend. IV. Under the Fourth Amendment, an affidavit is sufficient to show probable cause if, from the totality of the circumstances reflected in the affidavit, it provided the magistrate with a substantial basis for concluding that probable cause existed. *Illinois v. Gates,* 462 U.S. 213, 238-39 (1983). Probable cause sufficient to support a search warrant exists if the facts contained within the four corners of the affidavit and the reasonable inferences drawn therefrom justify the magistrate's conclusion that the object of the search is probably on the premises at the time of issuance. *Cassias v. State,* 719 S.W.2d 585, 587-88 (Tex. Crim. App. 1986) (op. on reh'g).

In ascertaining whether a search warrant is based on probable cause, we interpret the affidavit in a common-sense, realistic manner. The magistrate is entitled to draw reasonable inferences from the facts contained in the affidavit. *Ellis v. State,* 722 S.W.2d 192, 196 (Tex. App.-Dallas 1986, no pet.). We give the magistrate's determination of probable cause great deference. *Gates,* 462 U.S. at 236. Our review of the sufficiency of an affidavit is not a *de novo* review. As long as a magistrate had a substantial basis for concluding that a search would uncover evidence of wrongdoing the Fourth Amendment is satisfied. *See Johnson v. State,* 803 S.W.2d 272, 289 (Tex. Crim. App. 1990) *cert. denied,* 111 S. Ct. 2914 (1991).

***5** Although the informant's veracity and reliability are no longer separate and independent requirements for each case, they are still "highly relevant" considerations in the totality of the circumstances review. *Gates,* 462 U.S. at 231. There must be some indicia of reliability of the tip. *Knight v. State,* 814 S.W.2d 545, 547 (Tex. App.-Houston [1st Dist.] 1991, no pet.). The affiant's statement that the informant is reliable and has provided information in the past that led to convictions is sufficient to establish the informant's reliability. *Carmichael v. State,* 607 S.W.2d 536, 538 (Tex. Crim. App. 1980).

If information from an unknown informant alone does not show probable cause, an informant's tip combined with independent police investigation may provide a substantial basis for the probable cause finding. *Janecka v. State,* 739 S.W.2d 813, 825 (Tex. Crim. App. 1987). Corroboration of the details of an informant's tip by independent police work is another relevant consideration in the totality of the circumstances analysis. *Lowery v. State,* 843 S.W.2d 136, 141 (Tex. App.-Dallas 1992, no pet.).

C. Application of Law to Facts

1. Informant's Tip

The magistrate had a substantial basis to determine the informant was reliable. The affiant stated that every time the informant gave him information he found it to be true and correct. He also said that in the past year the informant provided information that led to numerous arrests. *See Carmichael,* 607 S.W.2d at 538.

However, the affidavit does not state the basis of the informant's knowledge. The affidavit does not provide any means of determining how the informant got his information. The affiant's statement that the informant had found and had personal knowledge that people were gambling in the apartment is conclusory. *See Ware v. State,* 724 S.W.2d 38, 41 (Tex. Crim. App. 1986). From the affidavit, the magistrate could not determine the source of the informant's tip.

The informant's reliability and the basis of his knowledge are only relevant factors to determine if there is probable cause and are not determinative. *Gates,* 362 U.S. at 231. One of the factors can show the tip is reliable without the other factor. In *Gates,* the informant's basis of knowledge was sufficient to show the tip was reliable even though the informant's motives were suspect. *See Gates,* 362 U.S. at 235. However, we conclude that without some basis to determine the source of the informant's tip, the statement that the informant is reliable is insufficient to show that the tip was reliable. The informant's tip alone is insufficient to provide the magistrate with a substantial basis for determining probable cause existed.

2. Corroboration

Our conclusion that the informant's tip, standing alone, does not show probable cause does not end our review. If an informant's tip is insufficient, independent police investigation that corroborates the tip can be used to

supplement the tip. The *tip plus corroboration* can then provide a substantial basis for the magistrate's probable cause finding. Corroboration of an informant's tip must consist of more than just innocent activity. *See* *Lowery*, 843 S.W.2d at 143.

***6** Based on the informant's tip, Nelson conducted surveillance of the apartment. During his surveillance he observed many people coming and going from the apartment on the nights the informant said gambling occurred. He stated that people were not admitted until they were identified by people inside the apartment. Nelson said that he could observe people sitting around a table in the apartment. Nelson also said that during his observations of the apartment he saw persons known to him as *gamblers* enter the apartment. We conclude that these observations sufficiently corroborate the informant's tip.

