

NOTICE FOR POSTING
MEETING OF
BOARD OF ADJUSTMENT, PANEL A
TUESDAY, MARCH 22, 2022

BRIEFING: **9:00 a.m.** via **Videoconference and** in **Council Chambers**, Dallas City Hall, 1500 Marilla Street

HEARING: **11:00 a.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, March 21, 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/BDA032222>

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, MARCH 22, 2022

AGENDA

BRIEFING: 9:00 a.m. via Videoconference and in Council Chambers
Dallas City Hall, 1500 Marilla Street

HEARING: 11:00 a.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, Senior Planner
LaTonia Jackson, Board Secretary

PUBLIC TESTIMONY

MISCELLANEOUS ITEM

Approval of the February 22, 2022 Board of Adjustment
Panel A Public Hearing Minutes

M1

HOLDOVERS

BDA212-018(JM)	11834 Harry Hines Boulevard, Suite 135 REQUEST: Application of Jonathan Vinson to appeal the decision of the administrative official	1
BDA201-125(JM)	9943 Coppedge Lane REQUEST: Application of Patrick Griot for a variance to the front yard setback regulations, and for a special exception to the fence height regulations, and for a special exception to the fence standards regulations, and for a special exception to the visibility obstruction regulations	2

UNCONTESTED CASES

BDA212-017(PD)	4715 Reiger Avenue REQUEST: Application of Joseph F. DePumpo for variances to the side yard setback regulations	3
BDA212-019(PD)	536 W. 9 th Street REQUEST: Application of Mark Drumm represented by Nate Parrott of KFM Engineering and Design for a special exception to the landscape regulations	4
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	5

REGULAR CASES

BDA212-021(PD)	5531 Anita Street REQUEST: Application of Dimitri Morris for a variance to the off-street parking regulations	6
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	7

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: BDA212-018(JM)

BUILDING OFFICIAL'S REPORT: Application of Jonathan Vinson to appeal the decision of the administrative official at 11814 Harry Hines Boulevard, Suite 135. This property is more fully described as Lot 1, Block A/6572, and is zoned an MU-2(SAH) Mixed-Use 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 in error and or 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: 11814 Harry Hines Boulevard, Suite 135

APPLICANT: Jonathan Vinson, Jackson Walker, LLP

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.

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).

PRIOR BOARD ACTION:

On February 22, 2022, Panel A held a hearing for this request. The Panel held the case to allow for a five-member Panel decision.

STAFF RECOMMENDATION:

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

BACKGROUND INFORMATION:

Zoning:

Site: MU-2(SAH) Mixed-Use District
North: IR Industrial Research District
East: IR Industrial Research District
South: PD No. 498
West: MU-3 Mixed-Use District

Land Use:

The subject site is developed with a mix of commercial uses within multiple suites. Surrounding land uses include warehouses to the north, a church to the east, and Stemmons Freeway wrapping the property to the 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. 2003031040 for a commercial amusement (inside) use issued on 10/23/20.
- 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:

- January 5, 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.
- January 6, 2022: The Board of Adjustment Chief Planner randomly assigned this case to Board of Adjustment Panel A.
- January 10, 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.
- January 26, 2022: The applicant’s attorney submitted additional evidence for consideration (**Attachment A**).
- January 27, 2022: The Board of Adjustment staff review team meeting was held regarding this request and the others scheduled for the February public hearing. The review team members in attendance included: the Board of Adjustment Chief Planner/Board Administrator, the Chief Arborist, the Development Code Specialist, the Transportation Senior Engineer, the Board of Adjustment Senior Planner, and the Assistant City Attorney to the Board. No staff review comment sheets were submitted in conjunction with this application.
- February 9, 2022: The applicant’s attorney submitted additional evidence for consideration (**Attachment B**).
- February 9, 2022: The City’s attorney submitted additional evidence for consideration (**Attachment C**).
- February 22, 2022: Panel A held a public hearing regarding this request. The item was held to March 22, 2022 to allow for a five-member decision.

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

BOARD OF ADJUSTMENT ACTION: February 22, 2022

APPEARING for PUBLIC TESTIMONY:

Victor Leone 7865 Firefall Way Dallas, TX
Darren Brown 4313 Dunning Ln. Austin, TX
Vanessa Russell 1403 Kerley St. Denton, TX
Clint Roberson 105 E.Scott, Wichita Falls, TX
Tiffany Hernandez 196 W.Davis St. Dallas, TX
Matthew Bizub 17878 Preston Rd. Dallas, TX
Thomas DuPree 5132 Bellerive Dr. Dallas, TX
Michael Gaudalupe 1817 Caney Creek Dr. Dallas, TX
Sam Moon 11826 Harry Hines Dallas, TX
Ryan Johnson 4500 Vitruvian Way Addison, TX
Clayton Daniels 815 Sherbrook Richardson, TX
Mitch Lloyd 4770 Teel Pkwy Frisco, TX
Eugene Plarp 1431 Julie St. Seagoville, TX
MC Dorsey 10456 Lake Park Hurst, TX
Matthew Lopez 5609 SMU Blvd. Dallas, TX
Robert Slagle 207 Simpson Sherman, TX
Joe Benavides 1012 W. Pioneer Irving, TX
Patrick Contrell 2700 Pomponessett Dr Arlington TX
Eric Brown 730 CR 1917 Yartis, TX
Talmage Brown 2312 Dampton Dr. Dallas, TX
James Gonzales 2719 Mark Twain Dr. Dallas, TX
Tyler Mawhinney 1890 Mercer Crossing Farmers Branch
Jeffrey Hurt 5012 Spyglass Dr. Dallas, TX

APPEARING IN FAVOR:

Jonathan Vinson 2323 Ross Ave. Dallas, TX
Ryan Crow 4600 Secluded Hollow Austin, TX

APPEARING IN OPPOSITION:

Gary Powell 1500 Marilla St. 7DN Dallas, TX
Megan Wimer 320 E. Jefferson Blvd. Dallas, TX

MOTION: Neumann

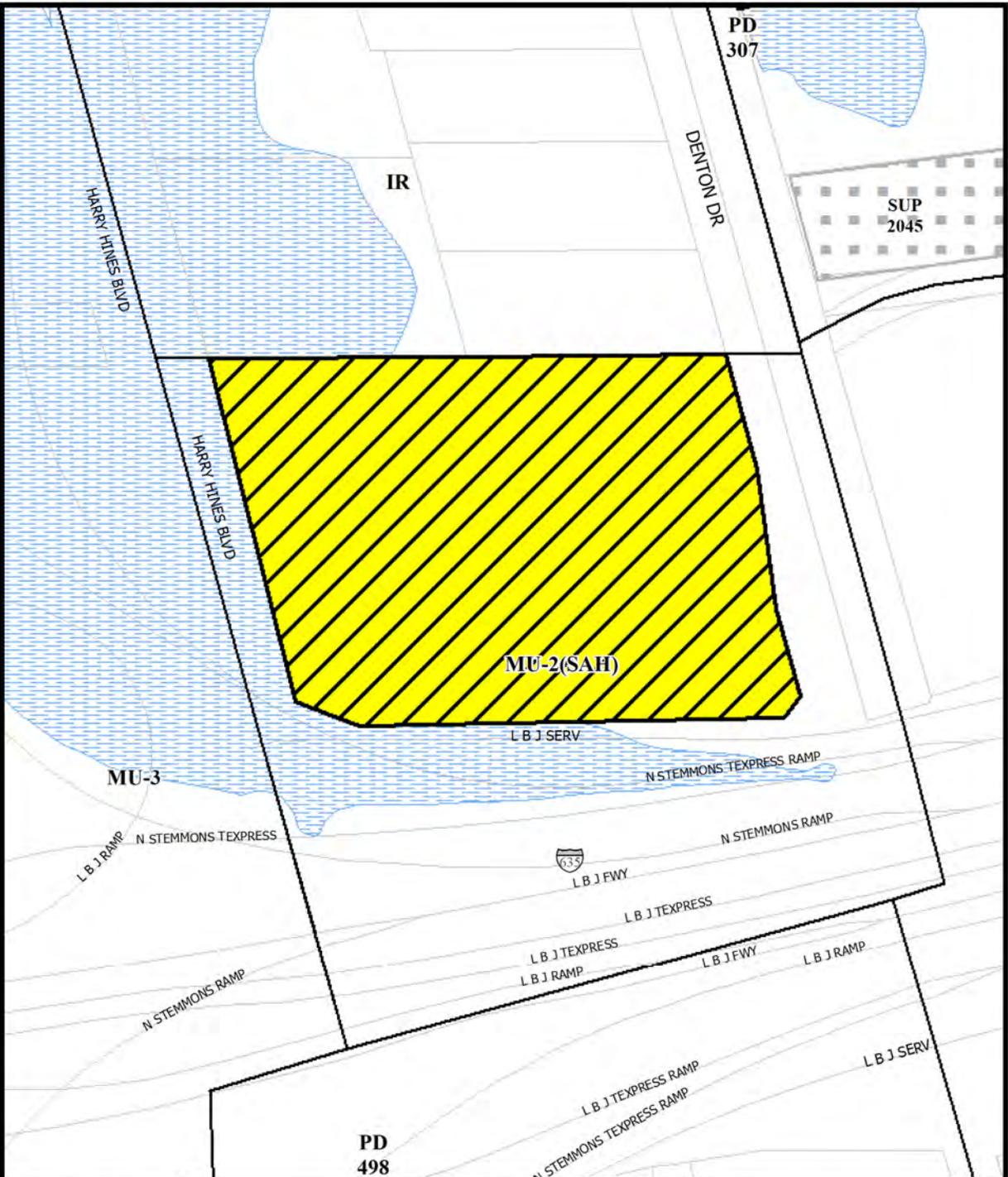
I move that the Board of Adjustment, in Appeal No. BDA 212-018, **hold** this matter under advisement until **March 22, 2022**.

SECONDED: Lamb

AYES: 5 – Lamb, Halcomb, Narey, Frankford, Neumann

NAYS: 0-

MOTION PASSED: 5-0 (unanimously)



1:2,400

ZONING MAP

Case no: BDA212-018

Date: 1/5/2022

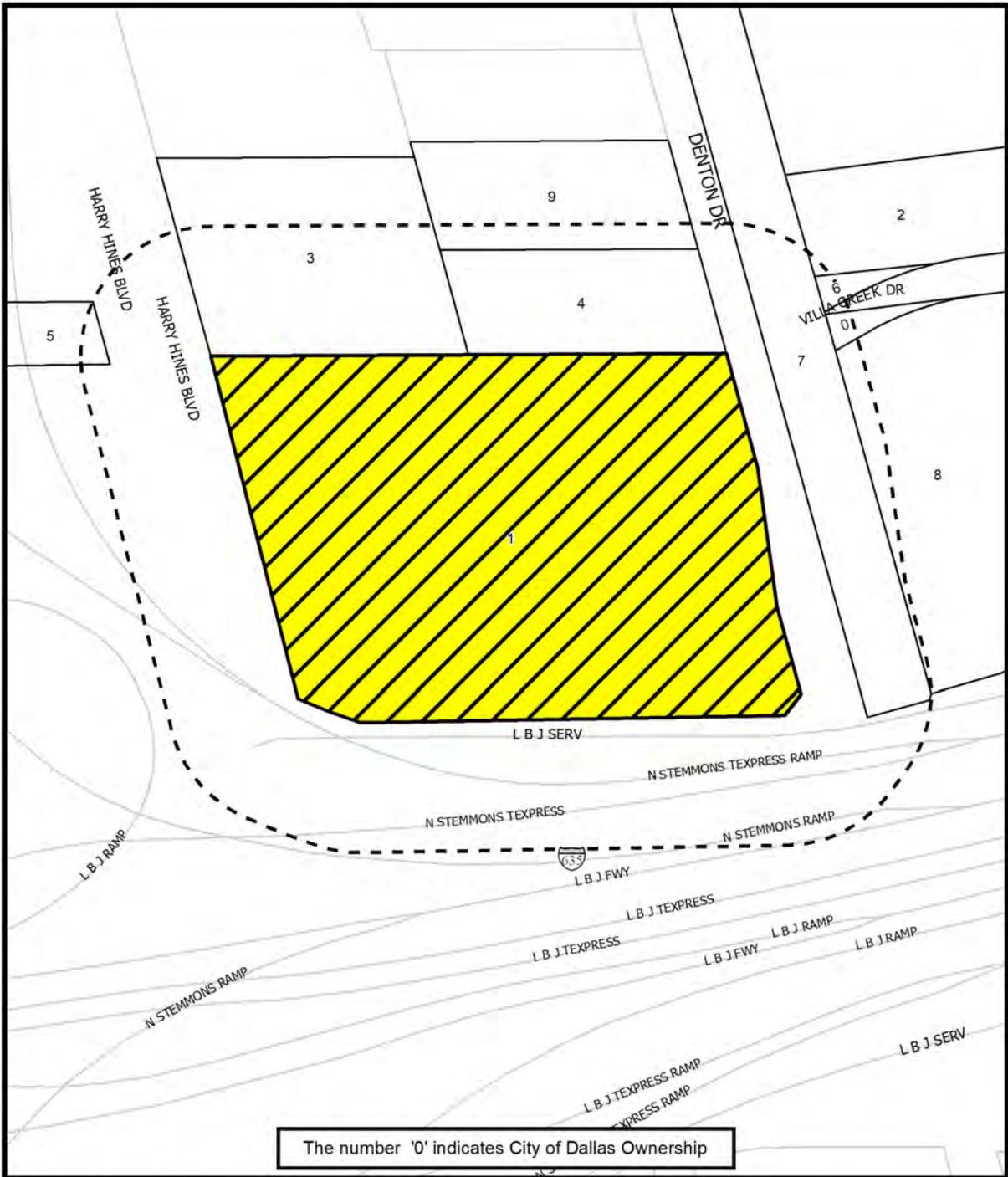


1:2,400

AERIAL MAP

Case no: BDA212-018

Date: 1/5/2022



1:2,400

NOTIFICATION

200' AREA OF NOTIFICATION
9 NUMBER OF PROPERTY OWNERS NOTIFIED

Case no: **BDA212-018**

Date: **1/5/2022**

01/05/2022

Notification List of Property Owners

BDA212-018

9 Property Owners Notified

<i>Label #</i>	<i>Address</i>	<i>Owner</i>
1	11814 HARRY HINES BLVD	MOON VENTURES LTD
2	11931 FORD RD	ENSERCH CORP
3	11942 HARRY HINES BLVD	NATIONAL BANNER CO INC
4	11929 DENTON DR	QADRI ANAN S
5	11901 HARRY HINES BLVD	ONCOR ELECRC DELIVERY COMPANY
6	11900 FORD RD	BALDWIN HARRIS COMPANY
7	401 S BUCKNER BLVD	DART
8	2605 LBJ FWY	Taxpayer at
9	11937 DENTON DR	Taxpayer at



City of Dallas

APPLICATION/APEAL TO THE BOARD OF ADJUSTMENT

Case No.: BDA 212-018

Date: ~~01-04-2022~~ 1-5-22 cot

Data Relative to Subject Property:

(Property address: 11814 Harry Hines Boulevard)

Location address: 11834 Harry Hines Boulevard, Suite 135 Zoning District: MU-2 (SAH)

Lot No.: 1 Block No.: A/6572 Acreage: 10.1544 acres Census Tract: 0140.01

Street Frontage (in Feet): 1) 543.24 FT 2) 648.37 3) 216.56 4) _____ 5) _____

To the Honorable Board of Adjustment :

Owner of Property/or Principal: Moon Ventures, Ltd.

Applicant: Jackson Walker L.L.P. / Suzan Kedron and Jonathan G. Vinson Telephone: 214-953-5941

Mailing Address: 2323 Ross Avenue, Suite 600 Zip Code: 75201

E-mail Address: jvinson@jw.com

Represented by: Jackson Walker L.L.P. / Suzan Kedron and Jonathan G. Vinson Telephone: 214-953-5941

Mailing Address: 2323 Ross Avenue, Suite 600 Zip Code: 75201

Affirm that an appeal has been made for a Variance ____, or Special Exception ____, Appeal the decision of the Building Official per letter dated December 17, 2021, regarding revocation of a Certificate of Occupancy for the "Commercial amusement (inside)" use.

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

The decision of the Building Official as set forth in the above-referenced letter of December 17, 2021, is incorrect. The existing zoning clearly permits the above-referenced use by right, and the Certificate of Occupancy for this use should be restored forthwith. This will be further supported by evidence to be provided to City Staff, and through Staff to the Board of Adjustment.

Note to Applicant: If the relief requested in this application is granted by the Board of Adjustment, said 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.

Jackson Walker L.L.P.

Respectfully submitted: By: Jonathan G. Vinson

Applicant's name printed

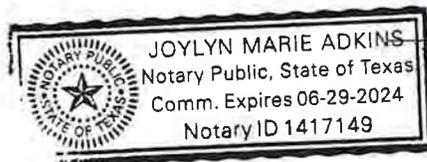
Jonathan G. Vinson
Applicant's signature

Affidavit

Before me the undersigned on this day personally appeared Jonathan G. Vinson 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.

Jonathan G. Vinson
Affiant (Applicant's signature)

Subscribed and sworn to before me this 4th day of January, 2022



Joylyn Marie Adkins
Notary Public in and for Dallas County, Texas

(Rev. 08-20-09)

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 Jonathan Vinson

did submit a request to appeal the decision of the administrative official
at 11834 Harry Hines Boulevard Suite #135

BDA212-018. Application of Jonathan Vinson to appeal the decision of the administrative official at 11834 HARRY HINES BLVD Suite #135. This property is more fully described as Lot 1, Block A/6572, and is zoned MU-2(SAH), which requires that the building official sha revoke a certificate of occupancy if the building official determines that the certificate of occupancy was issued in error and or 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

BDA Case # 212-018

I, Daniel Moon

of MOON VENTURES LTD. the Owner of the subject property at:

11814 Harry Hines Blvd

Authorize (applicant) Jackson Walker LLP (Suzan Kedron and Jonathan G. Vinson)

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

Variance (please specify)

Special Exception (please specify)

X Other (please specify) To appeal the decision of the Building Official, per letter dated December 17, 2021, to revoke Certificate of Occupancy No. 2003031040.

MOON VENTURES LTD

By: [Signature]

December 30, 2021

Print name of property owner

Its: JP
Signature of property owner

Date

Before me the undersigned on the day of personally appeared Daniel Moon

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

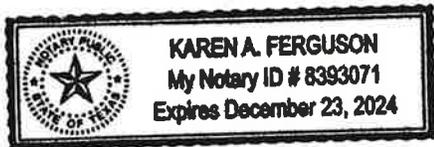
Subscribed and sworn to before me this 30th day of December, 2021.

[Signature: Karen A. Ferguson]

Notary Public in and for

Dallas County, TEXAS

Commission expires on 12/23/2024





CITY OF DALLAS

December 17, 2021

CERTIFIED MAIL NO. 7020 1290 0000 3631 0112

Ryan Crow, CEO
11834 Harry Hines Boulevard, #135
Dallas, TX 75234

RE: Revocation of Certificate of Occupancy No. 2003031040 for a commercial amusement (inside) use, dba Texas Card House at 11834 Harry Hines Boulevard, #135 ("the Property")

Dear Mr. Crow:

This letter is to inform you that the above-referenced certificate of occupancy issued on October 23, 2020 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,

A handwritten signature in blue ink that reads "Megan Wimer".

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.

Land Use Statement

Texas Card House
11834 Harry Hines Blvd., #135
Dallas, Texas

The Texas Card House in Dallas Texas will operate at this site as a private club offering poker and similar game to its members. The location will include several poker tables, pool tables, and other gaming amenities for legal games in Texas.

- Will operate seven days a week and plan to be open from 11am -4am.
- Will operate as a private club that charges a fee to enter. The fee to become a member will initially be \$10/Day, \$30/Month, \$300/Year.
- There will be no alcohol sold on the premises or stored on site. Members will be able to BYOB but there will be no setup fees, charges, or any financial transactions associated with this.
- There will be no coin operated machines, slots, or other automated gaming devices.
- All payment collected from players is for access to the club and club memberships.
- All winnings from poker games will stay with the players and no person will receive an economic benefit from the game other than personal winnings.
 - As an added precaution we have created special "tip chips" that are used to tip staff so that players do not unknowingly violate this by giving poker winnings to others.
- Texas Card House will be streaming live shows on its YouTube channel TCH Live 2-3 days per week.
- T-shirts, Hats, playing cards and other TCH branded items will be sold at this location.

Name: Ryan Crow

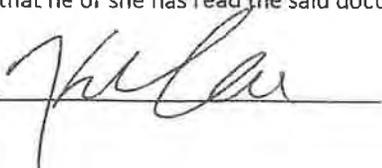
Title: CEO

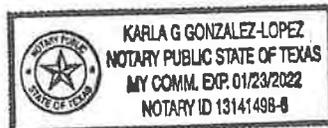
Date: 7/2/2020

Signature: 

Notary

BEFORE ME, the undersigned authority, on this 2nd day of July, 2020 the person whose name is signed to the foregoing document personally appeared and duly sworn by me, each states under oath that he or she has read the said document and that all facts therein set forth are true and correct.

SIGN HERE: 





City of Dallas

SUSTAINABLE DEVELOPMENT AND CONSTRUCTION
BUILDING INSPECTION DIVISION
320 E. JEFFERSON BOULEVARD
DALLAS, TEXAS 75203

CERTIFIED MAIL



NORTH TEXAS
DALLAS TX
20 DEC 2023



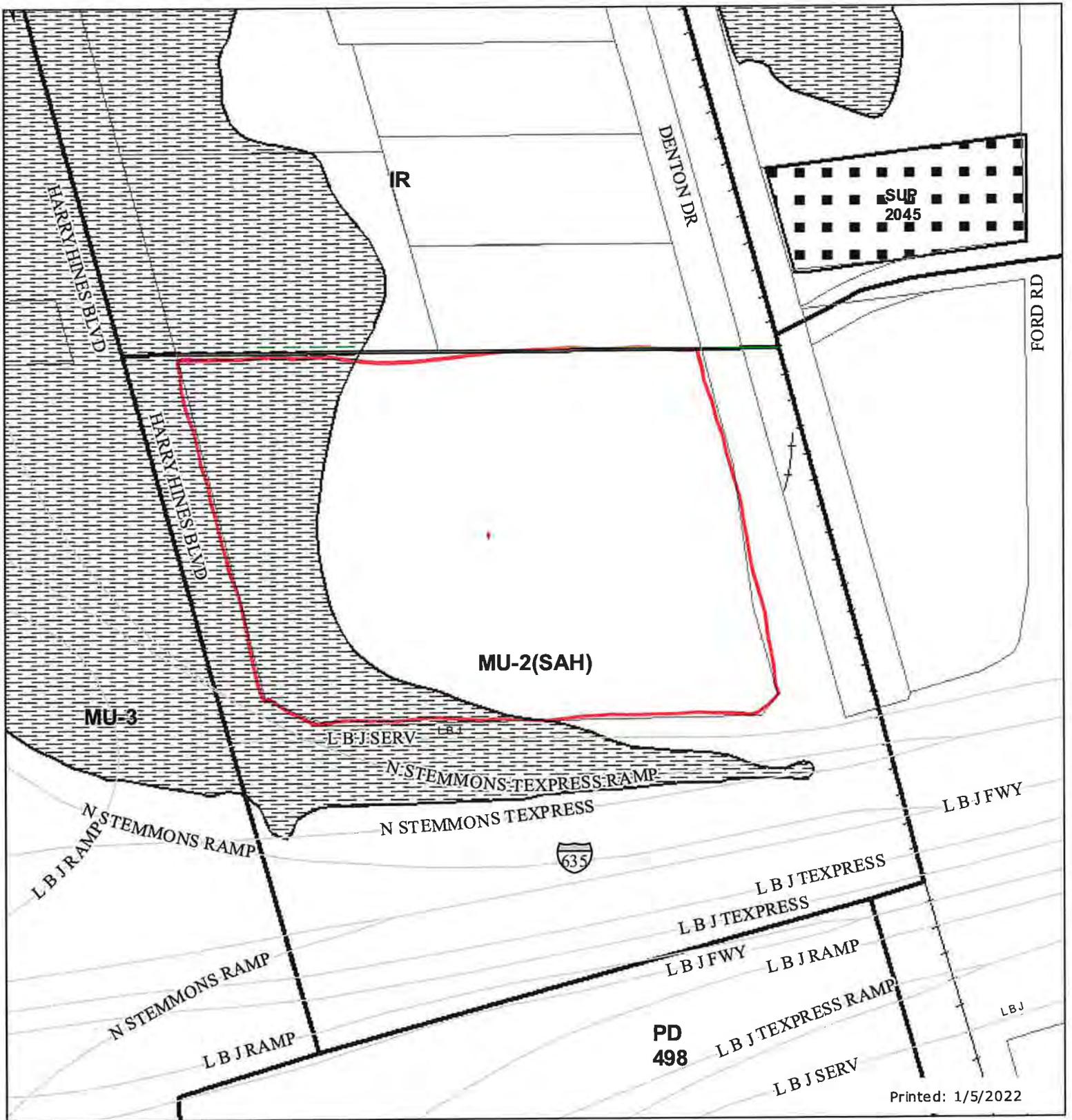
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7020 1290 0000 3631 0112
2251606

Ryan Crow
11834 Harry Hines Blvd #135
Dallas, TX 75234



75234-590635





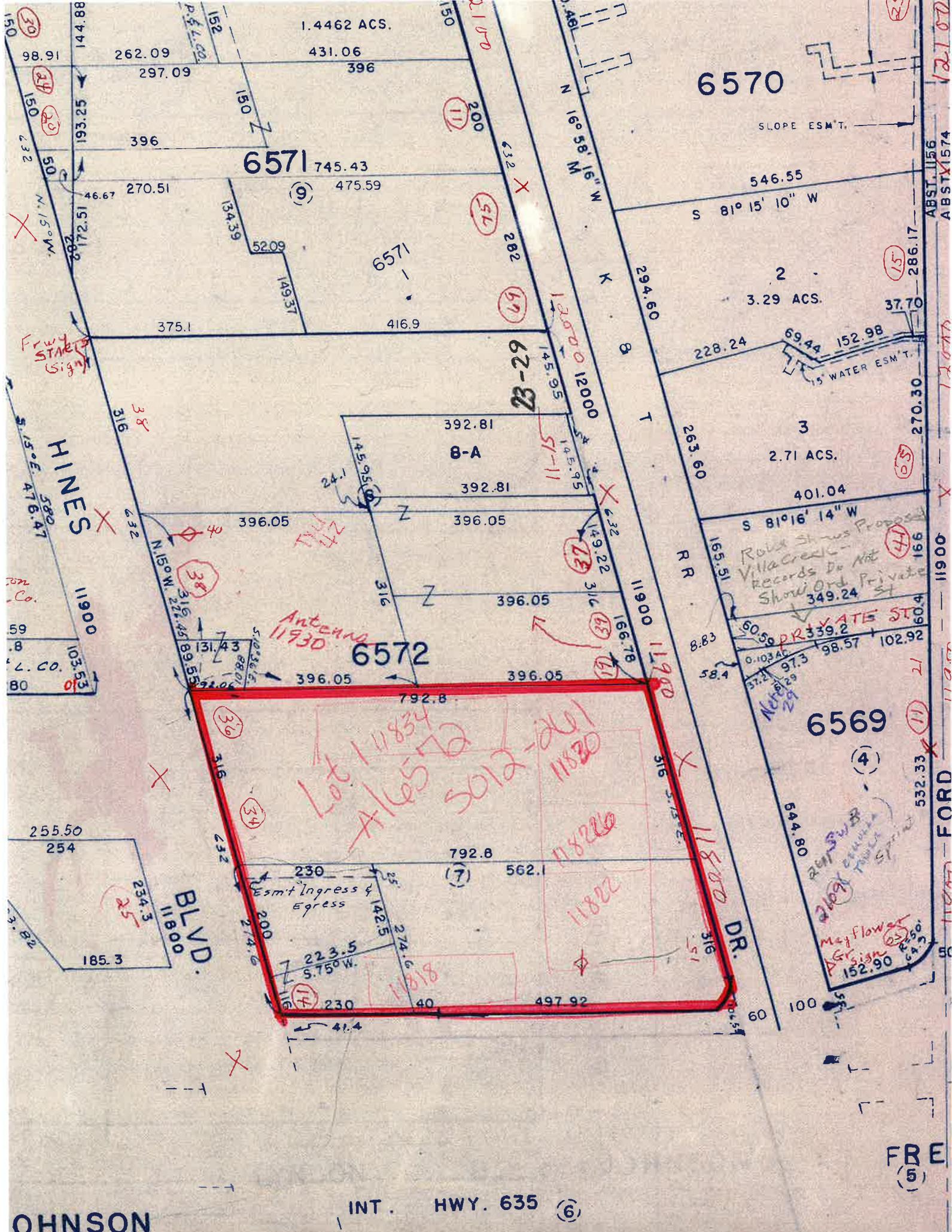
Printed: 1/5/2022

Legend

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





6570

6571 745.43

6572

6569

JOHNSON

INT. HWY. 635 (6)

FRE (5)

HINES

BLVD.

DR.

FORD

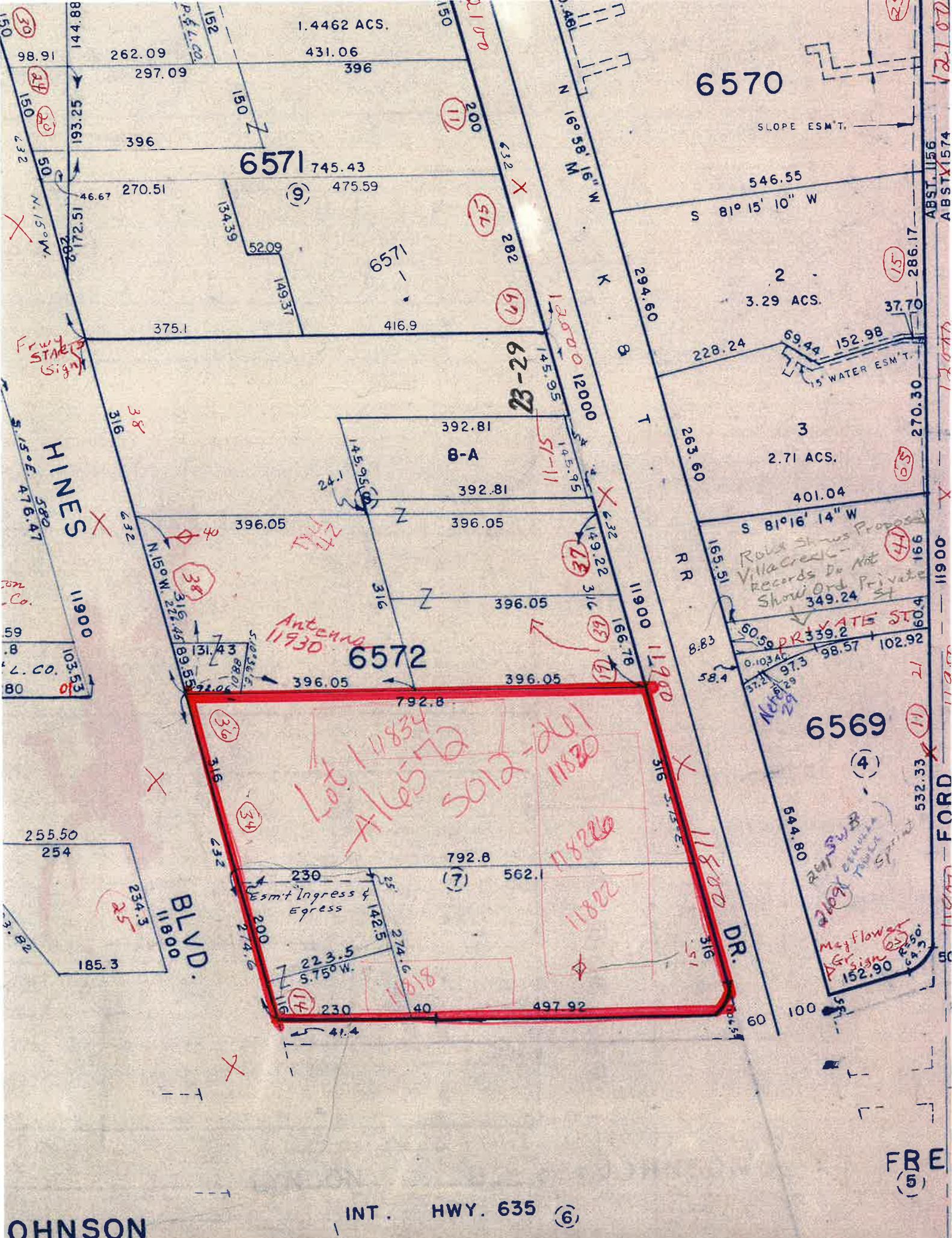
FRUIT STAIRS SIGN

Antenna 11930

Lot 11834
A/6572
5012-2011
11820
11822
11823
11818

Road Shows Proposed Villa Creek Records Do Not Show Ord Private 349.24

Mayflower Agr Sign 152.90



6570

6571 745.43

6572

6569

JOHNSON

INT. HWY. 635 (6)

FRE (5)

HINES

BLVD.

DR.

FORD

FRUIT STAIRS SIGN

Antenna 11930

Lot 11834
A/6572
5012-2011
11820
11822
11823
11818

Road Shows Proposed Villa Creek Records Do Not Show Ord Private 349.24

Mayflower Agr Sign 152.90



Jonathan G. Vinson
(214) 953-5941 (Direct Dial)
(214) 661-6809 (Direct Fax)
jvinson@jw.com

January 26, 2022

By Email

Ms. Jennifer Muñoz
Chief Planner/Board Administrator
Zoning Board of Adjustment
Current Planning
Department of Sustainable Development and Construction
City of Dallas
1500 Marilla Street, Room 5BN
Dallas, Texas 75201

Re: BDA 212-018: 11834 Harry Hines Boulevard, Suite 135;
Appeal of Administrative Official Decision.

Dear Ms. Muñoz:

Thank you for the opportunity to submit this letter to the City Staff prior to your team meeting. We understand that, in this instance, since this is an appeal from a decision of an Administrative Official, no Staff recommendation will be made. However, in anticipation that you will prepare a Staff report to Panel A, we would like to briefly restate our position, which will be explained and supported in much greater detail when we submit our packet for inclusion in the Board Panel's packet by the February 9, 2022, deadline.

As you know, the Applicant in this case, presumably after the normal review process including zoning review and other City Staff disciplines, was issued a Certificate of Occupancy on October 23, 2020, about 15 months ago, for the "Commercial Amusement (inside)" use. That use is permitted by right in the underlying MU-2(SAH) zoning on the subject site. The Applicant was informed by letter dated December 17, 2021, that the Building Inspection Division revoked the Certificate of Occupancy on stated grounds which we believe to be clearly erroneous.

The December 17, 2021, letter from Building Inspection notifying the Applicant of the revocation of the Certificate of Occupancy is manifestly in error in stating that the Applicant's operations, "upon rereview" of the Applicant's land use statement (dated July 2, 2020), have been determined "... to violate Texas Penal Code Section 47.04, 'Keeping a Gambling Place'", and that therefore, it is alleged, "Certificate of Occupancy No. 20030321040 was issued in error". No disclosure or discussion is offered in the letter as to what prompted "rereview" of the referenced Certificate of Occupancy or on what basis this erroneous determination was made.

31602517v.1

Ms. Jennifer Muñoz

January 26, 2022

Page 2

The Applicant is fully confident that the operation of its Commercial Amusement (inside) use has been from its inception, and continues to be, completely legal under relevant Texas law, in particular, but not limited to, the “safe harbor” provisions of Section 47.02(b) of the *Texas Penal Code*, and that this position is supported by the facts stated in the above-referenced land use statement. We look forward to advocating this position in much more detail in the docket materials and at our public hearing.

We would also point out that Texas state law is very clear on the point that 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, as required by Section 245.002 of the *Texas Local Government Code*, which is relevant to the original zoning review, review for and issuance of the Building Permit, and finally issuance of the Certificate of Occupancy.

To conclude, we firmly believe that this Certificate of Occupancy was revoked in error. We have therefore appealed the action of the Building Inspection Division in revoking the Certificate of Occupancy, as the existing zoning clearly permits by right the Commercial amusement (inside) use applied for, and the Certificate of Occupancy was properly issued originally and should not have been revoked.

We look forward to our opportunity to be heard at Panel A’s hearing on February 22 where we will be able to discuss this matter further. Thank you very much.

Very truly yours,


Jonathan G. Vinson

cc: Ryan Crow
Mike Gruber
Brian Mason
Bogdan Rentea
Sarah Dodd
Suzan Kedron
Luke Franz

Jonathan G. Vinson
(214) 953-5941 (Direct Dial)
(214) 661-6809 (Direct Fax)
jvinson@jw.com

February 9, 2022

By Scan/Email to jennifer.munoz@dallascityhall.com

Hon. Chair and Members
Zoning Board of Adjustment, Panel A
c/o Ms. Jennifer Muñoz, 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 212-018; 11834 Harry Hines Boulevard;
Appeal of Administrative Official Decision.

Dear Members of Panel A:

I. Introduction. We represent Texas Card House LLC (“TCH”), the Applicant in this appeal from a decision of the Administrative Official (revocation of an existing and validly-issued Certificate of Occupancy for a use which is clearly permitted by right) which we strongly believe to have been made in error. It is our understanding that, since this is an appeal of an administrative decision, no Staff recommendation has been made. We would like to explain the reason for our appeal, supported by the discussion below and relevant attachments, and which we will further explain and support at our hearing before you on February 22.

II. Background; Applicable Zoning; Site. The factual background is that TCH submitted an application to Building Inspection for a Certificate of Occupancy for the “Commercial amusement (inside)” use originally on August 17, 2020, and again subsequently on April 13, 2021. Included for your review is a copy of our submitted Land Use Statement [*Attachment 1*] and copies of the City’s own C.O. records [*Attachment 2*]. This use is *permitted by right* in the underlying MU-2(SAH) zoning on the subject site [*See Zoning Map excerpt, Attachment 3; MU-2(SAH) list of permitted uses, Attachment 4; and the Commercial amusement (inside) use definition, Attachment 5*].

31663936v.4

The subject site is located at 11834 Harry Hines Boulevard, Suite 135, within a larger retail center addressed as 11814 Harry Hines Boulevard *[See aerial and street view photos, Attachment 6]*. There is no question at all as to the condition of the building, adequacy of parking, or any other issues, other than the legality of the use itself. We note, also, that MU-2(SAH) 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, TCH was informed by letter dated December 17, 2021, that the Building Inspection Division had revoked the Certificate of Occupancy, on stated grounds which are erroneous. Evidently at some point in August of 2021, long after the thorough review of TCH’s use and issuance of their C.O., Building Inspection’s analysis of the use changed, for reasons which are unclear to us.

III. Description of Operation of Use. You have TCH’s Land Use Statement as part of Attachment 1, which describes in detail the existing business operation, but to summarize briefly, the model is the same as TCH’s other locations in Texas and to other legally-operating card rooms operating under Texas law. Entry into the use is by membership only. Guests may sign up for annual or monthly memberships. Time is charged for being seated at a table, and food and beverage service generates revenue, *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”.

IV. Not “Gambling” Under State Law. On that basis, TCH is fully confident that its operation as permitted, C.O.d, and ongoing, of the Commercial amusement (inside) use is completely legal under relevant Texas law. In fact, TCH engaged counsel with specific expertise in Texas law in this subject area, and operates in other Texas cities with no issues at all. The applicable state law provision in this instance is Sec. 47.02 of the Texas Penal Code on “Gambling” *[Chapter 47 attached as Attachment 7]*, which says 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 be 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, is that the Applicant’s use and operations falls squarely within this safe harbor provision, as evidenced, in part, by its successful operation of the same business model in other locations in Texas.

In addition, this specific business model has been thoroughly reviewed for legality, and TCH’s 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 [**Attachment 8**] and an opinion from Austin-based administrative and regulatory law specialists Rentea & Associates [**Attachment 9**] which we ask you to take the time to review on this crucial issue. 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 the 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.

V. 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, that 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, which appears not to have been done in this instance. However, 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 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

(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, Attachment 10].

VI. The C.O. Was Revoked In Error and Should be Reinstated. We are certain that TCH's Certificate of Occupancy was revoked in error, possibly because of a misunderstanding of the proposed business operation, but more likely for other reasons which we will discuss in the public hearing. We have noted that at least one *proposed* Commercial amusement (inside) uses offering poker was the subject of some attention from the public, from at least one City official, other elected officials, and from news media and social media outlets.

A. City Attorney's Original Advice Was This is a Legal Use. Interestingly, it was after that media and political attention beginning last August that the City began to deny these C.O.s, and ultimately, in TCH's case, revoke their C.O. that had already been issued about 17 months ago. One might speculate that this is coincidental – but we doubt it. These uses have been denied Certificates of Occupancy, 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. S.U.P. Granted January 23, 2019, to TCH for Same Use. In fact, this very same Applicant was granted a Specific Use Permit for a Commercial amusement (inside) use for two years under Zoning Case Z178-386, at a location at Montfort Drive and James Temple Drive in P.D. 887. The Council Agenda and Staff Report [*Attachment 11*] specifically mentions poker on page 2 of the Staff Report.

C. S.U.P. Again Granted February 12, 2020, to TCH for Same Use. TCH filed another request on September 7, 2019, at that same location in P.D. 887, again for an S.U.P. for a Commercial amusement (inside) use for two years under Zoning Case Z190-106 [*Attachment 12*]. This case was filed on September 7, 2019. The Staff Report for the January 9, 2020, City Plan Commission meeting on Z190-106 [*Attachment 13*] says in the Summary; “*The applicant proposes to operate a membership-based social club with activities to include card games, billiards, and sports lounges (Texas Card House)*”. The Plan Commission had recommended approval on a 13 to 1 vote on January 9, 2020, per their minutes for that meeting [*Attachment 14*].

The City Council went to *again* approve the S.U.P. for the Commercial amusement (inside) use at this location on February 12, 2020, as stated in the Council minutes for that meeting [*Attachment 15*], and as memorialized in Ordinance No. 31451, signed, stamped, and approved as to form by the City Attorney [*Attachment 16*].

D. S.A.F.E. Team Meeting at This Site. We have included an email thread in which it is relayed to TCH with respect to *this specific site* that “*The building official confirmed that a card house is classified as a commercial amusement (inside), which is permitted by right in the mixed use districts and would not fall under one of the exceptions requiring an SUP*” [*Attachment 17*].

Not only that, there was even a meeting at *this site* on Harry Hines on February 25, 2020, with S.A.F.E. Team personnel, including a Case Officer and Assistant Case Officer from the Dallas Police Department, two Assistant City Attorneys, a representative from Code Compliance, and

others, with a total of at least eight City of Dallas personnel being in that meeting. We have attached a copy of the sign-in sheet [*Attachment 18*] so you can see that for yourself.

E. City Even Initiated a Code Amendment Process. As to possible consideration now being given to amending the *Dallas Development Code* to add a Specific Use Permit requirement for a to-be-defined “poker room“ use (or at least it was before the use became a political football), Memoranda to the City Plan Commission dated May 20, 2021 [*Attachment 19*], and June 3, 2021 [*Attachment 20*], each signed by three Commissioners, requested the authorization of public hearing to amend the Development Code to require an S.U.P. for a “commercial amusement (inside) limited to a poker room”.

Also attached is an excerpt from the June 3, 2021, City Plan Commission minutes [*Attachment 21*] showing that CPC, on a unanimous vote, called a public hearing to begin the Code amendment process for an SUP for a “poker room” use. Was the Commission not being advised on that topic at that time by the City Attorney’s Office? Or if they were, as seems much more likely, then what was the City Attorney’s advice eight months ago, and how and why did it change?

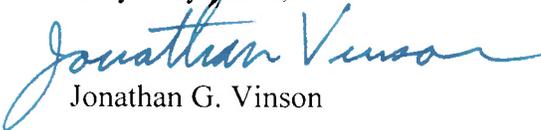
F. The City Has Completely Reversed Its Position. For two and one half years, this Applicant, in particular, has consistently been completely transparent and above board about their prospective operation, their business model, and their operational plan and rules. The City of Dallas has clearly, based on their own documentation, reviewed this 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, great expense.

All it took to turn all of that two and one half years of review and approval by every discipline at the City, and not once, but twice, by Plan Commission and Council, completely around was one ill-founded controversy in one Council District that received media attention and then, of course, attention from the local elected officials. At that point, everything changed, with complete disregard for every level of review and approval that had come before. We think the reason for that is obvious, and this has grave implications for fairness and the rule of law.

VII. Conclusion. Therefore, we have appealed the action of the Building Inspection Division in revoking the Certificate of Occupancy, as the existing zoning clearly permits, by right, the use and the Certificate of Occupancy was originally properly issued for this fully legal use. You as the Board of Adjustment have the power to, in effect, approve and direct the reissuance of the Certificate of Occupancy pursuant to Sec. 51A-4.703(d)(3) 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 February 22, at which time we will discuss this matter in additional detail, offer witness testimony, and then respectfully ask you to grant our appeal and direct the reissuance of TCH's Certificate of Occupancy. Thank you very much.

Very truly yours,



Jonathan G. Vinson

cc: Ryan Crow
Mike Gruber
Brian Mason
Bogdan Rentea
Suzan Kedron
Luke Franz

BDA 212-018; 11834 Harry Hines Boulevard

Appeal of Decision of Administrative Official

List of Attachments:

- 1. Texas Card House Land Use Statement dated July 2, 2020.**
- 2. Texas Card House C.O. records.**
- 3. Zoning Map excerpt.**
- 4. MU-2(SAH) permitted uses.**
- 5. Commercial amusement (inside) use definition.**
- 6. Aerial and site photos.**
- 7. *Texas Penal Code* Chapter 47.**
- 8. Kelly, Hart & Hallman Analysis.**
- 9. Rentea & Associates Opinion.**
- 10. *Texas Local Government Code* Chapter 245.**
- 11. January 23, 2019, City Council Agenda and Staff Report on Z178-386 (specifically refers to poker).**
- 12. October 7, 2019, Zoning Application under Z190-106 (p. 5 refers to poker).**
- 13. Planning Staff Report on Z190-106 (refers to Texas Card House on p. 1).**
- 14. January 9, 2020, City Plan Commission minutes recommending approval of Z190-106.**
- 15. February 12, 2020, Dallas City Council minutes approving Z190-106.**
- 16. February 15, 2020, S.U.P. Ordinance No. 31451 passed by City Council.**
- 17. Email dated December 2, 2019, confirming Building Inspection review and classification of use as Commercial amusement (inside).**
- 18. February 25, 2020, City Staff (including CAO and DPD) Site Meeting Sign-In Sheet.**

19. **May 20, 2021, Memorandum to City Plan Commission re SUPs for “poker rooms”.**
20. **June 3, 2021, Memorandum to City Plan Commission re SUPs for “poker rooms”.**
21. **June 3, 2021, City Plan Commission Minutes 14-0 vote to authorize hearing on S.U.P.s for “poker rooms”.**

**1. Texas Card House Land Use Statement
dated July 2, 2020.**

Land Use Statement

Texas Card House
11834 Harry Hines Blvd., #135
Dallas, Texas

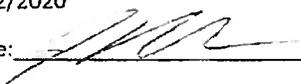
The Texas Card House in Dallas Texas will operate at this site as a private club offering poker and similar game to its members. The location will include several poker tables, pool tables, and other gaming amenities for legal games in Texas.

- Will operate seven days a week and plan to be open from 11am -4am.
- Will operate as a private club that charges a fee to enter. The fee to become a member will initially be \$10/Day, \$30/Month, \$300/Year.
- There will be no alcohol sold on the premises or stored on site. Members will be able to BYOB but there will be no setup fees, charges, or any financial transactions associated with this.
- There will be no coin operated machines, slots, or other automated gaming devices.
- All payment collected from players is for access to the club and club memberships.
- All winnings from poker games will stay with the players and no person will receive an economic benefit from the game other than personal winnings.
 - As an added precaution we have created special "tip chips" that are used to tip staff so that players do not unknowingly violate this by giving poker winnings to others.
- Texas Card House will be streaming live shows on its YouTube channel TCH Live 2-3 days per week.
- T-shirts, Hats, playing cards and other TCH branded items will be sold at this location.

Name: Ryan Crow

Title: CEO

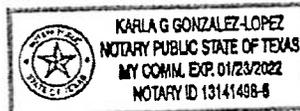
Date: 7/2/2020

Signature: 

Notary

BEFORE ME, the undersigned authority, on this 2nd day of July, 2020 the person whose name is signed to the foregoing document personally appeared and duly sworn by me, each states under oath that he or she has read the said document and that all facts therein set forth are true and correct.