Combining Nelson's observations and the informant's tip, we conclude that there was a substantial basis for the magistrate's determination that there was probable cause to support the warrant. Based on the totality of the circumstances reflected in the affidavit, we conclude that the affidavit provided a substantial basis for the magistrate's determination. We overrule appellant's second point of error.

Because of our determination that the affidavit provided probable cause for the search warrant, we do not reach the State's alternative arguments under its second counterpoint.

CONCLUSION

We overrule appellant's first point of error because the evidence supported the jury's finding that appellant received an economic benefit. We overrule appellant's second point of error because under the totality of the circumstances test the affidavit provided probable cause for the warrant.

We affirm the trial court's judgment.

All Citations

Not Reported in S.W.2d, 1994 WL 67733

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874 S.W.2d 908
Court of Appeals of Texas,
Houston (1st Dist.).

Ronnie MILLER, Appellant,
v.
The STATE of Texas, Appellee.

No. 01–93–00268–CR.
|
April 14, 1994.
|
Rehearing Denied May 19, 1994.

Synopsis

Defendant was convicted in the County Court at Law Number 1, Brazos County, Claude D. Davis, J., of gambling, and he appealed. The Court of Appeals, Duggan, J., held that: (1) provisions setting forth "social gambling" defense were not vague; (2) evidence was sufficient to support conviction; (3) expert testimony was admissible; (4) evidence tending to show that premises were not a private place and context of defendant's activities was admissible; (5) defendant was not selectively prosecuted; and (6) trial court properly excluded testimony on whether defendant knew he was playing in a game of craps that did not satisfy requirements of "social gambling" defense.

Affirmed.

West Headnotes (15)

[1] Constitutional Law Statutes

In examining criminal statute for vagueness, inquiry is whether ordinary, law-abiding individual would have received sufficient information that his or her conduct risked violating criminal law.

[2] Constitutional Law Vagueness on face or as applied

If First Amendment rights are not involved, court need only scrutinize statute to determine whether it is impermissibly vague as applied to defendant's specific conduct. U.S.C.A. Const.Amend. 1.

[3] Constitutional Law Statutes in general

Statute is not unconstitutionally vague merely because words or terms used are not specifically defined.

[4] Gaming and Lotteries Validity

Phrase "received any economic benefit" in statute providing "social gambling" defense to prosecution for gambling was not vague as applied in context of craps games played by defendant; "any economic benefit" would certainly include the sharing of profits by the owner of the premises and his partner, and "received" would always include the time period the craps game was being played. V.T.C.A., Penal Code § 47.02(b)(2).

[5] Gaming and Lotteries Validity

Phrase "the risks of losing and the chances of winning were the same for all participants" in statute providing "social gambling" defense to prosecution for gambling was not vague in context of craps games played by defendant in which pay-out odds gave the house an inherent advantage. V.T.C.A., Penal Code § 47.02(b)(3).

[6] **Statutes** Presumptions and Construction as to Validity

Statutes are vested with presumption of validity and must be construed in such a way as to uphold their validity.

[7] **Constitutional Law** Vagueness in general

Statute that is arguably vague may be given constitutional clarity by applying standard rules of statutory construction.

[8] **Gaming and Lotteries** Weight and Sufficiency

Conviction of gambling was supported by sufficient evidence, including testimony of partner of owner of the premises that he paid owner $13,000 to participate 50/50 in profits from the games; in order for state to show "that persons received some economic benefit other than personal winnings," it was not necessary that division of winnings occur at table during game played by defendant. V.T.C.A., Penal Code § 47.02(b).

[9] **Criminal Law** Particular issues
Criminal Law Miscellaneous matters

While expert witness' testimony about rules of craps, whether there was economic benefit other than personal winnings, and whether risks of losing and chances of winning were same for all participants encompassed ultimate fact issues, testimony was properly admitted in prosecution for gambling to assist trier of fact to understand the evidence and to determine facts in issue. Rules of Crim.Evid., Rule 702.

4 Cases that cite this headnote

[10] **Criminal Law** Matters Directly in Issue; Ultimate Issues
Criminal Law Experts

Expert testimony should not be excluded merely because it encompasses or embraces ultimate issue of fact, but such evidence may not decide that fact or issue for the jury. Rules of Crim.Evid., Rule 702.