SIGN HERE: 





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Address

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	Type	Project #	Status	Description	Issue Date	Trades
View	Certificate of Occupancy	0312031088	Issued	DBA: HOME DECOR	Dec 3, 2003	
View	Certificate of Occupancy	2003031040	Revoked	TEXAS CARD HOUSE Certificate of Occupancy (CO) DBA: TEXAS CARD HOUSE	Aug 17, 2020	
View	Master Permit	0310081033	Complete	Building (BU) CS, EL, FS, ME, PL	Oct 8, 2003	CS, EL, FS, ME, PL
View	Master Permit	2003031036	Complete	TEXAS CARD HOUSE Building (BU) EL, EC, PL, FA, ME, FS REMODEL FOR GAMING ROOM	Aug 17, 2020	EC, EL, FA, FS, ME, PL
View	Sign Permit	0311111005	Complete	Electrical Sign (ES) 135 11834 HARRY HINES BLVD	Dec 11, 2003	
View	Sign Permit	2007061087	Complete	Electrical Sign (ES) ATTACHED - S ELV (A) New Construction	Sep 18, 2020	

[Main Menu](#)



Certificate of Occupancy

City of Dallas

Address: 11834 HARRY HINES BLVD Ste:135, TEXAS
CARD HOUSE 75234

Issued: 10/23/2020

Owner: RYAN CROW
11826 HARRY HINES BLVD.
DALLAS, TEXAS 75234

DBA: TEXAS CARD HOUSE

Land Use: (7396) COMMERCIAL AMUSEMENT (INSIDE)

Occupied Portion:

C.O.#: 2003031040

Lot:	1	Block:	A/6572	Zoning:	IR, MU-2	PDD:	SUP:
Historic Dist:		Consrv Dist:	77	Pro Park:	77	Req Park:	77
Dwlg Units:	1	Stories:	A2	Occ Code:	A2	Lot Area:	442326
Type Const:	VB	Sprinkler:	All	Occ Load:	329	Alcohol:	N
						Dance Floor:	N
						Park Agrmt:	N
						Total Area:	7669

Remarks: NO ALCOHOL TO BE STORED, SOLD OR SERVED ON-SITE UNTIL TABC LICENSE OBTAINED; NO COIN-OPERATED MACHINES ALLOWED ON SITE. ALL WORK SUBJECT TO FIELD INSPECTORS APPROVAL. TABS #20200012562

David Session
David Session, Building Official

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

Certificate of Occupancy

Address: 11834 HARRY HINES BLVD Ste:135, TEXAS
CARD HOUSE 75234 Issued: 10/23/2020

Owner: RYAN CROW
11826 HARRY HINES BLVD.
DALLAS, TEXAS 75234

DBA: TEXAS CARD HOUSE

Land Use: (7396) COMMERCIAL AMUSEMENT (INSIDE)

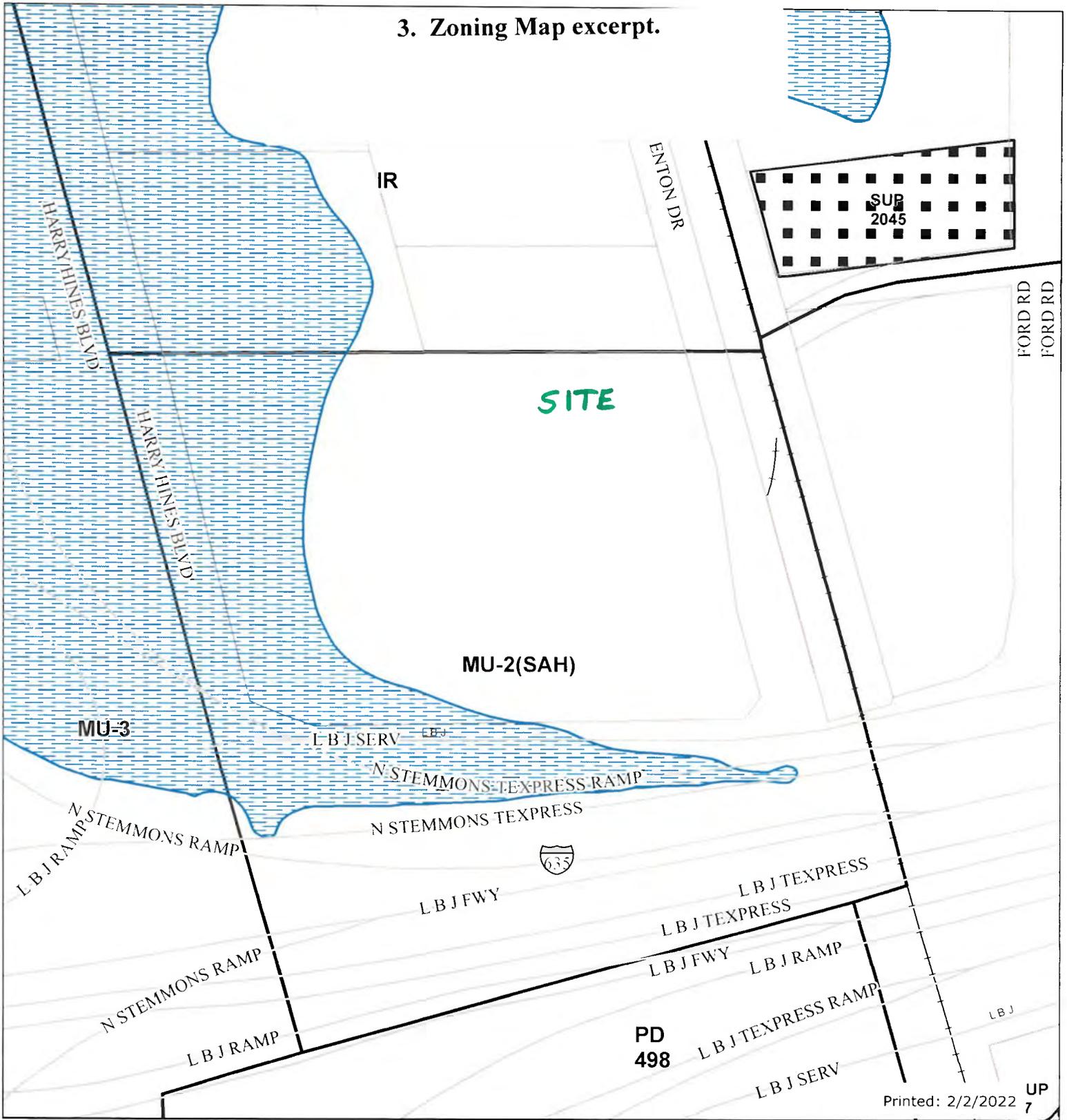
C.O.#: 2003031040

Lot:	1	Block:	A/6572	Zoning:	MU-2(SAF)	PDD:	SUP:		
Historic Dist:		Consrv Dist:		Pro Park:	77	Req Park:	77	Park Agrmt:	N
Dwlg Units:		Stories:	1	Occ Code:	A2	Lot Area:	442326	Total Area:	7669
Type Const:	VB	Sprinkler:	All	Occ Load:	329	Alcohol:	N	Dance Floor:	N

Remarks: NO ALCOHOL TO BE STORED, SOLD OR SERVED ON-SITE UNTIL TABC LICENSE OBTAINED; NO COIN-OPERATED MACHINES ALLOWED ON SITE. ALL WORK SUBJECT TO FIELD INSPECTORS APPROVAL. TABS #20200012562

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

3. Zoning Map excerpt.



Printed: 2/2/2022 **UP**
7

Legend

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



4. MU-2(SAH) permitted uses.

SEC. 51A-4.125. MIXED USE DISTRICTS.

(e) MU-2 and MU-2(SAH) districts.

(1) Purpose. To provide for the development of medium density retail, office, hotel, and/or multifamily residential uses in combination on single or contiguous building sites; to encourage innovative and energy conscious design, efficient circulation systems, the conservation of land, and the minimization of vehicular travel. Additionally, the MU-2(SAH) district is created to encourage the provision of affordable housing.

(2) Main uses permitted.

(A) Agricultural uses.

-- Crop production.

(B) Commercial and business service uses.

-- Catering service.

-- Custom business services.

-- Electronics service center.

-- Labor hall. [SUP]

-- Medical or scientific laboratory.

-- Tool or equipment rental.

(C) Industrial uses.

-- Gas drilling and production. [SUP]

-- Temporary concrete or asphalt batching plant. [By special authorization of the building official.]

(D) Institutional and community service uses.

-- Adult day care facility.

-- Cemetery or mausoleum. [SUP]

-- Child-care facility.

-- Church.

-- College, university or seminary.

-- Community service center. [SUP]

-- Convalescent and nursing homes, hospice care, and related institutions. [RAR]

-- Convent or monastery.

-- Foster home.

-- Halfway house. [SUP]

-- Hospital. [SUP]

-- Library, art gallery, or museum.

-- Open-enrollment charter school or private school. [SUP]

-- Public school other than an open-enrollment charter school. [RAR]

(E) Lodging uses.

-- Extended stay hotel or motel. [SUP]

-- Hotel or motel. [RAR]

-- Overnight general purpose shelter. [See Section 51A-4.205(2.1).]

(F) Miscellaneous uses.

-- Attached non-premise sign. [SUP]

-- Carnival or circus (temporary). [By special authorization of the building official.]

-- Temporary construction or sales office.

(G) Office uses.

- Alternative financial establishment. *[SUP]*
- Financial institution without drive-in window.
- Financial institution with drive-in window. *[DIR]*
- Medical clinic or ambulatory surgical center.
- Office.
- (H) Recreation uses.
 - Country club with private membership.
 - Private recreation center, club, or area.
 - Public park, playground, or golf course.
- (I) Residential uses.
 - College dormitory, fraternity, or sorority house.
 - Duplex.
 - Group residential facility. *[See Section 51A-4.209(3).]*
 - Multifamily.
 - Residential hotel.
 - Retirement housing.
- (J) Retail and personal service uses.
 - Alcoholic beverage establishments. *[See Section 51A-4.210(b)(4).]*
 - Animal shelter or clinic without outside runs. *[RAR]*
 - Auto service center. *[RAR]*
 - Business school.
 - Car wash. *[RAR]*
 - **Commercial amusement (inside). *[SUP may be required. See Section 51A-4.210(b)(7)(B).]***
 - Commercial amusement (outside). *[SUP]*
 - Commercial parking lot or garage. *[RAR]*
 - Convenience store with drive-through. *[SUP]*
 - Dry cleaning or laundry store.
 - Furniture store.
 - General merchandise or food store 3,500 square feet or less.
 - General merchandise or food store greater than 3,500 square feet.
 - General merchandise or food store 100,000 square feet or more. *[SUP]*
 - Household equipment and appliance repair.
 - Liquor store.
 - Mortuary, funeral home, or commercial wedding chapel.
 - Motor vehicle fueling station.
 - Nursery, garden shop, or plant sales.
 - Paraphernalia shop. *[SUP]*
 - Personal service uses.
 - Restaurant without drive-in or drive-through service. *[RAR]*
 - Restaurant with drive-in or drive-through service. *[DIR]*
 - Swap or buy shop. *[SUP]*
 - Temporary retail use.
 - Theater.
- (K) Transportation uses.
 - Helistop. *[SUP]*

- Railroad passenger station. [SUP]
- Transit passenger shelter.
- Transit passenger station or transfer center. [By SUP or city council resolution. See Section 51A-4.211.]

(L) Utility and public service uses.

- Commercial radio or television transmitting station.
- Electrical substation.
- Local utilities. [SUP or RAR may be required. See Section 51A-4.212(4).]
- Police or fire station.
- Post office.
- Radio, television, or microwave tower. [SUP]
- Tower/antenna for cellular communication. [See Section 51A-4.212(10.1).]
- Utility or government installation other than listed. [SUP]

(M) Wholesale, distribution, and storage uses.

- Mini-warehouse. [SUP]
- Recycling buy-back center [See Section 51A-4.213 (11).]
- Recycling collection center. [See Section 51A-4.213 (11.1).]
- Recycling drop-off container. [See Section 51A-4.213 (11.2).]
- Recycling drop-off for special occasion collection. [See Section 51A-4.213 (11.3).]

(3) Accessory uses. As a general rule, an accessory use is permitted in any district in which the main use is permitted. Some specific types of accessory uses, however, due to their unique nature, are subject to additional regulations contained in Section 51A-4.217. For more information regarding accessory uses, consult Section 51A-4.217.

(A) The following accessory uses are not permitted in this district:

- Private stable.

(B) In this district, the following accessory use is permitted by SUP only:

- Accessory helistop.

(C) In this district, an SUP may be required for the following accessory uses:

- Accessory medical/infectious waste incinerator. [See Section 51A-4.217 (3.1).]

5. Commercial amusement (inside) use definition.

SEC. 51A-4.210. RETAIL AND PERSONAL SERVICE USES.

(a) **General provisions.** Except as otherwise provided in this article, the following general provisions apply to all uses listed in this section:

(1) All uses must be retail or service establishments dealing directly with consumers. No person may produce goods or perform services on the premises unless those goods or services are principally sold on the premises to individuals at retail.

(2) Outside sales, outside display of merchandise, and outside storage may be classified as either main or accessory uses. Accessory outside sales, accessory outside display of merchandise, and accessory outside storage are limited to five percent of the lot. If these uses occupy more than five percent of the lot, they are only allowed in districts that permit them as a main use.

(3) In a GO(A) district, a retail and personal service use: (A) must be contained entirely within a building; and (B) may not have a floor area that, in combination with the floor areas of other retail and personal service uses in the building, exceeds 10 percent of the total floor area of the building.

(b) **Specific uses.**

(7) **Commercial amusement (inside).**

(A) Definitions. In this paragraph:

(i) AMUSEMENT CENTER means a facility for which an amusement center license is required under Chapter 6A of the Dallas City Code, as amended.

(ii) BILLIARD HALL means a facility for which a billiard hall license is required under Chapter 9A of the Dallas City Code, as amended.

(iii) CHILDREN'S AMUSEMENT CENTER means a facility with amusement rides, games, play areas, and other activities, catering primarily to children 12 years of age and younger.

(iv) CLASS E DANCE HALL means a facility for which a Class E dance hall license is required under Chapter 14 of the Dallas City Code, as amended.

(v) COMMERCIAL AMUSEMENT (INSIDE) means a facility wholly enclosed in a building that offers entertainment or games of skill to the general public for a fee. This use includes but is not limited to an adult arcade, adult cabaret, adult theater, amusement center, billiard hall, bowling alley, children's amusement center, dance hall, motor track, or skating rink.

(vi) DANCE HALL means a dance hall as defined in Chapter 14 of the Dallas City Code, as amended, but excludes those uses described in Section 14-2(d). This definition includes a Class E dance hall.

(B) Districts permitted:

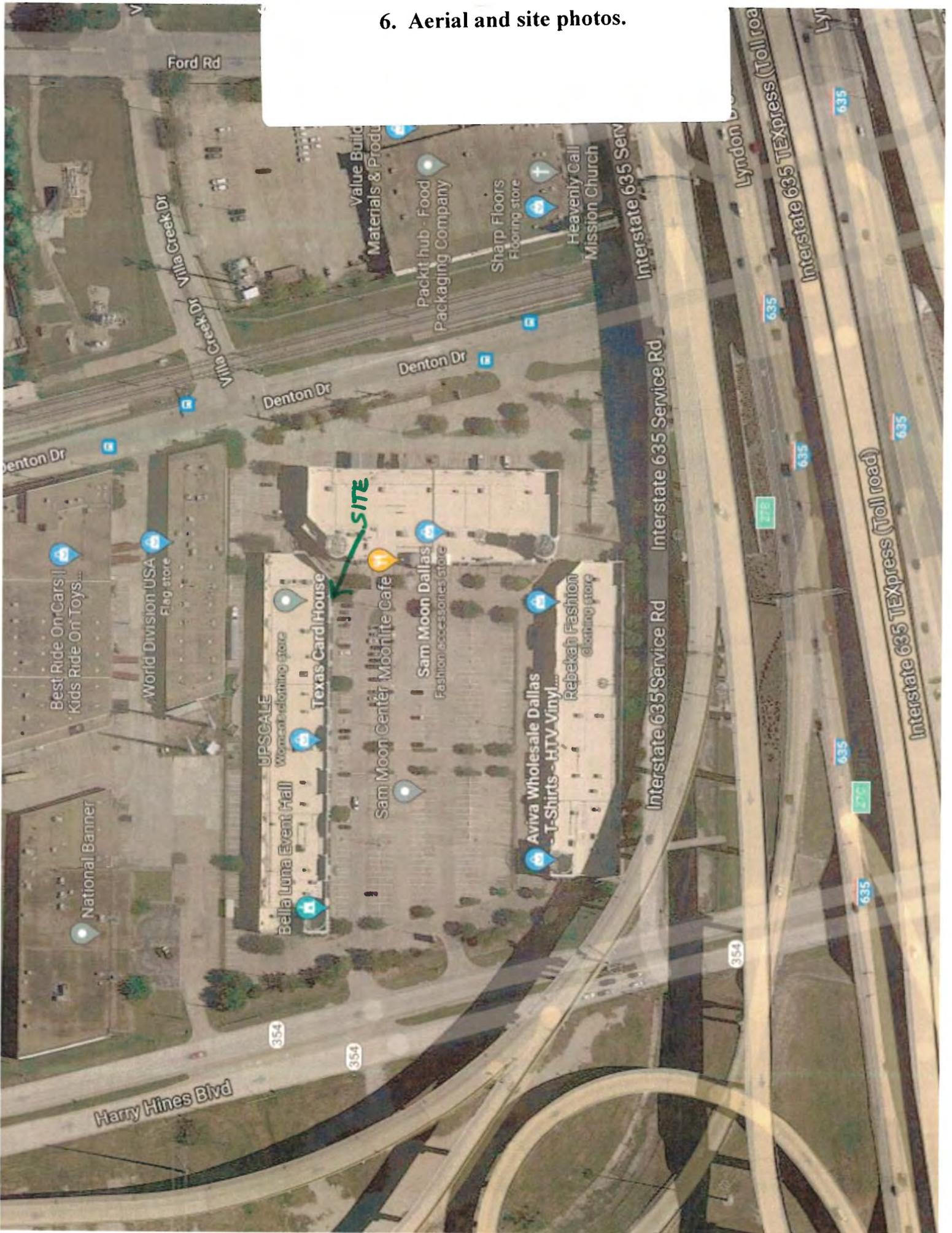
(i) Except as otherwise provided in Subparagraphs (B)(ii), (B)(iii), and (B)(iv), by right in CR, RR, CS, industrial, central area, mixed use, multiple commercial, UC-2, and UC-3 districts.

(ii) Amusement center: An SUP is required for an amusement center in a CR, RR, CS, industrial, central area, mixed use, multiple commercial, UC-1, or UC-2 district if it has a floor area of 2,500 square feet or more and is located within 300 feet of a residential district.

(iii) Bingo parlor: An SUP is required for a bingo parlor in a CR, UC-2, or UC-3 district.

(iv) Dance hall: An SUP is required for any dance hall (including a Class E dance hall) in a CR, CS, UC-2, or UC-3 district. An SUP is also required for a Class E dance hall in an RR, industrial, central area, mixed use, or multiple commercial district if the Class E dance hall is located within 300 feet of a residential district. RAR is required for any dance hall that does not require an SUP but is located within 300 feet of a residential district.

6. Aerial and site photos.









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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:

(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.

8. Kelly, Hart & Hallman Analysis.



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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

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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 from 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.

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

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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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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

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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 from 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.

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 gleaned 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”).

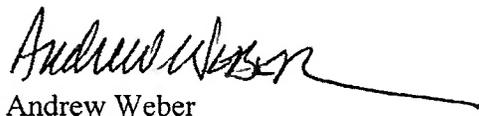
Because Chairman Morrison’s request does not ask the AG to construe these statutes or interpret the statutory definitions of “gambling place,” “bet” or “gambling equipment,” applying Chairman Morrison’s hypothetical to these laws goes far beyond the opinion process—and

The Honorable Ken Paxton
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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

9. Rentea & Associates Opinion.

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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 game¹; (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;*

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 winnings⁷, 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

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

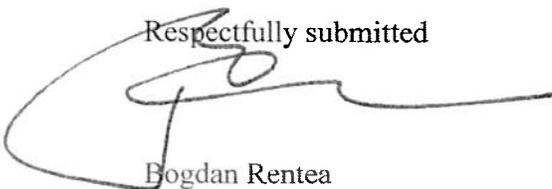
a wager, or bet.

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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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

(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.

**11. January 23, 2019, City Council Agenda
and Staff Report on Z178-386 (specifically
refers to poker).**

Texas Card House
Consent #59

REDE

2019 JAN 11 PM 2:02

CITY SECRETARY
DALLAS, TEXAS

City of Dallas

*1500 Marilla Street
Dallas, Texas 75201*



COUNCIL AGENDA

January 23, 2019

(For General Information and Rules of Courtesy, Please See Opposite Side.)
(La Información General Y Reglas De Cortesía Que Deben Observarse
Durante Las Asambleas Del Consejo Municipal Aparecen En El Lado Opuesto, Favor De Leerlas.)

**AGENDA
CITY COUNCIL MEETING
WEDNESDAY, JANUARY 23, 2019
ORDER OF BUSINESS**

Agenda items for which individuals have registered to speak will be considered no earlier than the time indicated below:

9:00 a.m. **INVOCATION AND PLEDGE OF ALLEGIANCE**

OPEN MICROPHONE

MINUTES

Item 1

CONSENT AGENDA

Items 2 - 48

ITEMS FOR INDIVIDUAL CONSIDERATION

No earlier
than 9:15 a.m.

Items 49 - 50

PUBLIC HEARINGS AND RELATED ACTIONS

1:00 p.m.

Items 51 - 68

NOTE: A revised order of business may be posted prior to the date of the council meeting if necessary.

59. 19-117 A public hearing to receive comments regarding an application for and an ordinance granting a Specific Use Permit for a commercial amusement (inside) use on property zoned Subdistrict 3 for WMU-20 Walkable Urban Mixed-Use District uses within Planned Development District No. 887, the Valley View/Galleria Area Special Purpose District, on the southwest corner of Montfort Drive and James Temple Drive
Recommendation of Staff and CPC: Approval for a two-year period, subject to a site plan and conditions
Z178-386(JM)
60. 19-118 A public hearing to receive comments regarding an application for and an ordinance granting an MF-2(A) Multifamily District on property zoned an IR Industrial Research District, on the southeast line of Kimsey Drive, northeast of Maple Avenue
Recommendation of Staff and CPC: Approval
Z178-389(CT)

ZONING CASES - INDIVIDUAL

61. 19-103 A public hearing to receive comments regarding an application for and an ordinance granting a Planned Development District for CR Community Retail District, a private school, and residential uses on property zoned an IR Industrial Research District, generally bounded by Singleton Boulevard and Bedford Street to the north, to the east and west of Vilbig Road, and Akron Street and Duluth Street to the south
Recommendation of Staff and CPC: Approval, subject to a development plan, traffic management plan, and conditions
Z178-162(JM)
62. 19-115 A public hearing to receive comments regarding an application for and an ordinance granting the renewal of Specific Use Permit No. 1903 for a late-hours establishment limited to a restaurant without drive-in or drive-through service on property zoned Planned Development District No. 842 with an MD-1 Modified Delta Overlay District, on the north line of Alta Avenue, west of Greenville Avenue
Recommendation of Staff: Approval for a three-year period, subject to conditions
Recommendation of CPC: Approval for a two-year period, subject to conditions
Z178-387(JM)



City of Dallas

1500 Marilla Street
Dallas, Texas 75201

Agenda Information Sheet

File #: 19-117

Item #: 59.

STRATEGIC PRIORITY: Mobility Solutions, Infrastructure, and Sustainability
AGENDA DATE: January 23, 2019
COUNCIL DISTRICT(S): 11
DEPARTMENT: Department of Sustainable Development and Construction
EXECUTIVE: Majed Al-Ghafry

SUBJECT

A public hearing to receive comments regarding an application for and an ordinance granting a Specific Use Permit for a commercial amusement (inside) use on property zoned Subdistrict 3 for WMU-20 Walkable Urban Mixed-Use District uses within Planned Development District No. 887, the Valley View/Galleria Area Special Purpose District, on the southwest corner of Montfort Drive and James Temple Drive

Recommendation of Staff and CPC: Approval for a two-year period, subject to a site plan and conditions

Z178-386(JM)

FILE NUMBER: Z178-386(JM) **DATE FILED:** September 24, 2018
LOCATION: Southwest corner of Montfort Drive and James Temple Drive
COUNCIL DISTRICT: 11 **MAPSCO:** 15 N
SIZE OF REQUEST: 1.88 acres **CENSUS TRACT:** 136.16

APPLICANT: TCHDallas1, LLC (Ryan Crow)

OWNER: RH Three LP

REPRESENTATIVE: Suzan Kedron, Jackson Walker, LLP

REQUEST: An application for a Specific Use Permit for a commercial amusement (inside) use on property zoned Subdistrict 3 for WMU-20 Walkable Urban Mixed-Use District uses within Planned Development District No. 887, the Valley View/Galleria Area Special Purpose District.

SUMMARY: The applicant proposes to operate a membership-based social club providing amenities and activities including poker, billiards, and sports lounges. Access will be granted based on an hourly club fee. Daily, monthly, or annual memberships will be available for a fee.

STAFF RECOMMENDATION: Approval for a two-year period, subject to a site plan and conditions.

STAFF RECOMMENDATION: Approval for a two-year period, subject to a site plan and conditions.

BACKGROUND INFORMATION:

- Planned Development District No. 887, the Valley View/Galleria Area Special Purpose District, was established on June 12, 2013, containing 445 acres and 13 subdistricts.
- The applicant proposes to operate a membership-based social club providing amenities and activities including poker, billiards, and sports lounges. Access will be granted based on an hourly club fee. Daily, monthly, or annual memberships will be available for a fee. This use is classified as a commercial amusement (inside) use, which requires a Specific Use Permit in Subdistrict 3 for WMU-20 Walkable Urban Mixed-Use District uses within PD No. 887.
- The existing multitenant facility contains 22,550 square feet divided into nine suites. The proposed commercial amusement (inside) use would operate from a 6,357-square foot suite.

Zoning History: There have been two zoning cases in the area over the past five years.

1. **Z156-189:** On May 11, 2016, the City Council approved the creation of Subdistrict 3A within PD No. 887, the Valley View/Galleria Area Special Purpose District.
2. **Z167-307:** On December 13, 2017, the City Council approved the creation of Subdistrict 1C within PD No. 887, the Valley View/Galleria Area Special Purpose District.

Thoroughfares/Streets:

Thoroughfare/Street	Type	Existing ROW	Proposed ROW
James Temple Drive	Collector	Variable	75 feet
Montfort Drive	Minor Arterial	60 feet	80 feet

Traffic:

The Engineering Division of the Sustainable Development and Construction Department has reviewed the request and determined that the proposed development will not have a negative impact on the surrounding street system.

Land Use:

Area	Zone	Use
Site	Subdistrict 3 within PD No. 887	Vacant commercial building
North	PD No. 250, NO(A), RR	Multifamily, Office, and Retail and personal service
East	Subdistrict 1A within PD No. 887	Vacant Retail (Valley View Mall)
South	Subdistrict 2 within PD No. 887	Office and Retail and personal service
West	Subdistrict 3 within PD No. 887	General merchandise or food store 100,000 square feet or more

STAFF ANALYSIS:

Comprehensive Plan:

The *forwardDallas! Comprehensive Plan* was adopted by the City Council in June 2006. The *forwardDallas! Comprehensive Plan* outlines several goals and policies which can serve as a framework for assisting in evaluating the applicant's request.

The applicant's request is consistent with the following goals and policies of the comprehensive plan.

ECONOMIC ELEMENT

GOAL 2.2 ENGAGE IN STRATEGIC ECONOMIC DEVELOPMENT

Policy 2.2.6 Restore Dallas as the foremost retail location in the region.

GOAL 2.4 CREATE AND MAINTAIN AN ENVIRONMENT FRIENDLY TO BUSINESSES AND ENTREPRENEURS

Policy 2.4.2 Restore Dallas as the premier city for conducting business within the region.

Area Plans:

The Valley View-Galleria Area Plan (May 2013) identifies the site is located in the Midtown Green Area overlooking the Midtown Commons. The Midtown Green is described on page 42 of the area plan as being "envisioned as a signature mid-rise and high-rise residential subdistrict centered on the new Midtown Commons." While the proposed use is not exactly supportive of the area plan, it does meet the subdistrict standards of allowing neighborhood-serving retail to complement the Midtown Commons.

Land Use Compatibility:

According to DCAD records, the 1.88-acre site was developed with a retail strip center in 1972, containing approximately 22,550 square feet of floor area divided into nine suites. The subject SUP site area encompasses one suite with 6,357 square feet of floor area to allow a membership-based social club providing amenities and activities including poker, billiards, and sports lounges. Access will be granted based on an hourly club fee. Daily, monthly, or annual memberships will be available for a fee. This use was classified as a commercial amusement (inside) use by staff within the Building Inspection Division and requires a Specific Use Permit per PD No. 887.

Surrounding land uses consist of multifamily, office, and retail and personal service uses to the north; vacant retail (the Galleria) to the east; retail and personal service and office uses to the south; and, general merchandise or food store 100,000 square feet or more to the west.

The general provisions for a Specific Use Permit in Section 51A-4.219 of the Dallas Development Code specifically state: (1) The SUP provides a means for developing certain uses in a manner in which the specific use will be consistent with the character of the neighborhood; (2) Each SUP application must be evaluated as to its probable effect on the adjacent property and the community welfare and may be approved or denied as the findings indicate appropriate; (3) The city council shall not grant an SUP for a use except upon a finding that the use will: (A) complement or be compatible with the surrounding uses and community facilities; (B) contribute to, enhance, or promote the welfare of the area of request and adjacent properties; (C) not be detrimental to the public health, safety, or general welfare; and (D) conform in all other respects to all applicable zoning regulations and standards. The regulations in this chapter have been established in accordance with a comprehensive plan for the purpose of promoting the health, safety, morals, and general welfare of the city.

While staff is open to the infill of the suite with the proposed commercial amusement use, an initial two-year term is recommended to adequately gauge the overall impact of the proposed use on the surrounding area. However, the applicant has requested an initial six-year term to match the lease agreement.

Landscaping:

The request will not trigger any Article XIII requirements, as no new construction is proposed on the site.

Market Value Analysis

Market Value Analysis (MVA), is a tool to aid residents and policy-makers in understanding the elements of their local residential real estate markets. It is an objective, data-driven tool built on local administrative data and validated with local experts. The analysis was prepared for the City of Dallas by The Reinvestment Fund. Public officials and private actors can use the MVA to more precisely target intervention

Z178-386(JM)

strategies in weak markets and support sustainable growth in stronger markets. The MVA identifies nine market types (A through I) on a spectrum of residential market strength or weakness. As illustrated in the attached MVA map, the colors range from purple representing the strongest markets to orange, representing the weakest markets. While the subject site is not located within a designated market type, Category E can be found to the north and south, and Category H to the south.

Parking:

Pursuant to Article XIII, a commercial amusement (inside) use requires one (1) space per 200 square feet of floor area. Therefore, the 6,357-square foot site requires 32 spaces. As depicted on the site plan, 123 spaces will be provided onsite. The remainder of the shopping plaza contains eight suites with a mix of uses which are all currently occupied. According to the existing identified uses, 117 parking spaces are required including the proposed commercial amusement (inside), leaving a surplus of eight parking spaces. If occupancy should change in the future, any deficit unable to be met on-site could be met through special parking requirements.

Z178-386(JM)

**CPC Action
December 13, 2018**

Motion: It was moved to recommend **approval** of a Specific Use Permit for a commercial amusement (inside) use for a two-year period, subject to a site plan and staff's recommended conditions to include the following additional conditions: 1) minimum of two security guards with one stationed outside during all hours of operation, and 2) hours of operation are 12:00 p.m. to 12:00 a.m., Sunday through Thursday and 12:00 p.m. to 2:00 a.m., Friday and Saturday on property zoned Subdistrict 3 for WMU-20 Walkable Urban Mixed-Use District uses within Planned Development District No. 887, the Valley View/Galleria Area Special Purpose District, on the southwest corner of Montfort Drive and James Temple Drive.

Maker: Schultz
Second: Murphy
Result: Carried: 12 to 0

For: 12 - MacGregor, Rieves, Davis, Shidid, Carpenter,
Lewis, Jung, Schultz, Peadon, Murphy, Ridley,
Tarpley

Against: 0
Absent: 1 - Housewright
Vacancy: 2 - District 3, District 7

Notices: Area: 300 Mailed: 6
Replies: For: 0 Against: 1

Speakers: For: Suzan Kedron, 2323 Ross Ave., 75201
Ryan Crow, 4600 Secluded Hollow, Austin, TX, 75727
Against: Juan Martinez, 13131 Montfort Dr., Dallas, TX, 75240

Z178-386(JM)

LIST OF OFFICERS

TCHDallas1, LLC

List of Partners/Principals/Officers

Ryan Crow, Owner/Manager and CEO
Darren Brown, Owner/Manager
Justin Northcutt, Owner/Manager

RH Three, LP

List of Partners/Principals/Officers

RH Three GP, LLC, General Partner
Judge M McStay, Director/Manager of RH Three GP, LLC
The Morning Star Family, LP, Limited Partner

CPC Recommended SUP CONDITIONS

1. **USE:** The only use authorized by this specific use permit is a commercial amusement (inside).
2. **SITE PLAN:** Use and development of the Property must comply with the attached site plan.

CPC and Staff's Recommendation:

3. **TIME LIMIT:** This specific use permit expires on (two years from date of passage of this ordinance).

Applicant's Request:

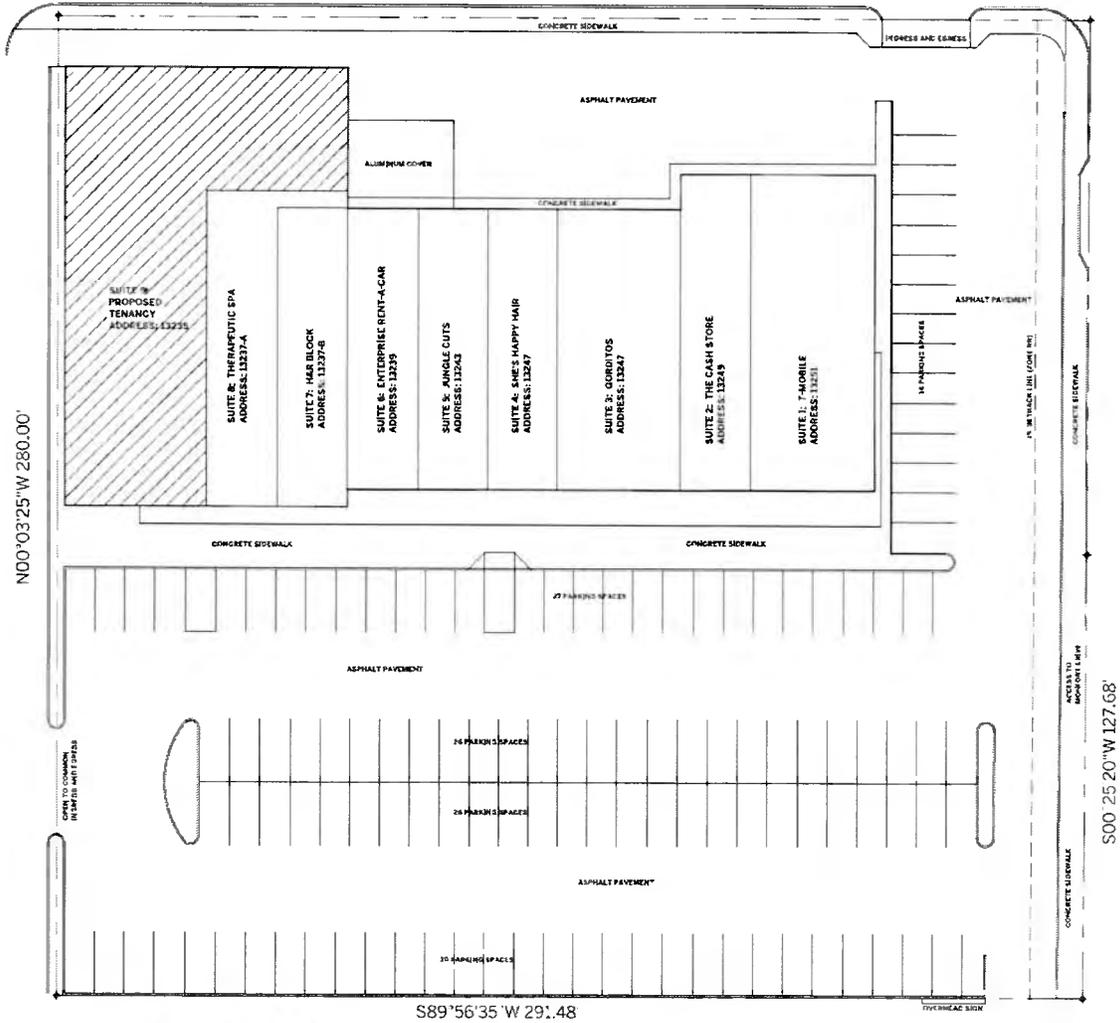
3. **TIME LIMIT:** This specific use permit expires on (six years from date of passage of this ordinance).

4. **HOURS OF OPERATION:** A commercial amusement (inside) use may operate from 12:00 p.m. to 12:00 a.m., Sunday through Thursday and 12:00 p.m. to 2:00 a.m., Friday and Saturday
5. **SECURITY:** A minimum of two off-duty peace officers must be employed and stationed with one stationed outside during all hours of operation.
6. **MAINTENANCE:** The Property must be properly maintained in a state of good repair and neat appearance.
7. **GENERAL REQUIREMENTS:** Use of the Property must comply with all federal and state laws and regulations and with all ordinances rules and regulations of the City of Dallas,

PROPOSED SITE PLAN

JAMES TEMPLE DRIVE
(VARIABLE WIDTH PRIVATE STREET)

N89°56'35"E 293.09'

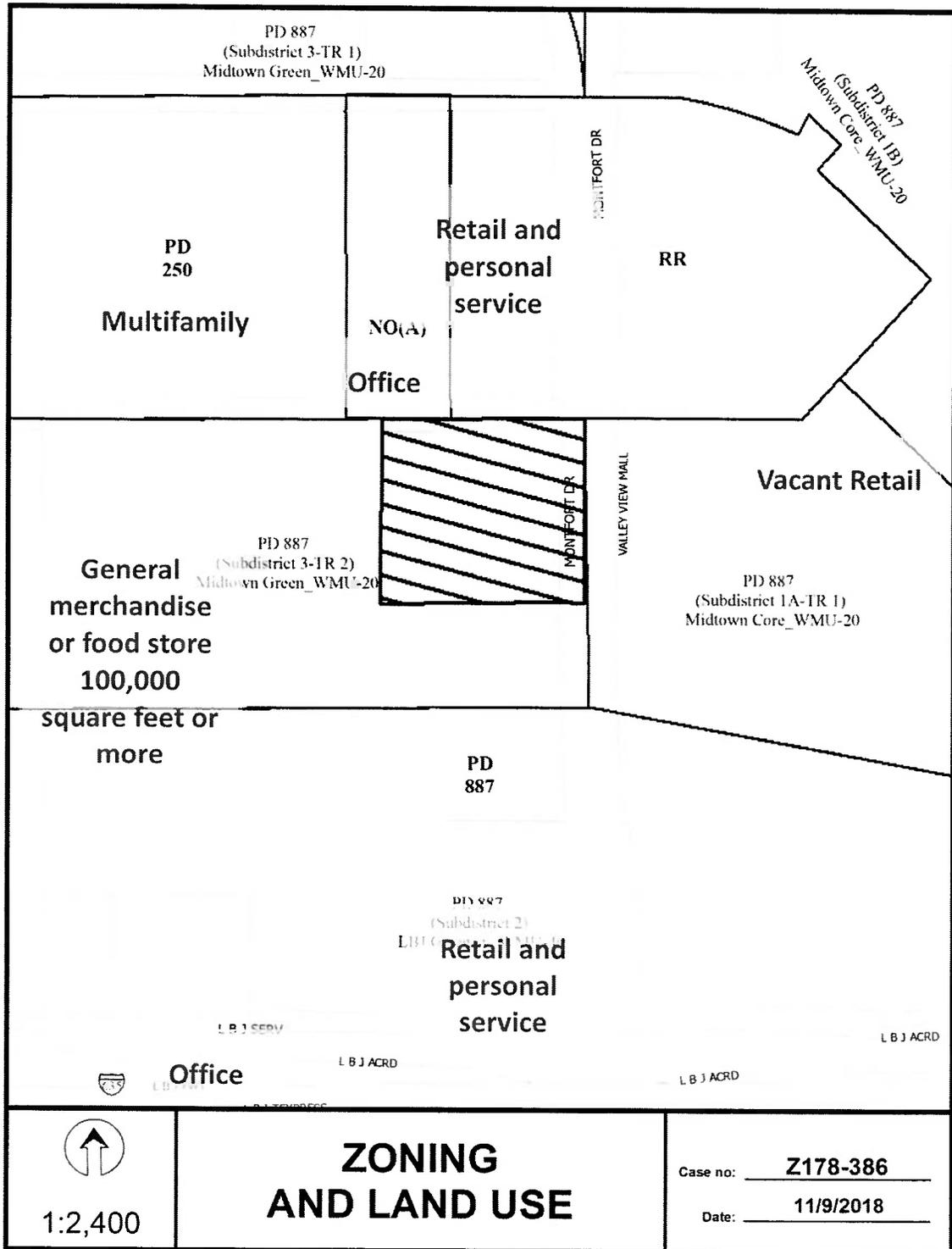


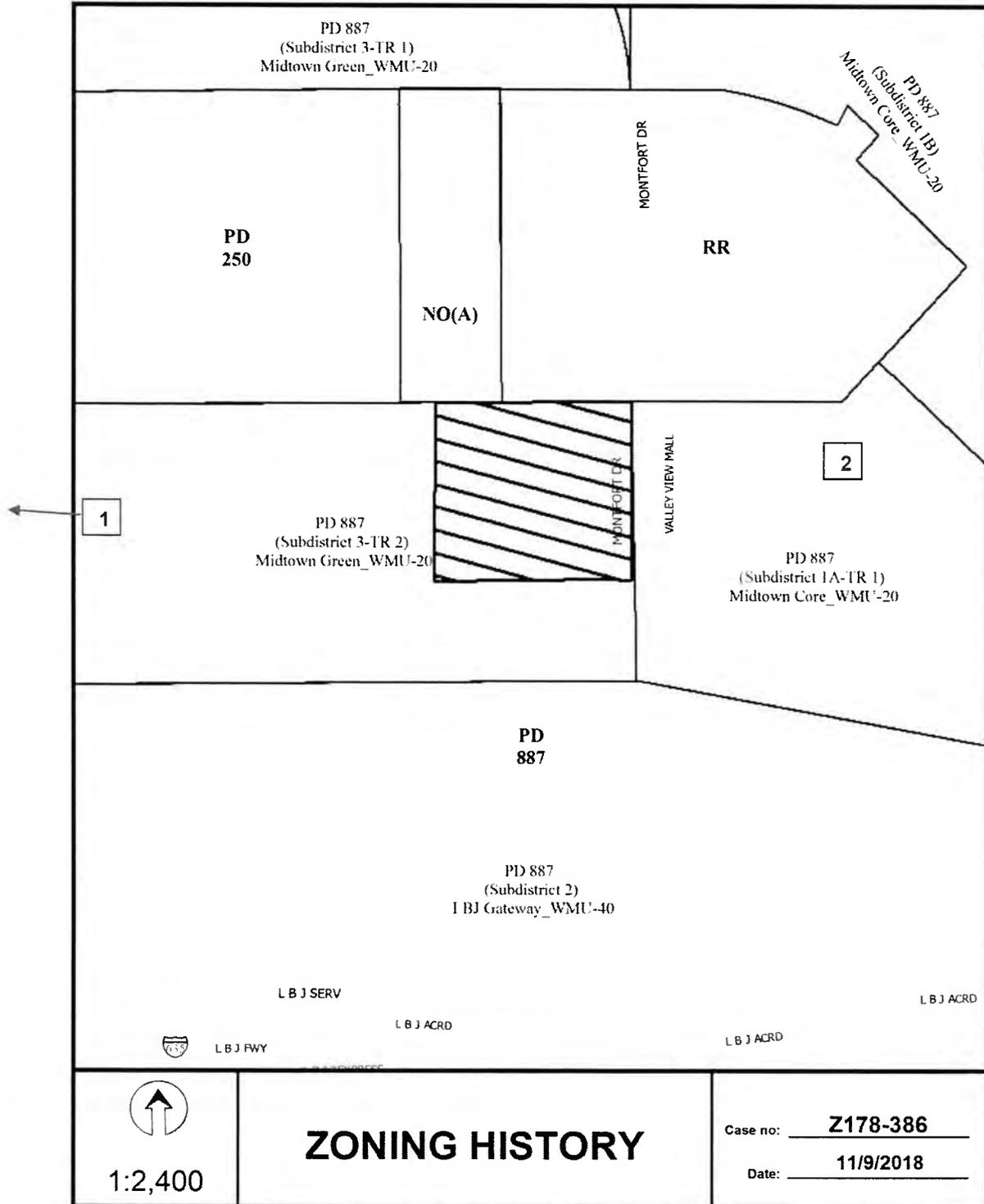
PARKING:

SUITE	ADDRESS	USE AS DEFINED IN 51A-13.300	SUITE SF	RATIO PER 13.402 [1 space per X sf]	REQUIRED PARKING
1	13251 Monfort Drive	Retail	3,150	250	12.6
2	13249 Monfort Drive	Office, Financial Services	1,600	222	7.2
3	13247 Monfort Drive	Restaurant Without Drive-Thru	2,755	200	13.8
4	13247 Monfort Drive	Personal Service	1,800	250	7.2
5	13243 Monfort Drive	Personal Service	2,200	250	8.8
6	13239 Monfort Drive	Vehicle Sales	1,900	200	9.5
7	13237-B Monfort Drive	Office, Professional Services	1,800	333	5.4
8	13237 A Monfort Drive	Personal Service	1,900	250	7.6
9	13235 Monfort Drive	Commercial Amusement (Indoor)	6,357	200	31.8
					TOTAL REQUIRED PARKING: 114
					TOTAL PARKING PROVIDED: 123
					SURPLUS: 9

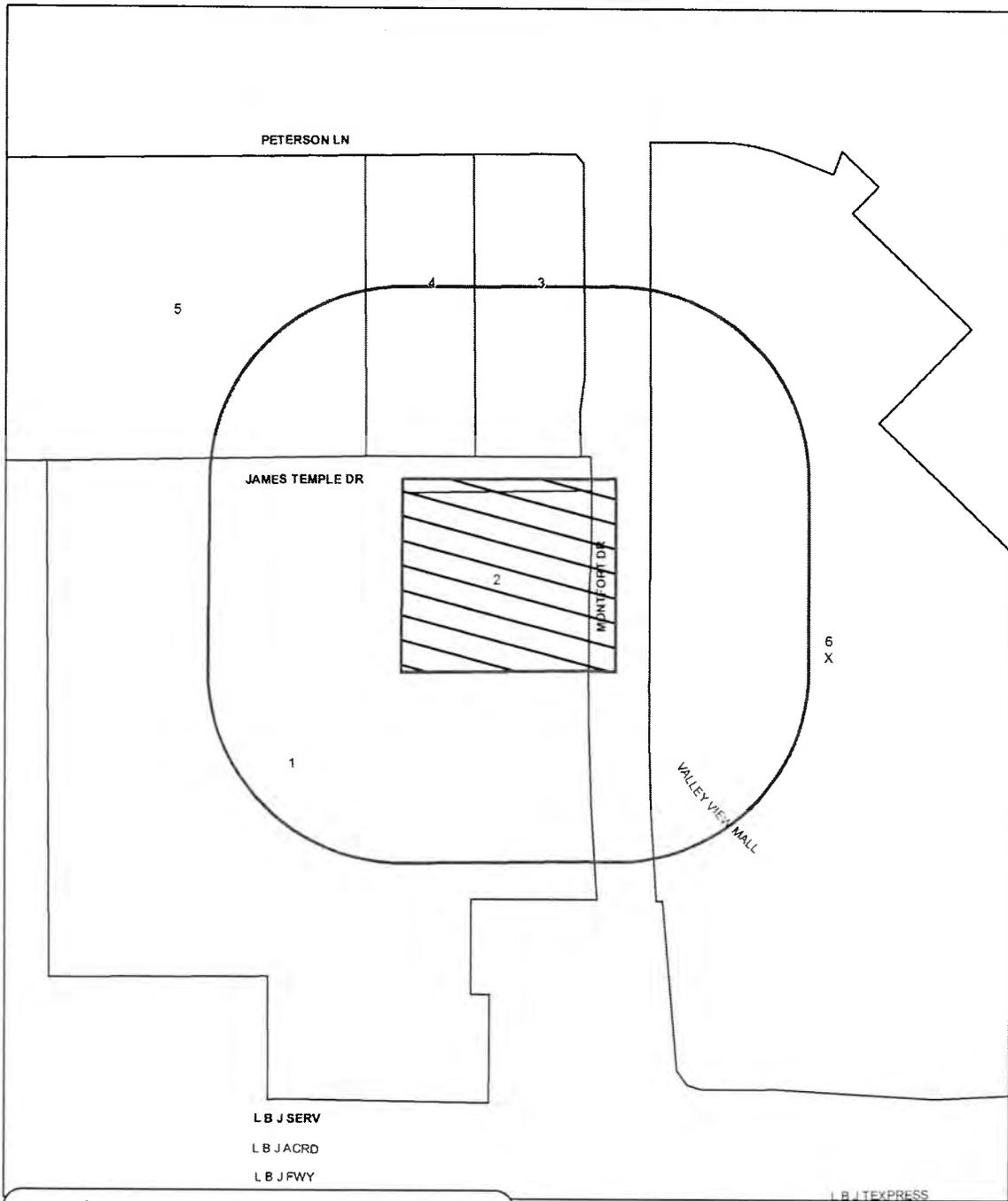
Z178-386(JM)