[11] **Criminal Law** Instruments or devices used, or suspected of use, in commission of crime

Two cases of poker chips, bag of poker chips, numbers written on dice table and testimony concerning 30–40 decks of cards, football schedules, shotgun, dealing shoe, and plastic discard holder were properly admitted in prosecution for gambling to show that premises in question were not a private place and to show context of defendant's activities. V.T.C.A., Penal Code § 47.02(b).

1 Cases that cite this headnote

[12] **Criminal Law** Discriminatory or Selective Prosecution

To prevail on claim of selective prosecution, defendant must first make prima facie showing that state has singled him out for prosecution while others similarly situated and committing the same acts have not.

[13] Criminal Law Discriminatory or Selective Prosecution

Mere exercise of some selectivity by government in instituting prosecutions is not itself a constitutional violation; defendant must show that state's discriminatory selection of him for prosecution has been invidious or in bad faith and that it rests upon such impermissible grounds as race, religion, or desire to prevent his exercise of constitutional rights.

1 Cases that cite this headnote

[14] Criminal Law Particular cases

County sheriff was not selectively prosecuted for gambling because of his refusal to endorse Republican judicial candidate; although other participants were not prosecuted for gambling, no other participants were similarly situated as defendant, and district attorney had duty to present to grand jury any information of official misconduct by an officer. Vernon's Ann.Texas C.C.P. art. 2.03; V.T.C.A., Penal Code § 47.02(b).

1 Cases that cite this headnote

[15] Gaming and Lotteries Admissibility

Trial court properly excluded testimony on whether defendant knew he was playing in a game of craps that did not satisfy requirements of "social gambling" defense; none of the excluded testimony related to defendant being mistaken about facts of the games occurring on the night in question, and there was sufficient evidence for jury to infer that defendant knew that premises owner and his partner were sharing profits or cutting the pot. V.T.C.A., Penal Code § 47.02(b).

Attorneys and Law Firms

***910** Chris J. Kling, Bryan, for appellant.

Brenda Bailey, Bryan, for appellee.

Before HUTSON–DUNN, DUGGAN and ANDELL, JJ.

OPINION

DUGGAN, Justice.

The jury found appellant, Ronnie Miller, guilty of the Class C misdemeanor[1] of gambling, and the trial court assessed punishment at a $200 fine. In six points of error, appellant argues that: (1) the evidence was insufficient to support a finding of guilty; (2) the controlling statutory provisions, TEX.PENAL CODE ANN. § 47.02(b)(2), (3) (Vernon 1973), are unconstitutionally vague; (3) the trial court erred in admitting the testimony of Kevin Templeton; (4) the trial court erred in admitting irrelevant evidence, the cumulative effect of which was to contribute to appellant's conviction; (5) the trial court erred in denying appellant's motion to dismiss for selective prosecution; and (6) the trial court erred in excluding testimony on whether appellant knew he was playing in a game of craps that did not satisfy the requirements of section 47.02(b). We affirm.

On November 14, 1990, appellant, the sheriff of Brazos County, went to a location known as the "lake house," bought $20 worth of chips, and played craps. At trial, the only disputed issue was whether appellant's actions complied with the "social gambling" ***911** defense[2] provided by section 47.02(b):

It is a defense to prosecution under this section that:
(1) the actor engaged in gambling in a private place;
(2) no person received any economic benefit other than personal winnings; and
(3) except for the advantage of skill or luck, the risks of

losing and the chances of winning were the same for all participants.

Constitutionality of the Gambling Statute

As a threshold issue, we will first consider appellant's constitutional complaint contained in his second point of error. Appellant argues that section 47.02(b)(2) is unconstitutionally vague because (1) "economic benefit" is not defined in terms of value or amount, and (2) the time when "economic benefit" is "received" is not specified. He argues that section 47.02(b)(3) is unconstitutionally vague because the phrase "the risks of losing and the chances of winning were the same for all participants" is not defined and is incapable of comprehension. He contends that this vagueness results in arbitrary and discriminatory enforcement by the police, and impermissibly delegates enforcement to the police, district attorneys, grand juries, and juries on an ad hoc and subjective basis.