CPC RESPONSES



<u>6</u>	Property Owners Notified (6 parcels)
<u>0</u>	Replies in Favor (0 parcels)
<u>1</u>	Replies in Opposition (1 parcels)
<u>300'</u>	Area of Notification
<u>12/13/2018</u>	Date

Z178-386
CPC



1:2,400

Z178-386(JM)

12/12/2018

Reply List of Property Owners

Z178-386

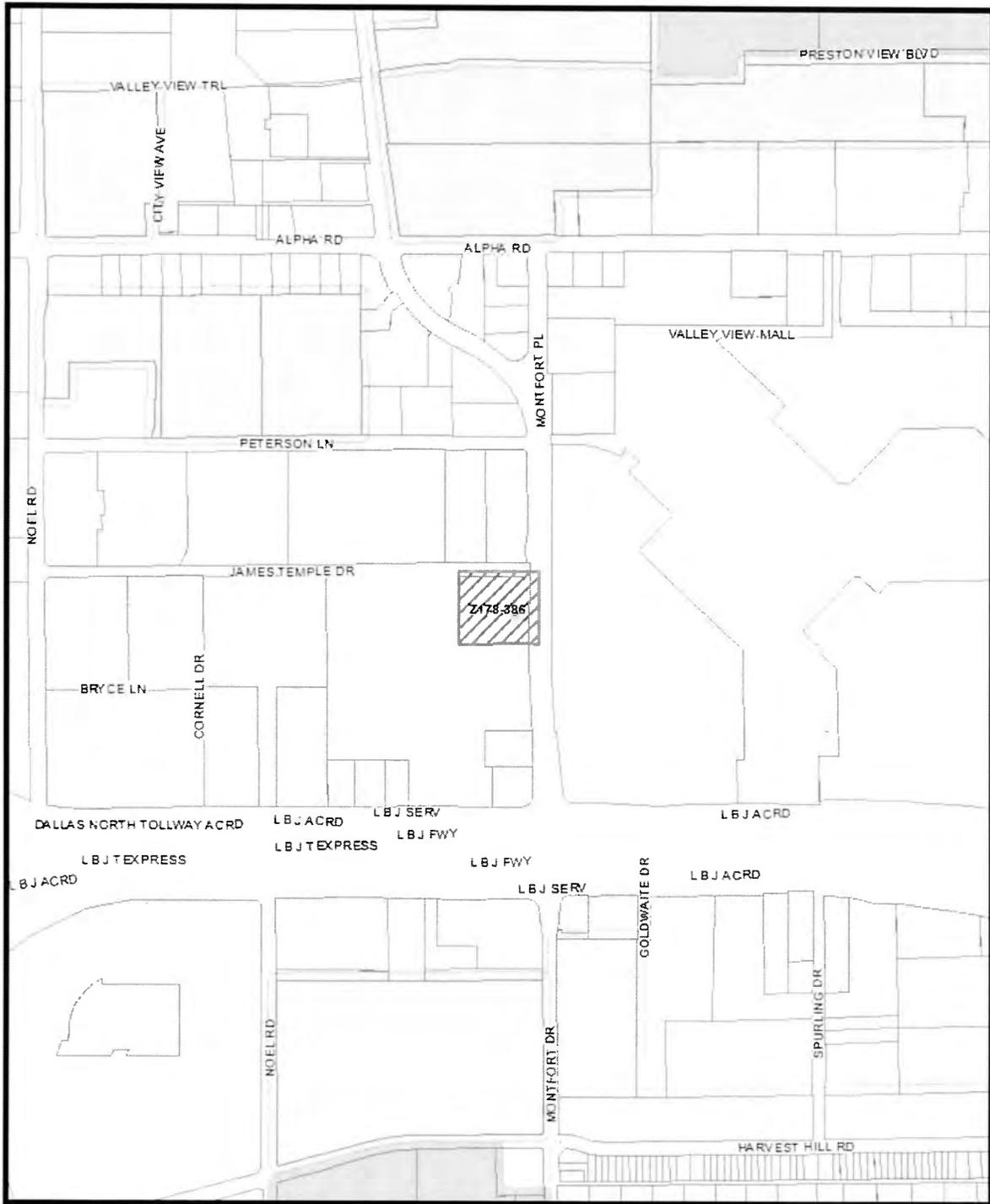
6 Property Owners Notified

0 Property Owners in Favor

1 Property Owners Opposed

<i>Reply</i>	<i>Label #</i>	<i>Address</i>	<i>Owner</i>
	1	13131 MONTFORT DR	DAYTON HUDSON CORP
	2	13235 MONTFORT DR	RH THREE LP
	3	13305 MONTFORT DR	MONTFORT VALLEY VIEW SHOPPING CTR LLC
	4	5580 PETERSON LN	PETERSON LANE PARTNERS LLC
	5	5454 PETERSON LN	ARTS AT MIDTOWN INVESTORS LP
X	6	13138 MONTFORT DR	EFK LBJ PARTNERS LP

Z178-386(JM)



MVA Cluster ■ A ■ B ■ C ■ D ■ E ■ F ■ G ■ H ■ I ■ NA

 1:6,000

Market Value Analysis

Printed Date: 11/9/2018

**12. October 7, 2019, Zoning Application under
Z190-106 (p. 5 refers to poker).**



Sustainable Development & Construction Department

1500 Marilla Street Room 5B North Dallas, TX 75201 Phone 214.670.4209 Fax 214.670.4210

Zoning Change Application

April 2019

Provide the following information. (Please print).

Applications that alter this form will not be accepted. Please attach a second page if necessary.

Applicant		Representative		Owner	
Owner <input type="checkbox"/> <input type="checkbox"/> Prospective Buyer Tenant <input checked="" type="checkbox"/>				Individual <input type="checkbox"/> <input type="checkbox"/> Corporation Partnership <input type="checkbox"/> <input type="checkbox"/> Trust	
Name:	TCHDallas1, LLC/ Ryan Crow	Name:	Jackson Walker L.L.P. /Suzan Kedron	Name:	RH Three LP
Address:	13376 N Hwy 183, Ste 605	Address:	2323 Ross Avenue, Ste. 600	Address:	5910 N Central Expy, S
City/St/Zip:	Austin, TX 78750	City/St/Zip:	Dallas, TX 75201	City/St/Zip:	Dallas, TX 75206
Telephone	409-779-9299	Telephone:	214-953-5943	Telephone:	
Fax:		Fax:	214-661-6654	Fax:	
E-mail:	ryan@texascardhouse.com	E-mail:	skedron@jw.com	E-mail:	
(See attached letter of authorization)			(See attached letter of authorization)		
_____ Signature of Applicant			_____ Signature of Owner		

Existing zoning:	PD 887, Sub 3	Location & cross street:	13235 Montfort Drive; NW of intersection of Montfort Drive and I-635		
Mapsco no.	15-N	Request:	Specific use permit for commercial amusement (inside) uses		
Zoning map no.	D-7				
Council district	11				
School district	Dallas ISD				
Census tract no.	136.16	Lot(s)/Block(s):	Block A/7020 Lot 4	Size of request:	1.88 Acres

Areas below to be completed by staff during application intake.

General Zoning Change*	Specific Use Permit*	Planned Development District*	Deed Restrictions*
	New <input type="checkbox"/> <input type="checkbox"/> Renewal Amendment <input type="checkbox"/> <input type="checkbox"/> Auto Renewal***	New <input type="checkbox"/> <input type="checkbox"/> Amendment	Termination <input type="checkbox"/> <input type="checkbox"/> Amendment
Proper signatures <input type="checkbox"/>	Proper signatures*** <input type="checkbox"/>	Proper signatures <input type="checkbox"/>	Proper signatures <input type="checkbox"/>
Letter(s) of authorization <input type="checkbox"/>	Letter(s) of authorization*** <input type="checkbox"/>	Letter(s) of authorization <input type="checkbox"/>	Letter(s) of authorization <input type="checkbox"/>
Land use statement <input type="checkbox"/>	Land use statement <input type="checkbox"/>	Land use statement <input type="checkbox"/>	Land use statement <input type="checkbox"/>
Zoning Location Maps (2) <input type="checkbox"/>	Draft Conditions <input type="checkbox"/>	Draft Conditions <input type="checkbox"/>	Zoning Location Maps (2) <input type="checkbox"/>
Tax Plat Maps (2) <input type="checkbox"/>	Zoning Location Maps (2)*** <input type="checkbox"/>	Zoning Location Maps (2) <input type="checkbox"/>	Tax Plat Maps (2) <input type="checkbox"/>
Correct lot & block or Metes & Bounds survey with drawing (2) <input type="checkbox"/>	Tax Plat Maps (2) <input type="checkbox"/>	Tax Plat Maps (2) <input type="checkbox"/>	Correct lot & block or Metes & Bounds survey with drawing (2) <input type="checkbox"/>
Copy of Deed <input type="checkbox"/>	Correct lot & block or Metes & Bounds survey with drawing (2) <input type="checkbox"/>	Correct lot & block or Metes & Bounds survey with drawing (2) <input type="checkbox"/>	Copy of Deed <input type="checkbox"/>
Tax and lien statements <input type="checkbox"/>	Copy of Deed <input type="checkbox"/>	Copy of Deed <input type="checkbox"/>	Tax and lien statements <input type="checkbox"/>
Traffic Impact Worksheet <input type="checkbox"/>	Tax and lien statements <input type="checkbox"/>	Tax and lien statements <input type="checkbox"/>	List of partners/principals/officers** <input type="checkbox"/>
Traffic impact Study or Waiver** <input type="checkbox"/>	Traffic Impact Worksheet <input type="checkbox"/>	Traffic Impact Worksheet <input type="checkbox"/>	Termination instrument <input type="checkbox"/>
List of partners/principals/officers** <input type="checkbox"/>	Traffic impact Study or Waiver** <input type="checkbox"/>	Traffic impact Study or Waiver** <input type="checkbox"/>	New instrument <input type="checkbox"/>
	List of partners/principals/officers** <input type="checkbox"/>	List of partners/principals/officers** <input type="checkbox"/>	
	Site Plans (10 folded) <input type="checkbox"/>	Conceptual plans (10 folded) or Development Plans (10 folded) <input type="checkbox"/>	
	Landscape Plans (10 folded)** <input type="checkbox"/>	Landscape Plans (10 folded)** <input type="checkbox"/>	
	Tree Survey (2 folded)** <input type="checkbox"/>	Tree Survey** <input type="checkbox"/>	
		Elevation/perspectives (optional) <input type="checkbox"/>	

*Additional requirements may be determined as necessary prior to application acceptance. ** If required.

2 year waiver:	Y <input type="checkbox"/> N <input type="checkbox"/>	Filing fee: \$	Sign fee: \$	Date filed:
Escarpment	Y <input type="checkbox"/> N <input type="checkbox"/>	Receipt no.	Receipt no.	Accepted by:
Floodplain	Y <input type="checkbox"/> N <input type="checkbox"/>	Notification area: FT.	No. of signs:	Date withdrawn:

Staff Review Date:	Planner:	File No.: Z _____
--------------------	----------	-------------------

Zoning Fee/Sign Schedule

General Zoning Change	0 to 1 acre	>1 acre to 5.0 acres *	>5.0 acres to 15 acres *	>15.0 acres to 25 acres *	>25.0 acres *
Fee	\$1,050.00	\$2,610.00	\$5,820.00	\$9,315.00	\$9,315 + \$113 for each acre over 25 to a maximum of \$37,500
Notification area	200 ft.	300 ft.	400 ft.	400 ft.	500 ft.

Includes Conservations Districts and Historic Overlay Districts.

Specific Use Permit	0 to 1 acre*	>1 acre to 5.0 acres *	>5.0 acres to 25 acres *	>25.0 acres*
New** Fee	\$1,170.00	\$1,170.00	\$1,170.00	\$1,170.00
Notification area	200 ft. ***	300 ft. ***	400 ft. ***	500 ft.
Amendment Fee	\$825.00	\$825.00	\$825.00	\$825.00
Notification area	200 ft. ***	300 ft. ***	400 ft. ***	500 ft.
Renewal Fee	\$825.00	\$825.00	\$825.00	\$825.00
Notification area	200 ft. ***	300 ft. ***	400 ft. ***	500 ft.
Automatic Renewal Fee	\$825.00 (\$350 refundable if 51A-1.105(a)(4) criteria met)			
Notification area	200 ft.			

**The fee for an SUP for a skybridge is \$10,000. Please consult the Dallas Development Code, 51A-4.217b(12) for requirements for a skybridge submittal.

**The fee for an SUP for gas drilling \$2,000. Please consult the Dallas Development Code, 51A-4.203(3.2) for requirements for gas drilling.

***The notification area for an SUP for a tower/antenna for cellular communication is 500 feet from the building site on which the use will located. 51A-4.212(10.1)

Planned Development District	0 to 5 acres*	>5.0 acres*
Amendment Fee	\$2,610.00 + \$1,000 per regulation type** being amended	
Notification area	500 ft.	

**Parking, Landscaping, Signs

Planned Development District	0 to 5 acres*	>5.0 acres*
New, enlargement or new subdistrict Fee	\$5,820.00 + \$1,000 per regulation type** being amended	\$5,820.00 + \$250.00 per acre for each acre over 5 to a maximum of \$50,000 + \$1,000 per regulation type** being amended
Notification area	500 ft.	

**Parking, Landscaping, Signs

Deed Restrictions	0 to 1 acre	>1 acre to 5.0 acres *	>5.0 acres to 15 acres *	>15.0 acres to 25 acres *	>25.0 acres *
New Fee	\$350.00				
Notification area	200 ft.	300 ft.	400 ft.	400 ft.	500 ft.
Amendment or Termination Fee	\$900.00				
Notification area	Same as original notification				

* Any fraction of an acre is rounded up to the next acre.

Notification Signs

- ✓ One sign for every 500 feet or less of street frontage, with one additional sign required for each additional 500 feet or less of street frontage, with **at least one signed required** but not to exceed five signs.
- ✓ Signs cost **\$10.00 each**, which is due upon submission of a completed application.
- ✓ The sign(s) must be posted **no later than 5:00 pm on the 14th day after your application is filed.**
- ✓ The sign(s) must be **visible from all street frontages.**
- ✓ Return Notification Sign Posting form to staff.
- ✓ Signs not properly displayed leave the City Plan Commission only two considerations:
1) *denial of the request* or 2) *postponement of the zoning case.*

September 29, 2019

Ms. Neva Dean
Current Planning Division
Department of Sustainable Development and Construction
City of Dallas
1500 Marilla Street, Room 5BN
Dallas, Texas 75201

RE: *Applicant's Authorization for a Specific Use Permit Application for Property Located at the Southwest Corner of Montfort Drive and Wollcott Drive/James Temple Drive (Block A/7020, Lot 4).*

Dear Ms. Dean:

As the applicant of the zoning application for the above-referenced property, this letter will authorize Jackson Walker L.L.P. to act as our representative in connection with filing and processing of a request for a zoning change on the above-referenced property and for any other City of Dallas applications or requests in connection therewith. This application is requested on behalf of the applicant as listed below.

TCHDallas1, LLC

By: 

Name: James Ryan Crow

Title: CEO

September 30, 2019

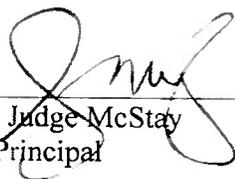
Ms. Neva Dean
Current Planning Division
Department of Sustainable Development and Construction
City of Dallas
1500 Marilla Street, Room 5BN
Dallas, Texas 75201

RE: *Property Owner's Authorization for a Specific Use Permit Application for Property Located at the Southwest Corner of Montfort Drive and Wollcott Drive/James Temple Drive (Block A/7020, Lot 4).*

Dear Ms. Dean:

As the property owner of the above-referenced property, this letter will authorize Jackson Walker L.L.P. to act as our representative in connection with filing and processing of a request for a zoning change on the above-referenced property and for any other City of Dallas applications or requests in connection therewith. This application is requested on behalf of the property owner as listed below.

RH Three LP

By: 
Name: Judge McStay
Title: Principal

LAND USE STATEMENT

(Property located at the southwest corner of Montfort Drive and James Temple Drive)

I. PURPOSE OF REQUEST:

This request is for a Specific Use Permit to allow commercial amusement (inside) uses for the Texas Card House, a membership-based social club that provides amenities and activities including card games, billiards, and sports lounges. This business currently operates locations in Austin and Houston and generates a profit through its daily, monthly, and annual memberships fees and hourly Club Access Fees. Club Access Fees are charged whether a member is playing a poker game, enjoying a game of billiards, or simply watching sports in the lounge. To reinforce its safe and relaxed social environment, all new members are subject to a one month probationary period and membership status is reviewed on a monthly basis by the Texas Card House Membership Committee. This membership-based social card club is consistent with the character of the neighborhood and community facilities.

According to the City of Dallas Vision Illustration, the Property appears to be designated as Urban Mixed-Use and Transit Center. The Urban Mixed-Use Building Block is intended to provide residents with a vibrant blend of opportunities to live, work, shop and play. Similarly, Transit Center Buildings Blocks are intended to incorporate a large range of land uses that support a compact mix of employment, retail, cultural facilities, and housing. The proposed use conforms to the designated future land use building blocks as it provides neighborhood-serving retail that complements the Midtown Commons and provides a sense of community for residents, employees, and visitors to the area. Further, this use contributes to the welfare of the community and adjacent properties.

II. EXISTING LAND USE:

The Property is currently zoned PD 887, Subdistrict 3 (WMU-20). The Property is currently occupied by restaurant, retail, personal service, and office uses.

III. ADJACENT PROPERTY USES:

To the north of the Property, across James Temple Drive are multifamily, office, retail, and personal service uses. Abutting the Property to the west is parking and a Target. The property to the south is occupied by parking, as well as retail, personal service, and office uses. To the east across Montfort Drive is vacant retail (Valley View Mall).

IV. PROPOSED USE OF THE REQUEST AREA:

The proposed use of the request area is Texas Card House, a membership-based social club, as described further above.

ORDINANCE NO. _____

An ordinance amending the zoning ordinances of the City of Dallas by permitting the following property, which is presently zoned Subdistrict 3 within Planned Development District 887 (Valley View-Galleria Area Special Purpose District):

BEING Lot 4 in City Block A/7020; ; fronting approximately 280 feet along the west line of Montfort Drive; front approximately 293 feet along the south line of James Temple Drive; and containing approximately 1.88 acres,

to be used under Specific Use Permit No. _____ for commercial amusement (inside); providing that this specific use permit shall be granted subject to certain conditions; providing a penalty not to exceed \$2,000; providing a saving clause; providing a severability clause; and providing an effective date.

WHEREAS, the city plan commission and the city council, in accordance with the Charter of the City of Dallas, the state law, and the ordinances of the City of Dallas, have given the required notices and have held the required public hearings regarding this specific use permit; and

WHEREAS, the city council finds that this use will complement or be compatible with the surrounding uses and community facilities; contribute to, enhance, or promote the welfare of the area of request and adjacent properties; not be detrimental to the public health, safety, or general welfare; and conform in all other respects to all applicable zoning regulations and standards; and

WHEREAS, the city council finds that it is in the public interest to grant this specific use permit, subject to certain conditions; Now, Therefore,

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF DALLAS:

SECTION 1. That the zoning ordinances of the City of Dallas are amended to allow the following property (“the Property”), which is presently zoned Subdistrict 3 within Planned Development District 887, to be used under Specific Use Permit No. _____ for commercial amusement (inside):

BEING Lot 4 in City Block A/7020; fronting approximately 280 feet along the west line of Montfort Drive; front approximately 293 feet along the south line of James Temple Drive; and containing approximately 1.88 acres.

SECTION 2. That this specific use permit is granted on the following conditions:

1. USE: The only use authorized by this specific use permit is commercial amusement (inside).
2. SITE PLAN: Use and development of the Property must comply with the attached site plan.
3. TIME LIMIT: This specific use permit expires on [two years from the passage of this ordinance].
4. HOURS OF OPERATION: A commercial amusement (inside) may only operate between 12:00 p.m. (noon) and 12:00 a.m. (midnight), Sunday through Thursday and between 12:00 p.m. (noon) to 2:00 a.m. (the next day) on Friday and Saturday.
5. SECURITY: During the hours of operation, a minimum of two security officers must be stationed on the Property, with at least one of the two stationed outside.
6. MAINTENANCE: The Property must be properly maintained in a state of good repair and neat appearance.
7. GENERAL REQUIREMENTS: Use of the Property must comply with all federal and state laws and regulations, and with all ordinances, rules, and regulations of the City of Dallas.

SECTION 3. That all paved areas, permanent drives, streets, and drainage structures, if any, on the Property must be constructed in accordance with standard City of Dallas specifications, and completed to the satisfaction of the City of Dallas.

SECTION 4. That the building official shall not issue a building permit or a certificate of occupancy for a use authorized by this specific use permit on the Property until there has been full compliance with this ordinance, the Dallas Development Code, the construction codes, and all other ordinances, rules, and regulations of the City of Dallas.

SECTION 5. That a person who violates a provision of this ordinance, upon conviction, is punishable by a fine not to exceed \$2,000.

SECTION 6. That the zoning ordinances of the City of Dallas, as amended, shall remain in full force and effect, save and except as amended by this ordinance.

SECTION 7. That the terms and provisions of this ordinance are severable and are governed by Section 1-4 of Chapter 1 of the Dallas City Code, as amended.

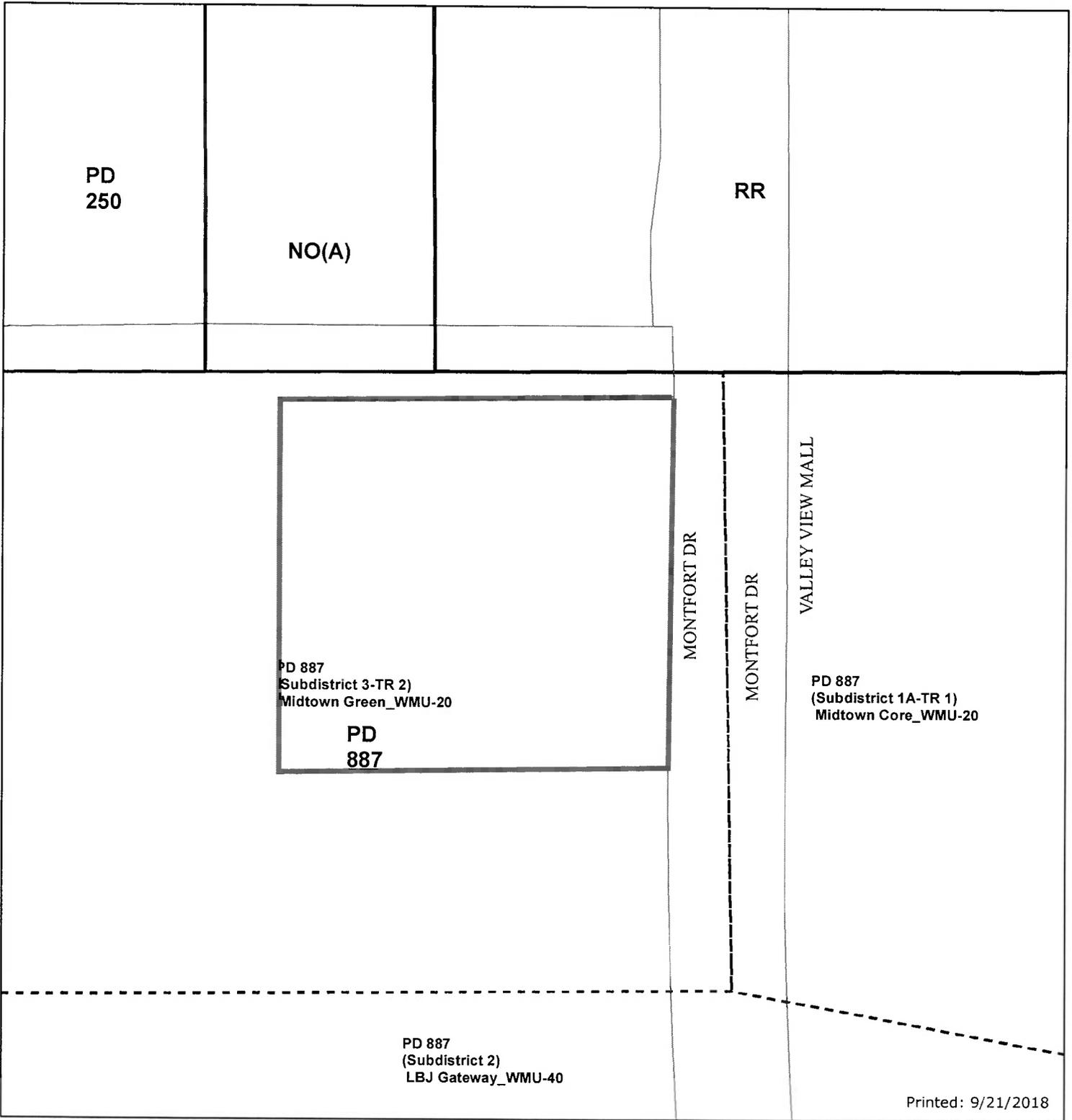
SECTION 8. That this ordinance shall take effect immediately from and after its passage and publication in accordance with the Charter of the City of Dallas, and it is accordingly so ordained.

APPROVED AS TO FORM:

CHRISTOPHER J. CASO, Interim City Attorney

BY: _____
Assistant City Attorney

Passed _____



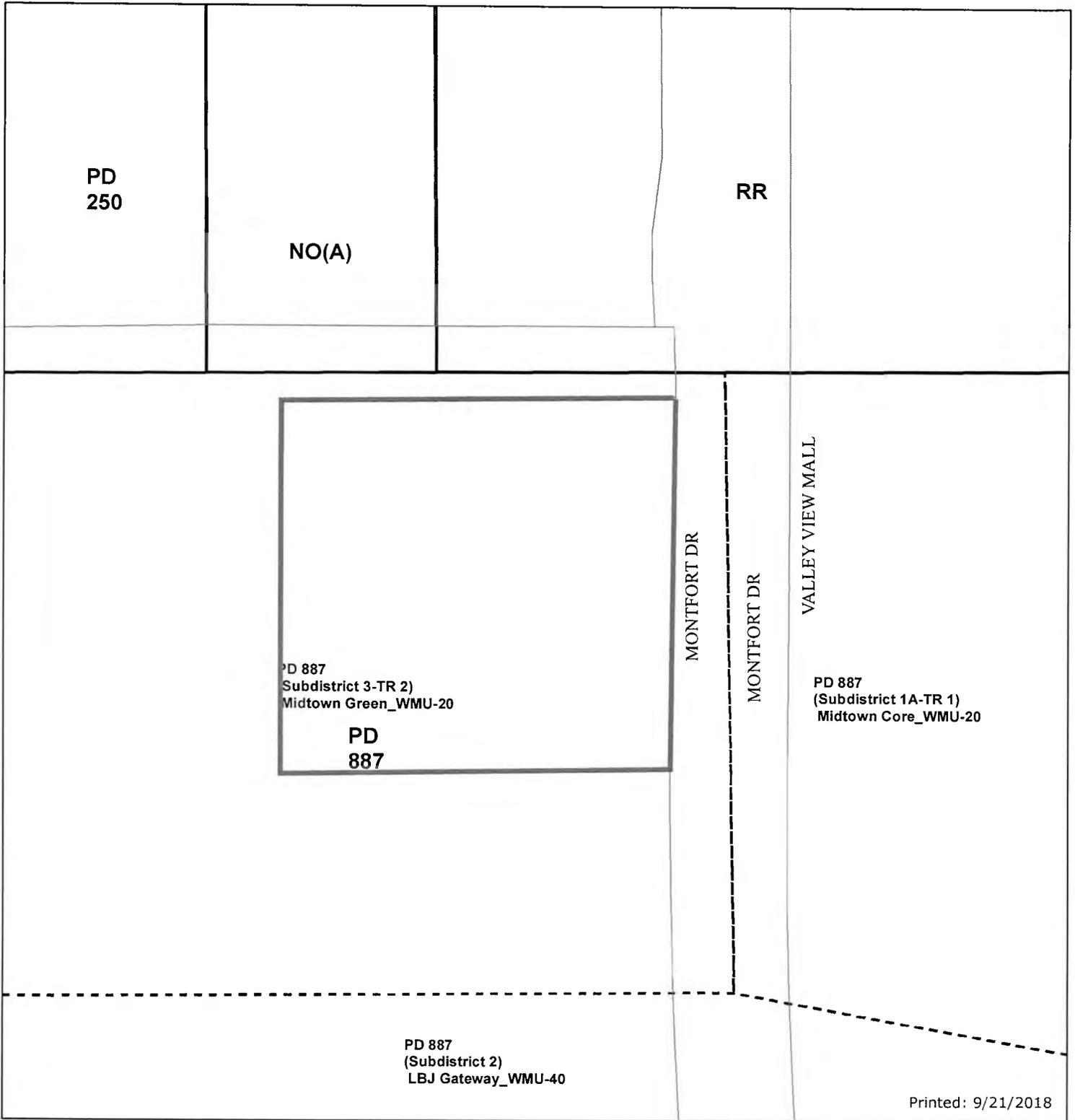
Printed: 9/21/2018

Legend

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





Printed: 9/21/2018

Legend

- | | | | |
|----------------------|--------------------------------|-----------------------|----------------------------|
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| School | Certified Parcels | D | PD Subdistricts |
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VOL. PAGE
71015 0095

OWNER'S CERTIFICATE

STATE OF TEXAS,
COUNTY OF DALLAS

WHEREAS, TARGET STORES, INC. is the owner of a tract of land situated in Block No. 7020, H. Wilburn Survey, Abstract No. 1567, City and County of Dallas, Texas, and more particularly described as follows:

BEGINNING at the intersection of the west right-of-way line of Montfort Drive with the north right-of-way line of Interstate Highway No. 635, said point being the southeast corner of Block No. 7020;
THENCE N 88°15'32" W 470.50 feet along the north line of said Interstate Highway No. 635 to an angle point
THENCE S 89°50'08" W 409.27 feet, continuing along said north highway line, to a point for corner;
THENCE N 0°03'25" W 1001.26 feet to a point for corner;
THENCE N 89°56'35" E 673.0 feet to an angle point;
THENCE N 89°55'29" E 180.0 feet to a point in the west right-of-way line of Montfort Drive;
THENCE Southerly along said west line of Montfort Drive with the following courses and distances: S 0°17'52" E 1.21 feet to beginning of a curve; Southerly 159.25 feet along a circular curve to the right having a radius of 15,855.5 feet and a central angle of 0°43'12", to end of curve; S 0°25'20" W 157.66 feet to the beginning of a curve; Southerly 304.59 feet along a circular curve to the left having a radius of 3765.60 feet and a central of 4°38'04", to the end of curve; S 4°12'44" E 160.26 feet to the beginning of a curve; and Southerly 193.14 feet along a circular curve to the right having a radius of 2615.92 feet and a central of 4°13'49", to the point of beginning, and CONTAINING 19,828 acres of land.

NOW THEREFORE, KNOW ALL MEN BY THESE PRESENTS that Target Stores, Inc. does hereby adopt this plat designating the herein described property as TARGET NORTH ADDITION to the City of Dallas, Texas. We do hereby dedicate to the public use forever the streets and alleys shown thereon. The easements shown thereon are hereby reserved for the purposes as indicated. The utility and fire line easements shall be open to the public, fire and police units, garbage and rubbish collection agencies, and all public utilities for each particular use. The maintenance of paving on the utility and fire line easements is the responsibility of the property owner. No buildings, fences, shrubs or other improvements or other things shall be constructed, reconstructed or placed upon, over or across the easements as shown. Said easements being hereby reserved for the mutual use of all public utilities using or desiring to use same. All and any public utility shall have the right to remove and keep removed all or parts of any buildings, fences, trees, shrubs or other improvements or growths which in any way may encroach or interfere with the construction, maintenance or efficiency of its respective system on the easements and all public utilities shall at all times have the full right of ingress and egress to and from and upon the said easements for the purpose of constructing, reconstructing, inspecting, patrolling, maintaining and adding to or removing all or parts of its respective systems without the necessity of any time of procuring the permission of anyone. Any public utility shall have the right of ingress and egress to private property for the purpose of reading meters and city maintenance or service required and usually performed by that utility. That the undersigned does covenant and agree that they will covenant on the fire line easements, as dedicated and shown hereon, a hard surface that they shall maintain in a state of good repair at all times and keep the same free and clear of any structures, fences, trees, shrubs or other improvements or obstructions, including but not limited to the parking of motor vehicles, trailers, boats or other restrictions to the access of the apparatus. The maintenance of mowing on the fire line easements is the responsibility of the property owners.

This plat approved subject to all zoning ordinances, rules, regulations and resolutions of the City of Dallas, Texas. Said plat shall be constructed by the builder as required by City Council Resolution No. 88-1058, and in accordance with the requirements of the Director of Public Works, City of Dallas, Texas.

WITNESS OUR HANDS OF Minneapolis, Minnesota this 21st day of January, A.D. 1971.

Wm. E. Hurd
Wm. E. Hurd, Atty. Secy
COUNTY OF MINNESOTA
COUNTY OF HENNEPIN



Robert J. Grubb - Vice President
TARGET STORES, INC.
BEFORE ME, the undersigned authority on this day personally appeared Robert J. Grubb, known to me to be the person whose name is subscribed to the foregoing instrument, and did acknowledge to me that he executed the same for the purposes and considerations therein expressed and in the capacity therein stated, as the act and deed of said corporation.

VOL. PAGE
71015 0094

STATE OF TEXAS,
COUNTY OF DALLAS

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Wm. E. Hurd
Wm. E. Hurd, Atty. Secy
COUNTY OF MINNESOTA
COUNTY OF HENNEPIN



Robert J. Grubb - Vice President
TARGET STORES, INC.
BEFORE ME, the undersigned authority on this day personally appeared Robert J. Grubb, known to me to be the person whose name is subscribed to the foregoing instrument, and did acknowledge to me that he executed the same for the purposes and considerations therein expressed and in the capacity therein stated, as the act and deed of said corporation.

MONTH

KNOW ALL MEN BY THESE PRESENTS that I, J.D. Mahoney, Jr., hereby certify that the foregoing plat is a true and correct copy of the original on record and occurs as a part of the same, and that I am a duly qualified and sworn surveyor and registered public surveyor in the State of Texas and registered in the City of Dallas, Texas.

BEFORE ME, the undersigned authority, on this day personally appeared J.D. Mahoney, Jr., known to me to be the person whose name is subscribed to the foregoing instrument, and did acknowledge to me that he executed same for the purposes and consideration therein expressed.

GIVEN UNDER MY HAND AND SEAL OF OFFICE this 21st day of January, A.D. 1971.

J.D. Mahoney, Jr.
Notary Public, in and for Dallas County, Texas



RECEIVED
JAN 21 1971
CITY OF DALLAS

CITY PLAN FILE NO. 70-241

TARGET NORTH ADDITION

BLOCK NO. 7020 - H. WILBURN SURVEY - ABSTRACT NO. 1567
CITY OF DALLAS, TEXAS

OWNER
TARGET STORES INC.
132 HOASPORT BUILDING
RD SOUTH SEVENTH STREET
MINNEAPOLIS, MINN. 55403
MCV-1570

ROLLINS AND MAHONEY
CONSULTING ENGINEERS

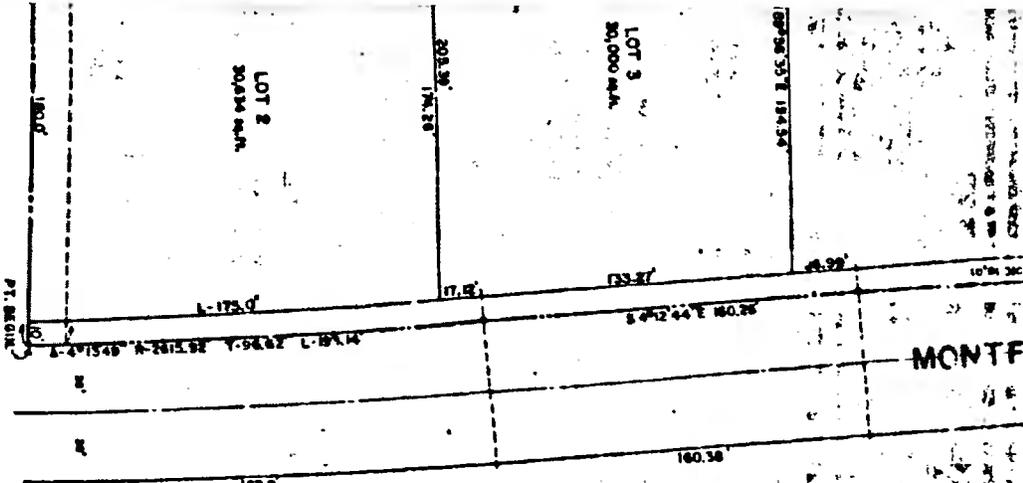
ROOM NO. 8185
DALLAS, TEXAS

4th VIL. PAGE
71015 0098

4th VIL. PAGE
71015 0099

LOT 3
20,000 sq. ft.

LOT 2
20,000 sq. ft.



VILL. 7414

71015 0093
7015

202
202
202

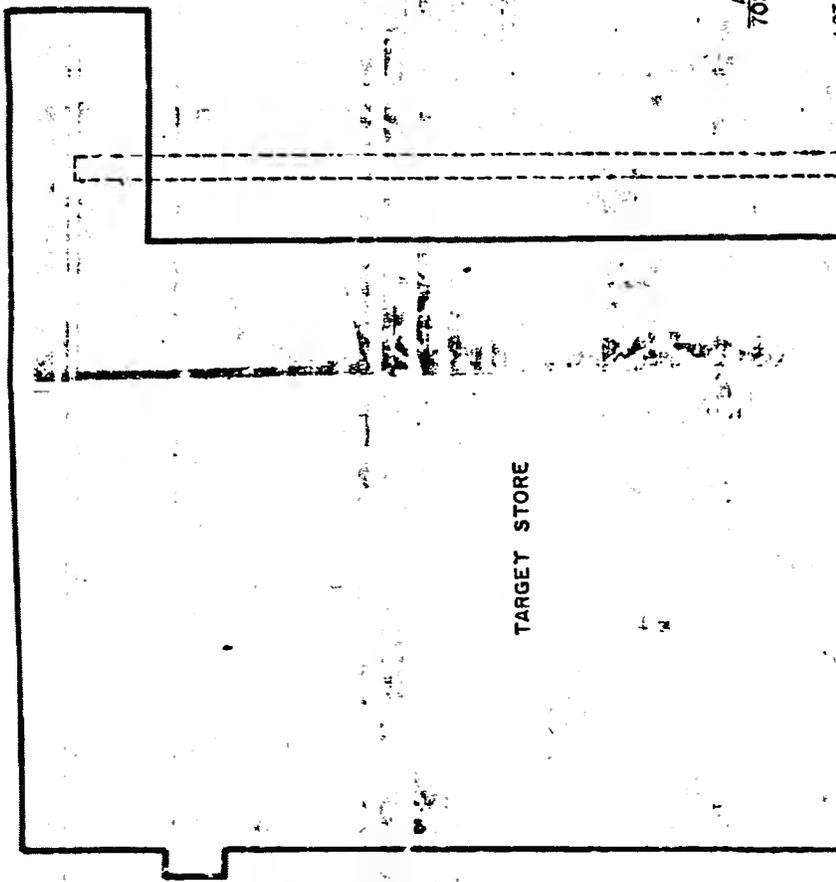
18847 10 HOOL. ROAD
15' WIDE EASEMENT 3'-4'-0" W/0000 8120

N 89°55' E 673.0

600

DEED RECORDED
71015 0093
7018

JAN-22-71 560737



TARGET STORE



RECORDED

7020

15.47' W 1001.26

15' WIDE EASEMENT 3'-4'-0" W/0000 8120

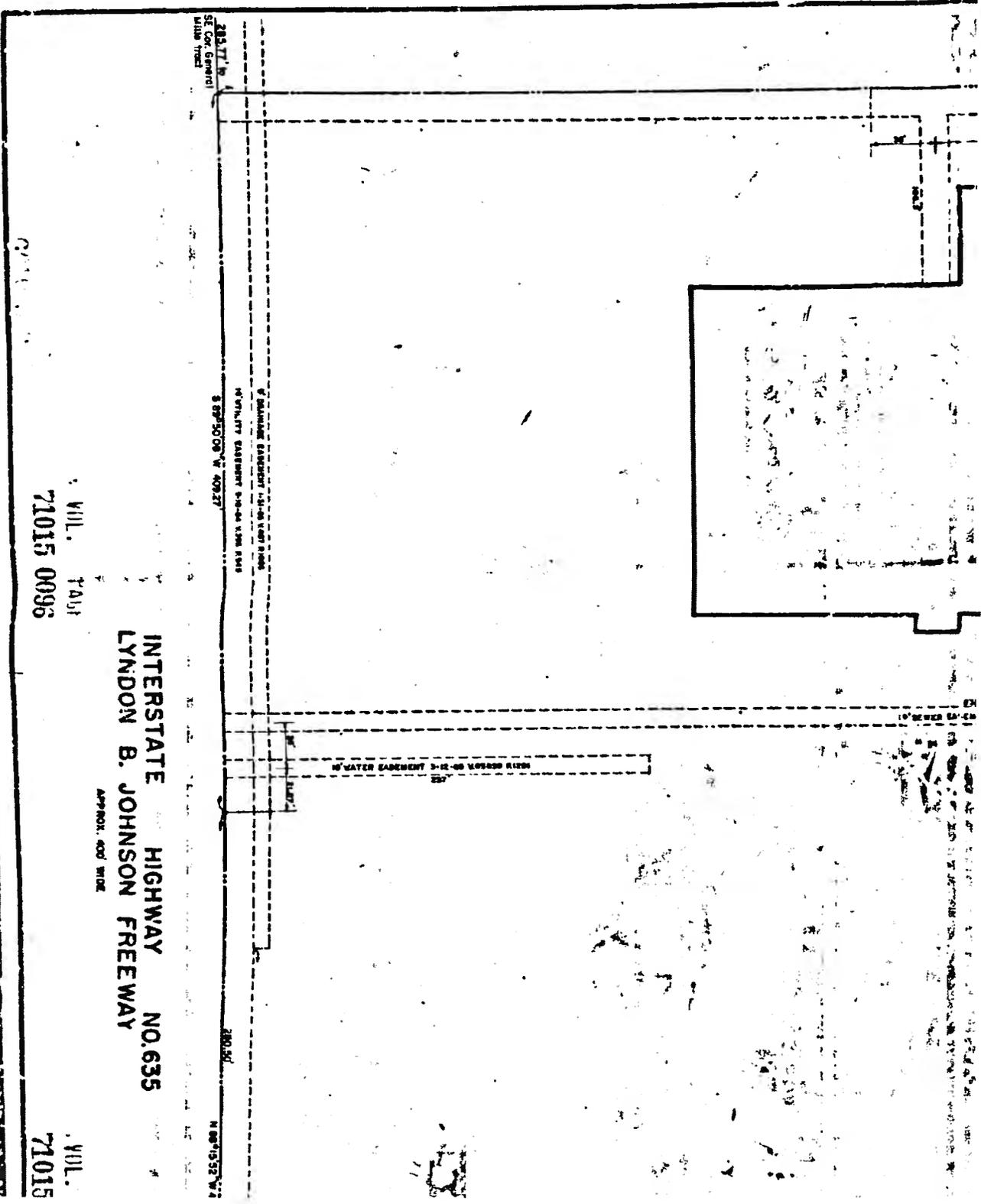
N 00°22' W 280.0

LOT 4
61,900 sq. ft.

N 89°55' E 103.78

N 89°55' E 214.47

7020



VILL. T40J
71015 0096

INTERSTATE HIGHWAY NO. 635
LYNDON B. JOHNSON FREEWAY
APPROX. 400' WIDE

VOL.
71015

OWNER'S CERTIFICATE

STATE OF TEXAS,
COUNTY OF DALLAS

WHEREAS, TARGET STORES, INC. is the owner of a tract of land situated in Block No. 7020, H. Wilburn Survey, Abstract No. 1567, City and County of Dallas, Texas, and more particularly described as follows:

BEGINNING of the west right-of-way line of Montfort Drive with the north right-of-way line of Interstate Highway No. 635, solid point being the southeast corner of Block No. 7020;
THENCE N 88°15'52" W 470.50 feet along the north line of said Interstate Highway No. 635 to an angle point
THENCE S 89°50'08" W 409.27 feet, continuing along said north highway line, to a point for corner;
THENCE N 0°05'25" W 1001.26 feet to a point for corner;
THENCE N 89°56'35" E 673.0 feet to an angle point;
THENCE N 89°55'29" E 180.0 feet to a point in the west right-of-way line of Montfort Drive;
THENCE Southerly along said west line of Montfort Drive with the following courses and distances: S 0°17'52" E 1.21 feet to beginning of a curve; Southerly 159.25 feet along a circular curve to the right having a radius of 15,855.5 feet and a central angle of 0°43'12", to end of curve; S 0°25'20" W 157.66 feet to the beginning of a curve; Southerly 304.59 feet along a circular curve to the left having a radius of 3765.60 feet and a central of 4°38'04", to the end of curve; S 4°12'44" E 160.26 feet to the beginning of a curve; and Southerly 193.14 feet along a circular curve to the right having a radius of 2615.92 feet and a central of 4°13'49", to the point of beginning, and CONTAINING 19,828 acres of land.

NOW THEREFORE, KNOW ALL MEN BY THESE PRESENTS that Target Stores, Inc. does hereby adopt this plat designating the herein described property as TARGET NORTH ADDITION to the City of Dallas, Texas. We do hereby dedicate to the public use forever the streets and alleys shown thereon. The easements shown thereon are hereby reserved for the purposes as indicated. The utility and fire line easements shall be open to the public, fire and police units, garbage and rubbish collection agencies, and all public utilities for each particular use. The maintenance of paving on the utility and fire line easements is the responsibility of the property owner. No buildings, fences, shrubs or other improvements or structures shall be constructed, reconstructed or placed upon, over or across the easements as shown. Solid easements being hereby reserved for the mutual use of all public utilities using or desiring to use same. All and any public utility shall have the right to remove and keep removed all or parts of any buildings, fences, trees, shrubs or other improvements or structures which in any way may endanger or interfere with the construction, maintenance or efficiency of its respective system on the easements and all public utilities shall at all times have the full right of ingress and egress to and from and upon the said easements for the purpose of constructing, reconstructing, inspecting, patrolling, maintaining and adding to or removing all or parts of its respective systems without the necessity of any time of procuring the permission of anyone. Any public utility shall have the right of ingress and egress to private property for the purpose of reading meters and city maintenance or service request and usually performed by that utility. That the undersigned does covenant and agree that they will construct on the fire line easements, as dedicated and shown hereon, a hard surface that they shall maintain in a state of good repair at all times and keep the same free and clear of any structures, fences, trees, shrubs or other improvements or obstructions, including but not limited to the parking of motor vehicles, trailers, boats or other restrictions to the access of fire apparatus. The maintenance of paving on the fire line easements is the responsibility of the property owners.

This plat approved subject to all planning ordinances, rules, regulations and resolutions of the City of Dallas, Texas. Said plat shall be constructed by the builder as required by City Council Resolution No. 88-1059, and in accordance with the requirements of the Director of Public Works, City of Dallas, Texas.

WITNESS OUR HANDS of Minneapolis, Minnesota this 21st day of January, A.C. 1971.

TARGET STORES, INC.

Robert J. Crobb
Robert J. Crobb - Vice President

Witness
Wm. E. Hardin, Atty. Sec. story
STATE OF MINNESOTA
COUNTY OF HENNEPIN

BEFORE ME, the undersigned authority on this day personally appeared Robert J. Crobb, known to me to be the person whose name is subscribed to the foregoing instrument, and did acknowledge to me that he executed the same for the purposes and considerations therein expressed and in the capacity therein stated, as the act and deed of said corporation.



MONTH

KNOW ALL MEN BY THESE PRESENTS that I, J.D. Motony, Jr., hereby certify that the foregoing plat is a true and correct copy of the original and accurate survey of the lots, and that same conform with the laws and regulations of the City Plan Commission, Dallas, Texas

BERNIE M.E. the undersigned authority, on this day personally appeared J.D. Motony, Jr., known to me to be the person whose name is subscribed to the foregoing instrument, and did acknowledge to me that he executed same for the purpose and consideration therein expressed.