[1] In examining a criminal statute for vagueness, the inquiry is whether the ordinary, law-abiding individual would have received sufficient information that his or her conduct risked violating a criminal law. *Bynum v. State*, 767 S.W.2d 769, 773 (Tex.Crim.App.1989).

> Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.
>
> *Grayned v. City of Rockford*, 408 U.S. 104, 108–109, 92 S.Ct. 2294, 2298–99, 33 L.Ed.2d 222 (1972) (footnotes and citations omitted).

[2] [3] If first amendment rights are not involved, we need only scrutinize the statute to determine whether it is impermissibly vague as applied to appellant's specific conduct. *Bynum*, 767 S.W.2d at 774. A statute is not unconstitutionally vague merely because the words or terms used are not specifically defined. *Id.* (citing *Engelking v. State*, 750 S.W.2d 213 (Tex.Crim.App.1988)). Instead, the words or phrase must be read in the context in which they are used and construed according to the rules of grammar and common usage. TEX. GOV'T CODE ANN. § 311.011(a) (Vernon 1988).

We first consider appellant's vagueness challenge of the section 47.02(b)(2) phrase "received any economic benefit" in relation to the facts before us. Appellant argues that "economic benefit" is vague because the act does not define a value or amount, and that "received" is vague because it fails to specify the time when the economic benefit must be received.

Although "economic benefit" is not defined in the Penal Code, "benefit" is defined in TEX. PENAL CODE ANN. § 1.07(a)(6) (Vernon Pamph.1994) as "anything reasonably regarded as economic gain or advantage, including benefit to any other person in whose welfare the beneficiary is interested." It is true that the plain language of sections 47.02(b) and 1.07(a)(6) do not define a value or amount. However, the failure to define a ***912** value, amount, or time period does not necessarily render the statute unconstitutionally vague.

The commentary following section 47.02 states:

> The elements of the defense in Subsection (b) are designed to exclude any form of exploitative or commercialized gambling.... therefore, if one party gets a special cut from each pot or charges for the privilege of using the facilities, none of the participants can rely on the defense.

Searcy & Patterson, Practice Commentary, TEX. PENAL CODE ANN. § 47.02 (Vernon 1989).

[4] We believe that in the context of the craps games played by appellant, "any economic benefit" would certainly include the sharing of profits by the owner of the

house (also acting as "the house") and his partner. Similarly, "received" would always include the time period the craps game was being played. Because we must scrutinize the statute to determine whether it is impermissibly vague as applied to appellant's specific conduct, we need not consider a time period before or after the craps game. It is not necessary to define a specific amount or a time period for appellant to have sufficient warning that if any person "received" an "economic benefit" other than personal winnings, participation in the craps game would violate the statute.

The evidence at trial supports this conclusion. Todd Chapman testified that although he was not playing the craps game with appellant, he had an agreement with L.A. Ford to split the profits from the games 50/50. (Ford was the owner of the lake house and acted as "the house" during the games; Chapman was Ford's partner.) Chapman further testified that everyone at the games knew about the partnership. Moreover, Chapman and Ford did in fact split the profits of the craps game played by appellant. We find this testimony sufficient to show that appellant had fair warning that while he played craps, Chapman received economic benefit other than personal winnings.

[5] We next consider appellant's vagueness challenge to the section 47.02(b)(3) phrase "the risks of losing and the chances of winning were the same for all participants" in relation to the facts before us. The commentary following section 47.02 states:

> If the "odds" of the game are stacked in favor of one party, Subsection (b)(3) excludes the defense. However, the equal risks and chances requirement of Subsection *(b)(3) refers only to the rules of the game,* not to the advantages that accrue to a skilled player. Therefore, a game that ensures a percentage to the house or banker, regardless of the luck or skill involved, is not a "friendly" game to which the defense applies; but the presence of a superior, even professional player, who relies on skill and luck, does not vitiate the defense.
>
> Searcy & Patterson, Practice Commentary, TEX. PENAL CODE ANN. § 47.02 (Vernon 1989) (emphasis added).

Again, we turn to the evidence at trial and consider if appellant had fair warning about whether the "risks of losing and the chances of winning were the same for all participants" under the rules of the craps game.

Mr. Weido testified about the basic game of craps. There are two players, a shooter who rolls the dice, and a fader who bets against the shooter. Three possibilities result from the first roll. First, if the shooter rolls a seven or 11, the shooter wins. Second, if he rolls a two, three, or 12, the fader wins. Third, if he rolls any other number, the shooter's point is established. When a point is established, the shooter then continues to roll. On the following rolls, if the shooter rolls his point before he rolls a seven, he wins; if he rolls a seven before he makes his point, the fader wins.

Out of the 36 possible combinations of the dice, the seven will appear more than any other number because there are six ways for it to occur; conversely, there are two ways for the 11 to occur. Therefore, on the first roll, the shooter has a total of eight chances out of 36 to win, a total of four chances out of 36 to lose, and a total of 24 chances out of 36 to make a point. On the same roll, the fader has four chances to win, eight chances to lose, and 24 chances that the shooter will make a point. The first roll is the only roll where the shooter has a greater chance to win than the fader. After the first roll, the fader always has the statistical advantage.

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In addition to these basic rules, which apply to all craps games and which only address the risks of losing and the chances of winning in a statistical manner, L.A. Ford had other rules he imposed on the participants of the craps game played by appellant. While appellant was playing, Ford acted as the fader and as "the house." Mr. Weido testified that on "hard-way" bets, Ford set five to one odds on the amount "the house" would pay the winners. A "hard-way" bet can only be made when the shooter is attempting to make his established point, and that point is four, six, eight, or 10. The "hard-way" player is betting that the shooter will roll doubles to make his point. For example, if the shooter is attempting to roll a six, only the combination of double threes will result in a win for the "hard-way" bet. Again, this must occur before a seven is rolled. In this example, because there are six chances to roll a seven, and four chances to roll a six (other than by double threes), the chances of winning this bet are 10 to one. Weido stated that Ford, acting as "the house," only paid out five to one.

Weido testified that to participate in Ford's game, the players had to abide by his rules. We believe these rules clearly indicate that while appellant played craps, the risks of losing and the chances of winning were not the same for all participants. From the plain language of the statute, appellant had fair warning of the prohibited conduct.

Similarly, we find that sections 47.02(b)(2) and 47.02(b)(3) provide sufficient guidance to law enforcement authorities so that arbitrary or discriminatory enforcement is not permitted. For enforcement purposes, law enforcement authorities could observe: (1) the receipt of economic benefit other than personal winnings, and (2) whether "the house" pay-out odds set by Ford gave him an inherent advantage.

[6] [7] Statutes are vested with a presumption of validity and must be construed in such a way as to uphold their validity. *Ely v. State*, 582 S.W.2d 416, 419 (Tex.Crim.App.1979). A statute that is arguably vague may be given constitutional clarity by applying the standard rules of statutory construction. *Engelking*, 750 S.W.2d at 215. Although the legislature could have been more specific, we find these sections nonetheless incorporate a comprehensible standard of conduct. *See Coates v. City of Cincinnati*, 402 U.S. 611, 614, 91 S.Ct. 1686, 1688, 29 L.Ed.2d 214 (1971); *Lear v. State*, 753 S.W.2d 737, 739 (Tex.App.—Austin 1988, no pet.).

Accordingly, neither section 47.02(b)(2) nor section 47.02(b)(3) is unconstitutionally vague as applied to appellant's conduct. We overrule point of error two.

Sufficiency of Evidence

Appellant claims that the State failed to disprove the social gambling defense. In reviewing the sufficiency of the evidence, an appellate court must view the evidence in the light most favorable to the verdict to determine if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). This Court may not sit as a thirteenth juror and disregard or reweigh the evidence. *Moreno v. State*, 755 S.W.2d 866, 867 (Tex.Crim.App.1988). If there is evidence that establishes guilt beyond a reasonable doubt, and the trier of fact believes that evidence, we are not in a position to reverse the judgment on sufficiency of evidence grounds. *Id.; Glass v. State*, 761 S.W.2d 806, 807 (Tex.App.—Houston [1st Dist.] 1988, no pet.). The jury, as trier of fact, is the sole judge of the credibility of witnesses, *Sharp v. State*, 707 S.W.2d 611, 614 (Tex.Crim.App.1986), *cert. denied*, ***914** 488 U.S. 872, 109 S.Ct. 190, 102 L.Ed.2d 159 (1988), and may believe or disbelieve all or any part of a witness's testimony. *Id.* at 614; *Smith v. State*, 789 S.W.2d 419, 420 (Tex.App.—Houston [1st Dist.] 1990, pet. ref'd). A jury may believe a witness even though his testimony is contradicted. *Sharp*, 707 S.W.2d at 614.