GIVEN UNDER MY HAND AND SEAL OF OFFICE this 21st day of January, A.D. 1971

J.D. Motony, Jr.
Notary Public, in and for Dallas County Texas

J.D. Motony, Jr.
Registered Public Surveyor



RECEIVED
JAN 21 1971
CITY ENGINEER

CITY PLAN FILE NO. 70-241

TARGET NORTH ADDITION

BLOCK NO. 7020-H, WILLBURN SURVEY-ABSTRACT NO. 1567
CITY OF DALLAS, TEXAS

OWNER

TARGET STORES INC.
632 BOKA MOUNT BUILDING
100 SOUTH RIVERSIDE STREET
MINNEAPOLIS, MINN. 55403

NOV-1970

ROLLINS AND MAHONEY
CONSULTING ENGINEERS

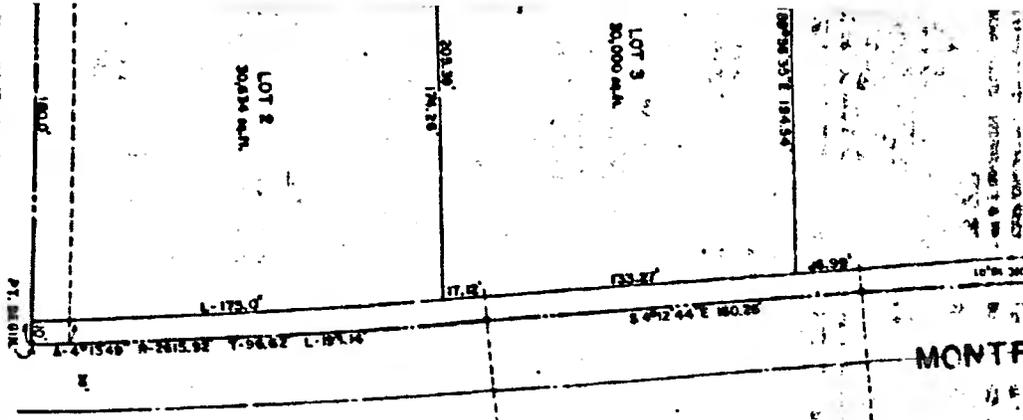
PO BOX NO. 8185
DALLAS, TEXAS

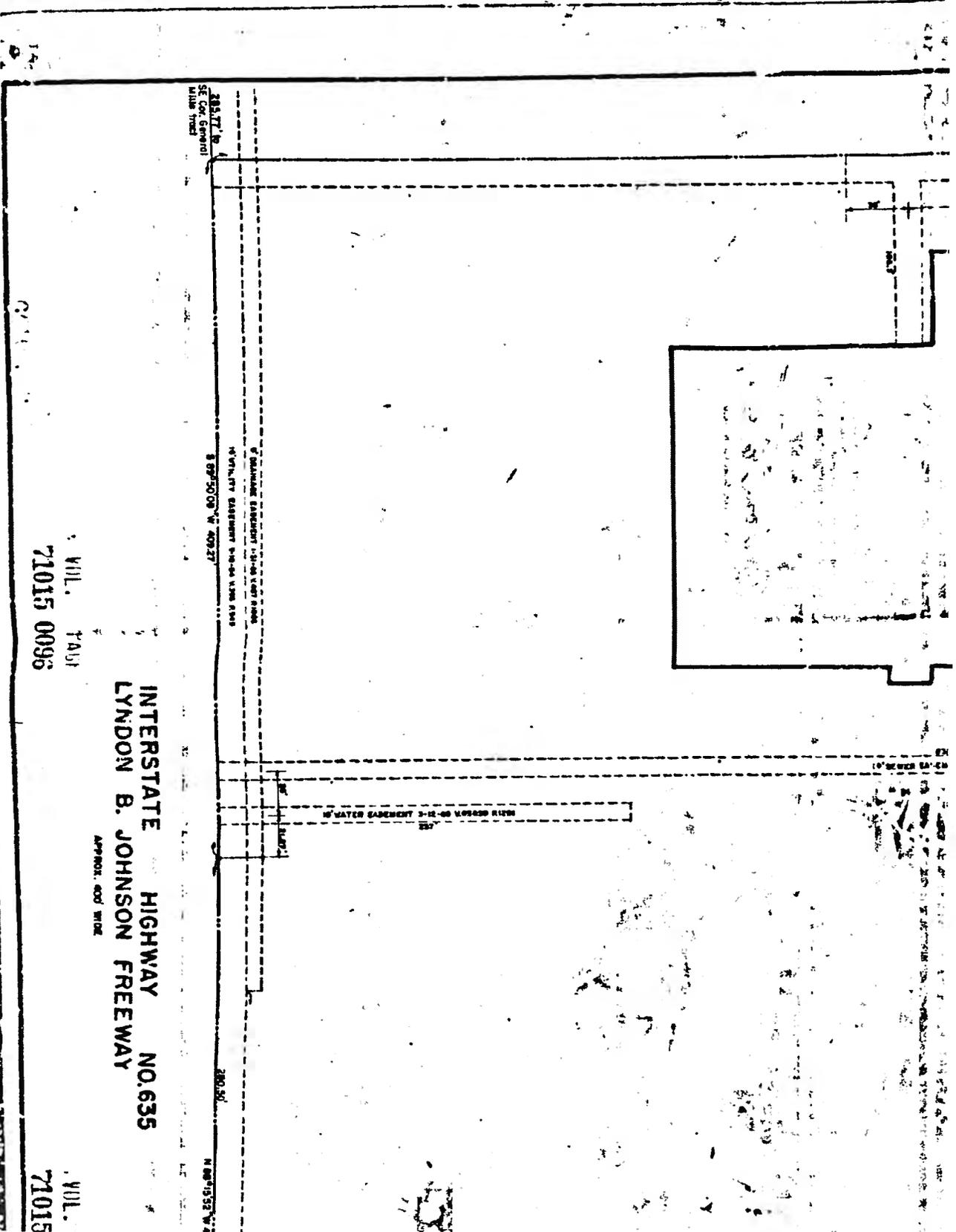
4th VIL. PAGE
71015 0099

4th VIL. PAGE
71015 0098

LOT 3
20,000 S.W.

LOT 2
20,000 S.W.





VOL. PAID
71015 0096

INTERSTATE HIGHWAY NO. 635
LYNDON B. JOHNSON FREEWAY

APPROX. 400' WIDE

VOL.
71015

LEGAL DESCRIPTION

Lot 4, Block A/7020 of the Target North Addition, an addition to the City of Dallas, Dallas County, Texas, according to the plat thereof recorded in Volume 71015, Page 92, of the map records of Dallas County, Texas.

13. Planning Staff Report on Z190-106 (refers to Texas Card House on p. 1).

CITY PLAN COMMISSION

THURSDAY, JANUARY 9, 2020

Planner: Carlos A. Talison Sr., J.D.

FILE NUMBER: Z190-106(CT) **DATE FILED:** September 7, 2019
LOCATION: Southwest corner of Montfort Drive and James Temple Drive
COUNCIL DISTRICT: 11 **MAPSCO:** 15 N
SIZE OF REQUEST: Approx. 1.88 acres **CENSUS TRACT:** 136.16

REPRESENTATIVE: Suzan Kedron, Jackson Walker L.L.P.

APPLICANT: Ryan Crow, TCHDallas1, LLC

OWNER: RH Three LP

REQUEST: An application for a Specific Use Permit for a commercial amusement (inside) use on property zoned Subdistrict 3 (Tract 2), Midtown Green Walkable Urban Mixed Use District (WMU-20) within Planned Development District No. 887, the Valley View-Galleria Area Special Purpose District.

SUMMARY: The applicant proposes to operate a membership-based social club with activities to include card games, billiards, and sports lounges (Texas Card House).

STAFF RECOMMENDATION: Approval for a two-year period, subject to a site plan and conditions.

BACKGROUND INFORMATION:

- The area of request is within subdistrict 3 (Tract 2) Midtown Green Walkable Urban Mixed Use District (WMU-20) within Planned Development District No. 887 and is currently developed with a one-story building, housing nine suites composed of retail and personal service uses.
- The applicant proposes to operate a commercial amusement (inside) use on the subject site [Texas Card House].
- The suite housing the commercial amusement (inside) use is 6,357-square-feet.

Zoning History: There has been one zoning change for the area of request in the past five years.

1. **Z167-307** On December 13, 2017, City Council approved an application to modify the boundaries of Subdistrict 1, 1A, 1B, and create subdistrict 1C within Planned Development District No. 887.

Thoroughfares/Streets:

Thoroughfare/Street	Type	Existing ROW
Montfort Drive	Minor Arterial	80 feet
James Temple Drive	Community Collector	50 feet

Traffic:

The Engineering Division of the Sustainable Development and Construction Department has reviewed the request and determined that it will not significantly impact the surrounding roadway system.

STAFF ANALYSIS:

Comprehensive Plan:

The *forwardDallas! Comprehensive Plan* was adopted by the City Council in June 2006. The *forwardDallas! Comprehensive Plan* outlines several goals and policies which can serve as a framework for assisting in evaluating the applicant's request.

The request complies with the following land use goals and policies of the Comprehensive Plan:

ECONOMIC ELEMENT

GOAL 2.1 PROMOTE BALANCED GROWTH

Policy 2.1.1 Ensure that zoning is flexible enough to respond to changing economic conditions.

URBAN DESIGN

GOAL 5.3 ESTABLISH WALK-TO CONVENIENCE

Policy 5.3.1 Encourage a balance of land uses within walking distance of each other.

Land Use:

	Zoning	Land Use
Site	PDD No. 887 Subdistrict 3-Tract 2	Retail/Personal Service
North	NO-(A), PDD No. 250, RR	Retail/Personal Service, Multifamily
East	PDD No. 887, Subdistrict 1A-Tract 1 (WMU-20)	Retail/Personal Service
South	PDD No. 887, Subdistrict 2 (WMU-20)	Retail
West	PDD No. 887, Subdistrict 2 (WMU-20)	Retail

Land Use Compatibility:

The site is developed with a one-story retail building and a surface parking lot. The proposed location of the commercial amusement (inside) use is within the westernmost suite of the retail building. North, across James Temple Drive there is a multifamily development. Other surrounding uses to the proposed membership-based social club are a large retail store (Target), retail and personal service uses in the suites to the east, and a restaurant with drive-in or drive-through service to the south. Across Montfort Drive to the east, is the remnants of Valley View Mall, as it is being demolished.

The commercial amusement (inside) use is defined as a facility wholly enclosed in a building that offers entertainment or games of skill to the general public for a fee. This includes but is not limited to an adult arcade, adult cabaret, adult theater, amusement center, billiard hall, bowling alley, a children’s amusement center, dance hall, motor track or skating rink. The applicant intends to offer card games, billiards, and other games of skill to the public as a part of a membership-based social club.

The general provisions for a Specific Use Permit in Section 51A-4.219 of the Dallas Development Code specifically state: (1) The SUP provides a means for developing certain uses in a manner in which the specific use will be consistent with the character of the neighborhood; (2) Each SUP application must be evaluated as to its probable effect on the adjacent property and the community welfare and may be approved or denied as the findings indicate appropriate; (3) The city council shall not grant an SUP for a use except upon a finding that the use will: (A) complement or be compatible with the surrounding uses and community facilities; (B) contribute to, enhance, or promote the welfare of the area of request and adjacent properties; (C) not be detrimental to the public health, safety, or general welfare; and (D) conform in all other respects to all applicable zoning regulations and standards. The request does not appear to have an adverse impact on the surrounding zoning and land uses.

Staff supports the request and recommends approval for a two-year period because the applicant has agreed to comply with hours of operation restrictions, has added security measures as a condition of the use, and it is not foreseen to be detrimental to surrounding properties. Additionally, a two-year period would allow for the use to be re-evaluated in a short period of time.

Landscaping:

Landscaping will be provided in accordance to the landscaping requirements in Article X, as amended.

Parking:

The off-street parking requirement for the commercial amusement (inside) use in a Walkable Urban Mixed Use District is one parking space per each 200 square feet of floor area. The applicant has proposed a floor area of 6,357 square feet for the use resulting in a minimum of 32 parking spaces required for the proposed use. The applicant also reports that the cumulative parking requirement for the entire shopping center site is 114 spaces and 123 parking spaces are provided.

Market Value Analysis:

Market Value Analysis (MVA), is a tool to aid residents and policy-makers in understanding the elements of their local residential real estate markets. It is an objective, data-driven tool built on local administrative data and validated with local experts. The analysis was prepared for the City of Dallas by The Reinvestment Fund. Public officials and private actors can use the MVA to more precisely target intervention strategies in

Z190-106(CT)

weak markets and support sustainable growth in stronger markets. The MVA identifies nine market types (A through I) on a spectrum of residential market strength or weakness. As illustrated in the attached MVA map, the colors range from purple representing the strongest markets (A through C) to orange, representing the weakest markets (G through I). Although the area of request is not within an identifiable MVA cluster, the nearest MVA cluster is located to the north and is identified as an "E" MVA cluster and the area to the south of LBJ Freeway is identified as an "E" MVA cluster to the south and an "H" MVA cluster to the southeast.

Z190-106(CT)

List of Partners/Principals/Officers

TCHDallas1, LLC

Ryan Crow, Owner/Manager and CEO
Darren Brown, Owner/ Manager

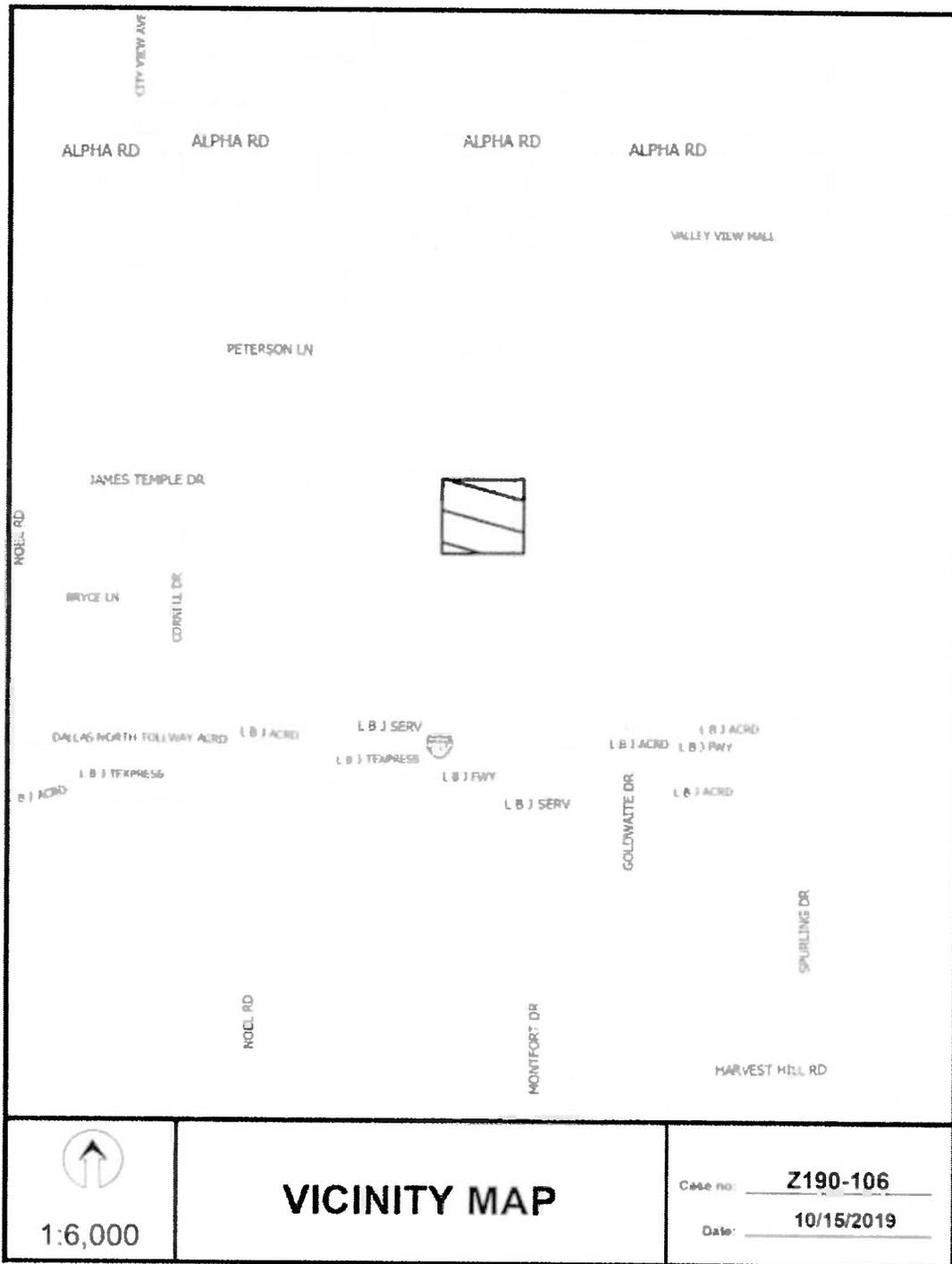
RH Three, LP

RH Three GP, LLC, General Partner
Judge McStay, Director/Manager of RH Three GP, LLC

The Morning Star Family, LP Limited Partner

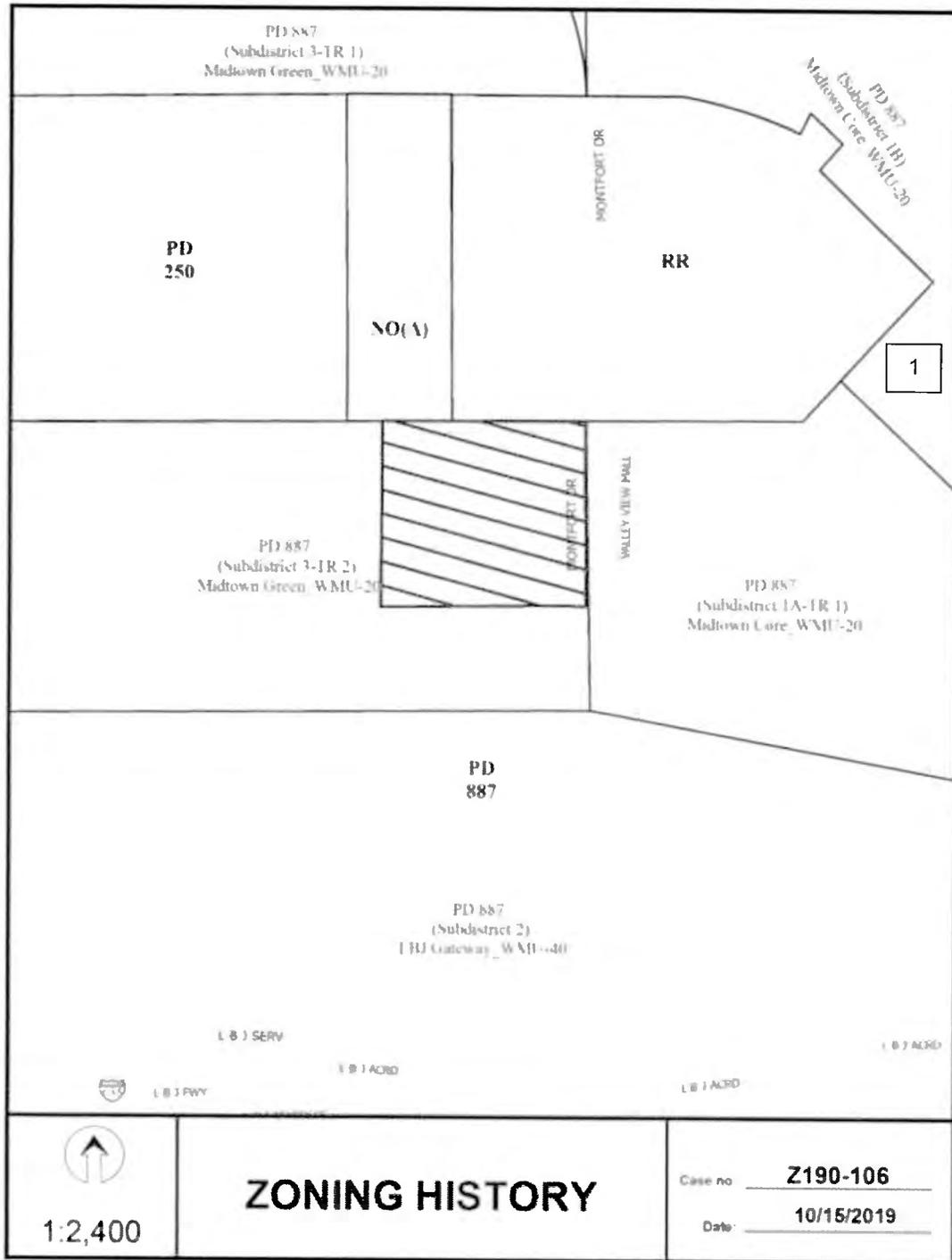
PROPOSED SUP CONDITIONS

1. USE: The only use authorized by this specific use permit is commercial amusement (inside).
2. SITE PLAN: Use and development of the Property must comply with the attached site plan.
3. TIME LIMIT: This specific use permit expires on (two years from the passage of this ordinance) _____.
4. HOURS OF OPERATION: A commercial amusement (inside) may only operate between 12:00 p.m. (noon) and 12:00 a.m. (midnight), Sunday through Thursday and between 12:00 p.m. (noon) and 2:00 a.m. (next day) on Friday and Saturday.
5. SECURITY: During the hours of operation, a minimum of two security officers must be stationed on the property, with at least one of the two stationed on the outside.
6. MAINTENANCE: The Property must be properly maintained in a state of good repair and neat appearance.
7. GENERAL REQUIREMENTS: Use of the Property must comply with all federal and state laws and regulations, and with all ordinances, rules, and regulations of the City of Dallas.

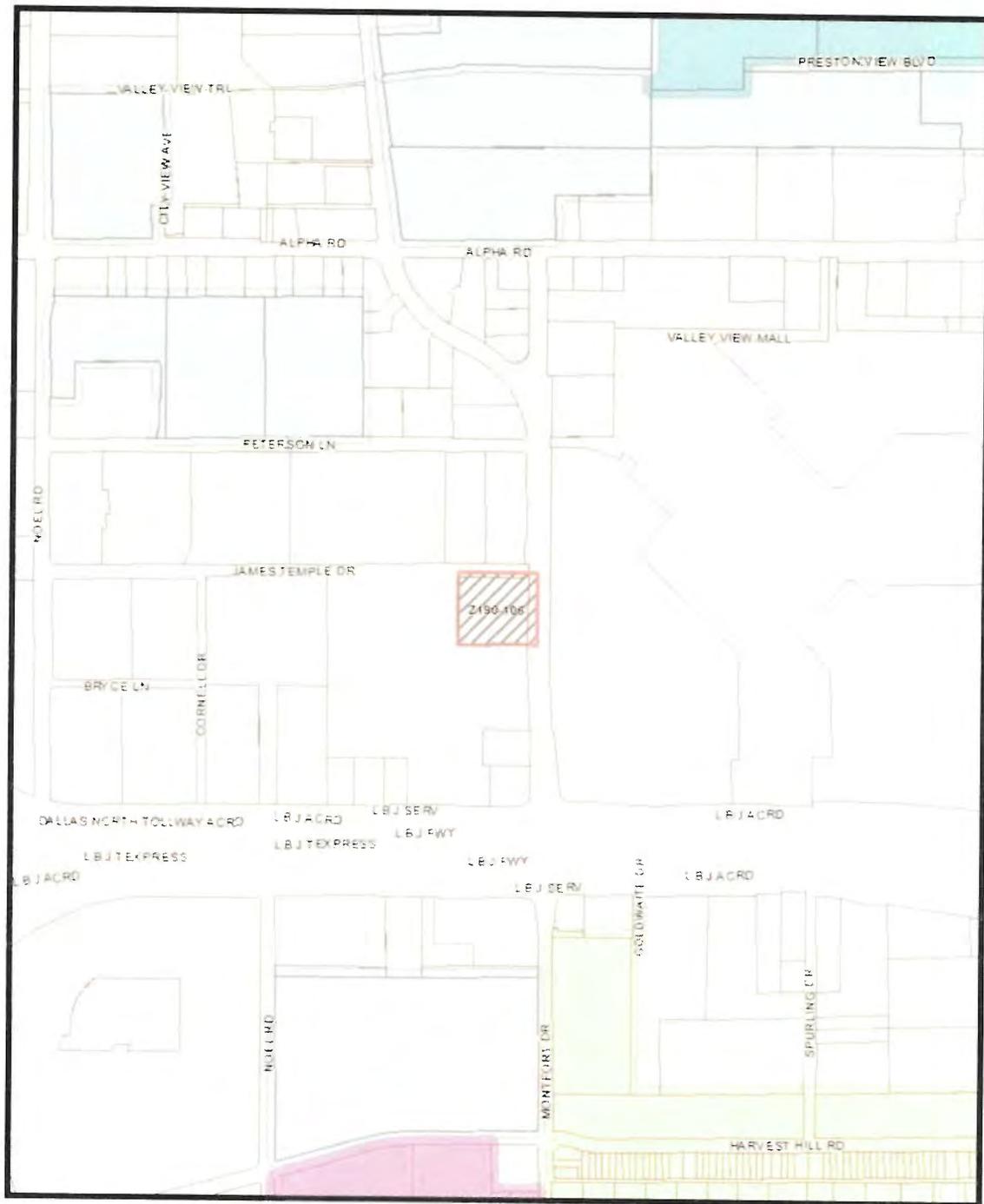


Z190-106(CT)

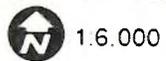




Z190-106(CT)