To prove appellant illegally gambled, the State had to show one of the following:

(1) that the gambling did not occur in a private place; or

(2) that persons received some economic benefit other than personal winnings; or

(3) that except for the advantage of skill or luck, the risks of losing and the chances or winning were not the same for all participants.

[8] The most compelling evidence was presented in connection with the second requirement. Todd Chapman testified that pursuant to an agreement with L.A. Ford, he paid $13,000 to participate 50/50 in the profits from the games at the lake house. Appellant argues that if, after the game, Chapman and Ford privately divide Ford's winnings, it cannot retroactively invalidate the game. He claims that the division must occur at the table during the game played by appellant. We believe Chapman did receive an economic benefit at the table during the game played by appellant. The agreement to split profits was connected with each roll of the dice in each game played that night; half of the winnings were Chapman's although he did not play in the games.

Appellant ignores the plain language of the statute, that no person receive any economic benefit other than personal winnings. It does not provide an amount of economic benefit or a time period for the receipt of an economic benefit.

Because this agreement represents sufficient evidence[3] for a rational fact finder to find against appellant on the second element of the gambling defense beyond a reasonable doubt, we need not address the first or third elements. We overrule point of error one.

Testimony of Kevin Templeton

[9] In point of error three, appellant argues that the trial court erred in admitting the testimony of Kevin Templeton as an expert because the testimony determined ultimate fact issues that could only be found by the jury. Templeton testified about the rules of craps, whether there was an economic benefit other than personal winnings, and whether the risks of losing and the chances of winning were the same for all participants.

[10] The decision to allow a witness to testify as an expert is committed to the sound discretion of the trial court. *Duckett v. State*, 797 S.W.2d 906, 910 (Tex.Crim.App.1990). The threshold determination for admitting expert testimony is whether the specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue. *Id.*; TEX. R.CRIM.EVID. 702. While expert testimony should not be excluded merely because it encompasses or embraces an "ultimate issue" or fact, such evidence may not decide that fact or issue for the jury. *Duckett*, 797 S.W.2d at 914.

While we agree that Templeton's testimony encompassed ultimate fact issues, we disagree that it should have been excluded. His specialized knowledge of the rules of craps assisted the trier of fact to understand the evidence and to determine facts in issue. Without understanding the rules of craps and how the game is normally played, it would be difficult for the average juror to make a determination about whether there was economic benefit or whether the risks of losing and the chances of winning were the same ***915** for all participants. Further, the trial court carefully excluded testimony about Templeton's legal interpretation of the statute.

The trial court did not abuse its discretion by allowing Templeton to testify about these facts. We overrule point of error three.

Cumulative Error

In point of error four, appellant contends that the trial court erred in admitting irrelevant evidence, the cumulative effect of which contributed to his conviction. Over appellant's objections, the trial court admitted:

1. two cases of poker chips,

2. a bag of poker chips,

3. numbers written on the dice table, and

4. testimony concerning 30–40 decks of cards, football schedules, a shotgun, a dealing shoe, and a plastic discard holder.

Appellant contends that to get a conviction, the State had to show a casino and try the activity at the lake house, rather than the conduct of appellant. He claims that the evidence was prejudicial and had little or no probative value on the conduct of appellant.

[11] However, appellant ignores that the State had to introduce evidence showing that the lake house was not a private place in order to disprove one of the elements of the defense. The evidence must be relevant to a contested fact or issue to be admissible, and that determination is within the sound discretion of the trial judge. *Jackson v. State*, 575 S.W.2d 567, 570 (Tex.Crim.App.1979). That decision will not be reversed on appeal unless a "clear abuse of discretion is shown." *Werner v. State*, 711 S.W.2d 639, 643 (Tex.Crim.App.1986).

We find that the evidence tended to show the jury (1) whether or not the lake house was a private place, and (2) the context of appellant's activities. We overrule point of error four.

Selective Prosecution

In point of error five, appellant argues that the trial court erred in denying his motion to dismiss for selective prosecution. Appellant, a Republican, argues that he was prosecuted because of his refusal, in the fall of 1990, to endorse a fellow Republican in his efforts to run against a sitting Democratic judge. He claims that Bill Turner, a Democrat and the district attorney during the fall of 1990, asked appellant to support the Republican judicial candidate. He claims that his refusal to endorse the Republican candidate caused Turner to selectively prosecute him for gambling.

[12] To prevail on the motion, appellant must first make a prima facie showing that the State has singled him out for prosecution while others similarly situated and committing the same acts have not. *United States v. Greene*, 697 F.2d 1229, 1234 (5th Cir.), *cert. denied*, 463 U.S. 1210, 103 S.Ct. 3542, 77 L.Ed.2d 1391 (1983). In

the case before us, twenty-four other participants at the lake house were not prosecuted for gambling. Presuming that this is sufficient to meet the first part of the test, we address the second part by examining the reasons why appellant, and not others, were prosecuted.

[13] Appellant must show that the State's discriminatory selection of him for prosecution has been invidious or in bad faith in that it rests upon such impermissible grounds as race, religion, or the desire to prevent his exercise of constitutional rights. *Greene*, 697 F.2d at 1234. The mere exercise of some selectivity by the government in instituting prosecutions is not itself a constitutional violation. *Greene*, 697 F.2d at 1234. It has been held that

> selection for prosecution based in part upon the potential deterrent effect on others serves a legitimate interest in promoting more general compliance with the tax laws. Since the government lacks the means to investigate every suspected violation of the tax laws, it makes good sense to prosecute those who will receive, or are likely to receive, the attention of the media.

United States v. Catlett, 584 F.2d 864, 868 (8th Cir.1978). *See also* ***916** *United States v. Ness*, 652 F.2d 890, 892 (9th Cir.1981); *United States v. Johnson*, 577 F.2d 1304, 1309 (5th Cir.1978).

[14] No other participants at the lake house were similarly situated as appellant, the sheriff of Brazos County. Further, the district attorney has a duty to present to the grand jury any information of official misconduct by an officer. TEX.CODE CRIM.P.ANN. art. 2.03 (Vernon 1977). We find that appellant fails to meet the second part of the test because the State had legitimate reasons to only prosecute appellant. We overrule point of error five.

Exclusion of Evidence Regarding Knowledge

[15] In appellant's sixth point of error, he claims the trial court erred in excluding testimony on whether appellant knew he was playing in a game of craps that did not satisfy the requirements of section 47.02(b). Appellant sought to introduce evidence of his belief that the games at the lake house were legal, i.e., that he did not "knowingly" violate the gambling statute.

The excluded testimony would have shown that upon inquiry of various people, including the district attorney and certain Texas Department of Public Safety officers, appellant was told through his years as sheriff that if there was no cutting of the pot and no cheating, then the games were legal. Appellant argues that because he was mistaken about the facts surrounding the game of craps at the lake house, the evidence should have been admitted to support a mistake of fact defense.

The witnesses testified to conversations appellant had with them over a five-year period. None of the excluded testimony related to appellant being mistaken about facts of the games occurring at the lake house on November 14, 1990. We have already decided there was sufficient evidence for the jury to infer that appellant knew Ford and Chapman were sharing the profits or cutting the pot. The trial court did not abuse its discretion by excluding the testimony. We overrule point of error six.

We affirm the trial court's judgment.

All Citations

874 S.W.2d 908

Footnotes

1 This case originated in the justice court, having jurisdiction over Class C misdemeanors. TEX. CONST. art. V, sec. 19; TEX.CODE CRIM.P.ANN. art. 4.11 (Vernon Pamph.1994). On appeal from the justice court, the county court tried the case de novo. TEX. CONST. art. V, sec. 16; TEX.CODE CRIM.P.ANN. art. 4.08 (Vernon Pamph.1994).

2 While section 47.02(a) prohibits gambling (making bets), section 47.02(b) "provides a defense ... for the social gambler...." Searcy & Patterson, Practice Commentary, TEX.PENAL CODE ANN. § 47.02 (Vernon 1989).

[3] The State also presented Weido's testimony that while appellant was playing the craps game, Weido tipped a waiter a chip for bringing free drinks to the players. Weido further testified that while appellant was playing the craps game, Weido gave John LeFlore, a deputy sheriff watching the game, a $25 chip, and that LeFlore then used it to gamble. Because we find the Ford/Chapman partnership agreement to be sufficient evidence to support the jury finding, we need not consider whether players giving chips to non-players would constitute sufficient evidence to support a conviction.