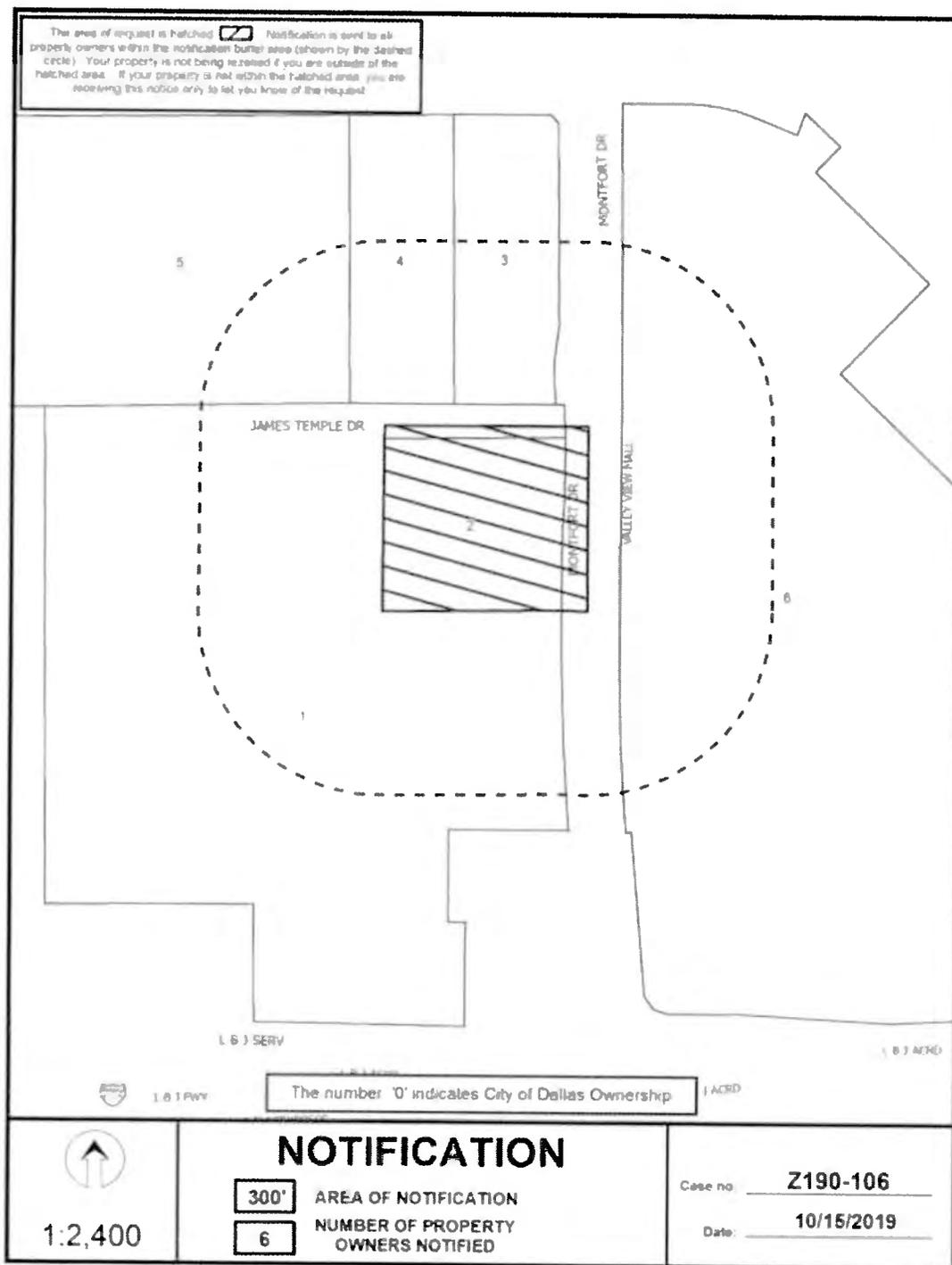
MVA Cluster A B C D E F G H I NA



Market Value Analysis

Printed Date: 10/15/2019

Z190-106(CT)



Z190-106(CT)

10/15/2019

Notification List of Property Owners

Z190-106

6 Property Owners Notified

<i>Label #</i>	<i>Address</i>	<i>Owner</i>
1	13131 MONTFORT DR	DAYTON HUDSON CORP
2	13235 MONTFORT DR	RH THREE LP
3	13305 MONTFORT DR	MONTFORT VALLEY VIEW SHOPPING CTR LLC
4	5580 PETERSON LN	PETERSON LANE PARTNERS LLC
5	5454 PETERSON LN	ARTS AT MIDTOWN INVESTORS LP
6	13138 MONTFORT DR	EFK LBJ PARTNERS LP

14. January 9, 2020, City Plan Commission
minutes recommending approval of Z190-106. City Plan Commission
January 9, 2020

Against: 0
Absent: 0
Vacancy: 1 - District 3

Notices: Area: 200 Mailed: 70
Replies: For: 2 Against: 0

Speakers: None

8. Z190-106(CT)

Planner: Carlos Talison

Note: The Commission considered this item individually.

Motion: It was moved to recommend **approval** of a Specific Use Permit for a commercial amusement (inside) use for a two-year period, subject to a site plan and conditions on property zoned Subdistrict 3 (Tract 2), Midtown Green Walkable Urban Mixed Use District (WMU-20) within Planned Development District No. 887, the Valley View-Galleria Area Special Purpose District, on the southwest corner of Montfort Drive and James Temple Drive.

Maker: Schultz
Second: Carpenter
Result: Carried: 13 to 1

For: 13 - MacGregor, Hampton, Johnson, Shidid,
Carpenter, Brinson, Blair, Jung, Schultz,
Schwope, Murphy, Garcia, Rubin

Against: 1 - Housewright
Absent: 0
Vacancy: 1 - District 3

Notices: Area: 300 Mailed: 6
Replies: For: 0 Against: 0

Speakers: For: Suzan Kedron, 2323 Ross Ave., Dallas, TX, 75201
Against: None

Note: The Commission heard Zoning agenda item #9. Z190-110(CT) next.

**15. February 12, 2020, Dallas City Council
minutes approving Z190-106.**

OFFICIAL ACTION OF THE DALLAS CITY COUNCIL

FEBRUARY 12, 2020

20-0298

Item Z8: Zoning Case 190-106(CT) [Consent Zoning Docket]

A public hearing to receive comments regarding an application for and an ordinance granting a Specific Use Permit for a commercial amusement (inside) use on property zoned Subdistrict 3 (Tract 2), Midtown Green Walkable Urban Mixed Use District (WMU-20) within Planned Development District No. 887, the Valley View-Galleria Area Special Purpose District, on the southwest corner of Montfort Drive and James Temple Drive

Recommendation of Staff and CPC: Approval for a two-year period, subject to a site plan and conditions

Adopted as part of the consent zoning docket.

Assigned ORDINANCE NO. 31451

**16. February 15, 2020, S.U.P. Ordinance No.
31451 passed by City Council.**

200298

1-30-20

ORDINANCE NO. **31451**

An ordinance amending the zoning ordinances of the City of Dallas by permitting the following property, which is presently zoned as Tract 2 of Subdistrict 3 within Planned Development District No. 887 (Valley View-Galleria Area Special Purpose District):

BEING all of Lot 4 in City Block A/7020; fronting approximately 282 feet along the west line of Montfort Drive; fronting approximately 296 feet along the south line of James Temple Drive; and containing approximately 1.88 acre,

to be used under Specific Use Permit No. 2363 for a commercial amusement (inside); providing that this specific use permit shall be granted subject to certain conditions; providing a penalty not to exceed \$2,000; providing a saving clause; providing a severability clause; and providing an effective date.

WHEREAS, the city plan commission and the city council, in accordance with the Charter of the City of Dallas, the state law, and the ordinances of the City of Dallas, have given the required notices and have held the required public hearings regarding this specific use permit; and

WHEREAS, the city council finds that this use will complement or be compatible with the surrounding uses and community facilities; contribute to, enhance, or promote the welfare of the area of request and adjacent properties; not be detrimental to the public health, safety, or general welfare; and conform in all other respects to all applicable zoning regulations and standards, and

WHEREAS, the city council finds that it is in the public interest to grant this specific use permit, subject to certain conditions; Now, Therefore,

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF DALLAS:

SECTION 1. That the zoning ordinances of the City of Dallas are amended to allow the following property ("the Property"), which is presently zoned as Tract 2 of Subdistrict 3 within Planned Development District No. 887, to be used under Specific Use Permit No. 2363 for a commercial amusement (inside):

BEING all of Lot 4 in City Block A/7020; fronting approximately 282 feet along the west line of Montfort Drive; fronting approximately 296 feet along the south line of James Temple Drive; and containing approximately 1.88 acre.

SECTION 2. That this specific use permit is granted on the following conditions:

1. USE: The only use authorized by this specific use permit is a commercial amusement (inside).
2. SITE PLAN: Use and development of the Property must comply with the attached site plan.
3. TIME LIMIT: This specific use permit expires on February 12, 2022.
4. HOURS OF OPERATION: A commercial amusement (inside) may only operate between 12:00 p.m. (noon) and 12:00 a.m. (midnight), Sunday through Thursday, and between 12:00 p.m. (noon) and 2:00 a.m. (next day) on Friday and Saturday.
5. SECURITY: During the hours of operation, a minimum of two security officers must be stationed on the Property, with at least one of the two stationed outdoors.
6. MAINTENANCE: The Property must be properly maintained in a state of good repair and neat appearance.
7. GENERAL REQUIREMENTS: Use of the Property must comply with all federal and state laws and regulations, and with all ordinances, rules, and regulations of the City of Dallas.

SECTION 3. That all paved areas, permanent drives, streets, and drainage structures, if any, on the Property must be constructed in accordance with standard City of Dallas specifications, and completed to the satisfaction of the City of Dallas.

SECTION 4. That the building official shall not issue a building permit or a certificate of occupancy for a use authorized by this specific use permit on the Property until there has been full

compliance with this ordinance, the Dallas Development Code, the construction codes, and all other ordinances, rules, and regulations of the City of Dallas.

SECTION 5. That a person who violates a provision of this ordinance, upon conviction, is punishable by a fine not to exceed \$2,000.

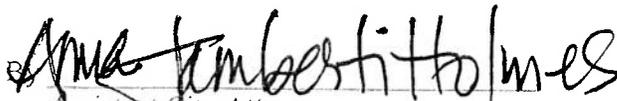
SECTION 6. That the zoning ordinances of the City of Dallas, as amended, shall remain in full force and effect, save and except as amended by this ordinance.

SECTION 7. That the terms and provisions of this ordinance are severable and are governed by Section 1-4 of Chapter 1 of the Dallas City Code, as amended.

SECTION 8. That this ordinance shall take effect immediately from and after its passage and publication in accordance with the Charter of the City of Dallas, and it is accordingly so ordained.

APPROVED AS TO FORM:

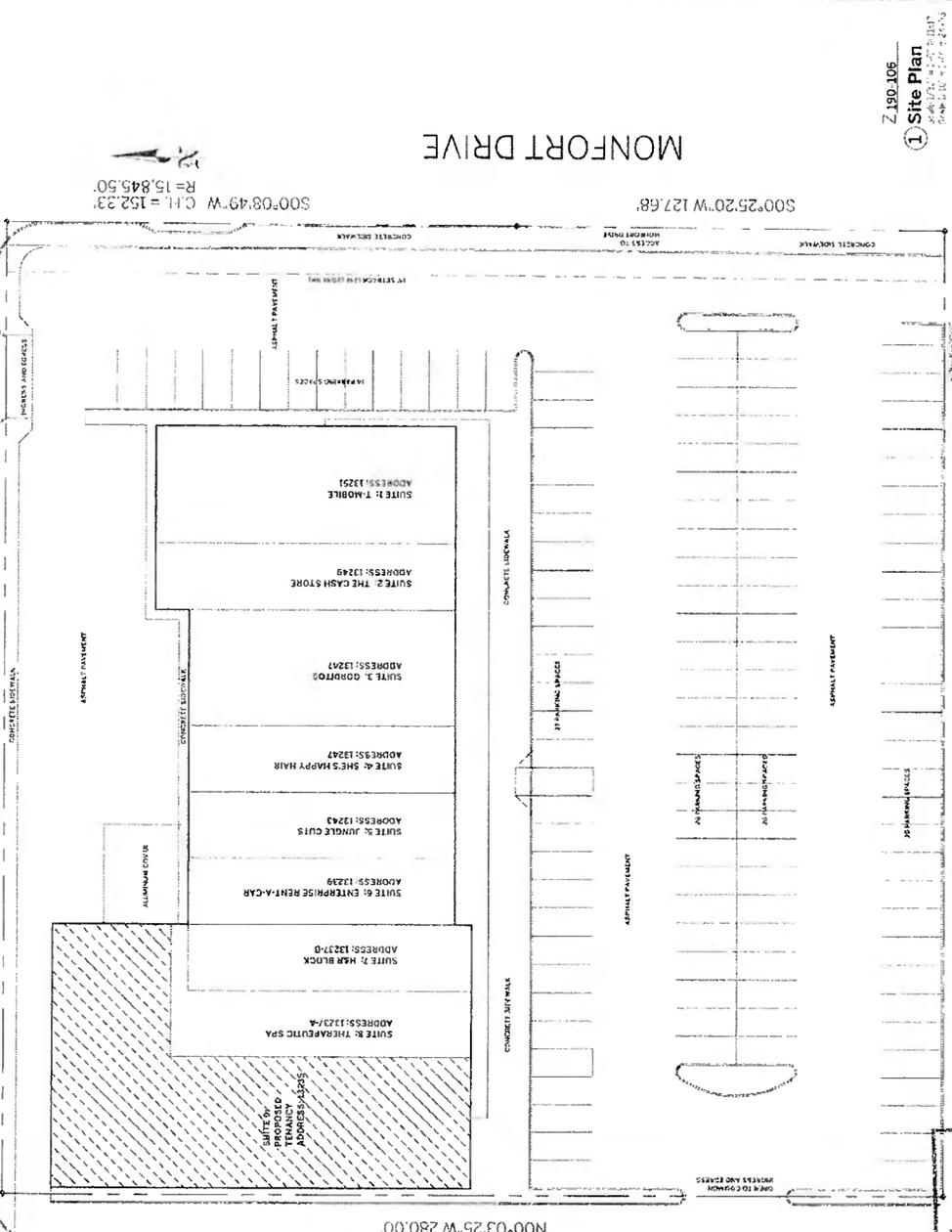
CHRISTOPHER J. CASO, Interim City Attorney


Assistant City Attorney

Passed FEB 12 2020

JAMES TEMPLE DRIVE
(VARIABLE WIDTH PRIVATE STREET)

N89°56'35"E 280.00'



S00°08'49"W C.H.L. = 152.23'
R = 15,845.50'

MONFORT DRIVE

S00°25'20"W 127.68'

S89°56'35"W 291.48'



Vicinity Map (N.T.S)

LEGAL DESCRIPTION:
LOT 4, BLOCK A, 7020 OF THE TARGET NORTH ADDITION, AN ADDITION TO THE CITY OF DALLAS, DALLAS COUNTY, TEXAS, ACCORDING TO THE PLAT THEREOF RECORDED IN VOLUME 71013, PAGE 92 OF THE MAP RECORDS OF DALLAS COUNTY, TEXAS

PARKING:

Area	Surface	Area (sq. ft.)	Capacity (Vehicles)
Lot 1	Asphalt	10,000	100
Lot 2	Asphalt	10,000	100
Lot 3	Asphalt	10,000	100
Lot 4	Asphalt	10,000	100
Lot 5	Asphalt	10,000	100
Lot 6	Asphalt	10,000	100
Lot 7	Asphalt	10,000	100
Lot 8	Asphalt	10,000	100
Lot 9	Asphalt	10,000	100
Lot 10	Asphalt	10,000	100
Lot 11	Asphalt	10,000	100
Lot 12	Asphalt	10,000	100
Lot 13	Asphalt	10,000	100
Lot 14	Asphalt	10,000	100
Lot 15	Asphalt	10,000	100
Lot 16	Asphalt	10,000	100
Lot 17	Asphalt	10,000	100
Lot 18	Asphalt	10,000	100
Lot 19	Asphalt	10,000	100
Lot 20	Asphalt	10,000	100
Lot 21	Asphalt	10,000	100
Lot 22	Asphalt	10,000	100
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Lot 26	Asphalt	10,000	100
Lot 27	Asphalt	10,000	100
Lot 28	Asphalt	10,000	100
Lot 29	Asphalt	10,000	100
Lot 30	Asphalt	10,000	100
Lot 31	Asphalt	10,000	100
Lot 32	Asphalt	10,000	100
Lot 33	Asphalt	10,000	100
Lot 34	Asphalt	10,000	100
Lot 35	Asphalt	10,000	100
Lot 36	Asphalt	10,000	100
Lot 37	Asphalt	10,000	100

MONFORT PLAZA SHOPPING CENTER

ANOHCO
ALTA NORTH OCEAN HOUSING COOPERATIVE
3000 W. MONFORT DRIVE
DALLAS, TEXAS 75246

PERMIT DATE: 30 OCT 2020
SITE PLAN: A000

ALTHOUGH THESE EXISTING MAPS BECOME PUBLIC RECORDS, THEY ARE NOT TO BE USED FOR ANY PURPOSES OTHER THAN THE ORIGINAL PURPOSE FOR WHICH THEY WERE PREPARED. THE USER OF THESE MAPS SHALL BE RESPONSIBLE FOR OBTAINING ALL NECESSARY INFORMATION FROM THE APPROPRIATE AGENCIES TO MEET LOCAL REGULATIONS.

POSSESSION OF THESE PLANS
ACKNOWLEDGES THAT THE INFORMATION CONTAINED HEREIN IS UNOFFICIAL AND SUBJECT TO CHANGE WITHOUT NOTICE. THE USER OF THESE MAPS SHALL BE RESPONSIBLE FOR OBTAINING ALL NECESSARY INFORMATION FROM THE APPROPRIATE AGENCIES TO MEET LOCAL REGULATIONS.

Z-190-105
1 Site Plan
DATE: 10/30/2020

31451

APPROVED BY
CITY COUNCIL

FEB 12 2020

ESD
CITY SECRETARY

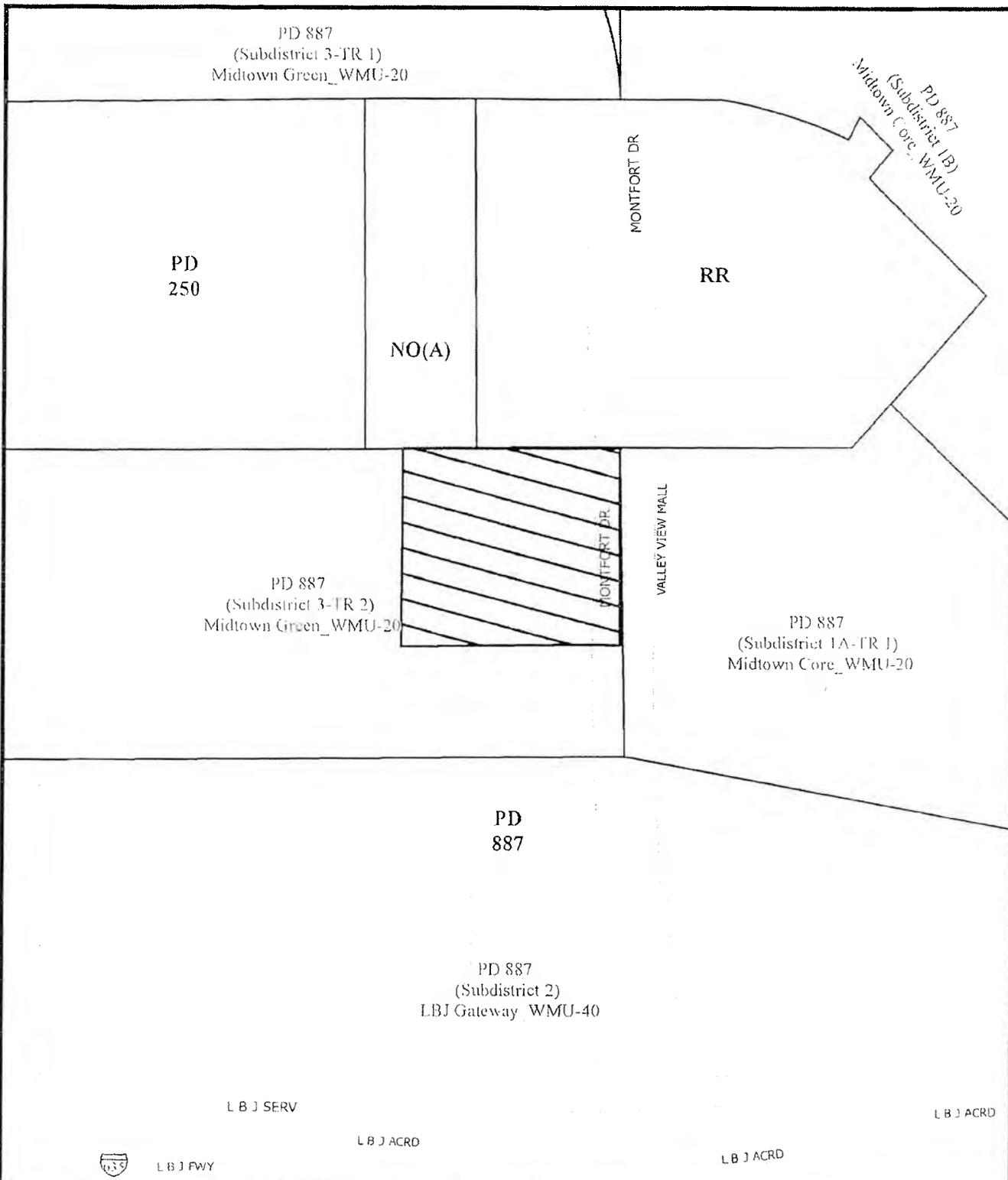
200298

Approved
City Plan Commission
January 9, 2020

Specific Use Permit
No. 2363

31451

200298



1:2,400

ZONING MAP

Case no: Z190-106

Date: 10/15/2019



PROOF OF PUBLICATION – LEGAL ADVERTISING

The legal advertisement required for the noted ordinance was published in the Dallas Morning News, the official newspaper of the city, as required by law, and the Dallas City Charter, Chapter XVIII, Section 7.

DATE ADOPTED BY CITY COUNCIL FEB 12 2020

ORDINANCE NUMBER 31451

DATE PUBLISHED FEB 15 2020

ATTESTED BY:

**17. Email dated December 2, 2019, confirming
Building Inspection review and
classification of use as Commercial
amusement (inside).**

Vinson, Jonathan

From: Rawlings, Gaby <gawlings@jw.com>
Sent: Monday, December 2, 2019 5:20 PM
To: Ryan Crow
Cc: Kedron, Suzan
Subject: RE: Please_DocuSign_Texas_Card_House_-_Sam_Moon.pdf

Ryan,

The building official confirmed that a card house is classified as a commercial amusement (inside), which is permitted by right in the mixed use districts and would not fall under one of the exceptions requiring an SUP.

Please let us know if you have any additional questions. Thanks!

Gaby Rawlings
2323 Ross Avenue, Suite 600 | Dallas, TX | 75201
V: (214) 953-5924 | F: (214) 953-5822 | gawlings@jw.com



From: Rawlings, Gaby
Sent: Monday, November 25, 2019 1:48 PM
To: 'Ryan Crow' <ryan@texascardhouse.com>
Cc: Kedron, Suzan <skedron@jw.com>
Subject: RE: Please_DocuSign_Texas_Card_House_-_Sam_Moon.pdf

Ryan,

Please find attached the zoning verification letter, which confirms the property is zoned MU-2(SAH). We're following up with the building official to confirm whether the use is permitted by right at the property.

Thanks!

Gaby Rawlings
2323 Ross Avenue, Suite 600 | Dallas, TX | 75201
V: (214) 953-5924 | F: (214) 953-5822 | gawlings@jw.com



From: Ryan Crow <ryan@texascardhouse.com>
Sent: Tuesday, November 19, 2019 10:45 AM
To: Rawlings, Gaby <gawlings@jw.com>
Cc: Kedron, Suzan <skedron@jw.com>
Subject: Re: Please_DocuSign_Texas_Card_House_-_Sam_Moon.pdf

****RECEIVED FROM EXTERNAL SENDER – USE CAUTION****

Yes please.

Sent from my iPhone

On Nov 19, 2019, at 8:00 AM, Rawlings, Gaby <grawlings@jw.com> wrote:

Ryan,

Would you like the request expedited? Regular is \$90 and expedited is \$110.

Gaby Rawlings

2323 Ross Avenue, Suite 600 | Dallas, TX | 75201

V: (214) 953-5924 | F: (214) 953-5822 | grawlings@jw.com

<image001.jpg>

From: Ryan Crow <ryan@texascardhouse.com>

Sent: Monday, November 18, 2019 6:12 PM

To: Rawlings, Gaby <grawlings@jw.com>

Cc: Kedron, Suzan <skedron@jw.com>

Subject: Re: Please_DocuSign_Texas_Card_House_-_Sam_Moon.pdf

****RECEIVED FROM EXTERNAL SENDER – USE CAUTION****

Can we go ahead and submit a zoning verification letter?

There are other tenants In the shopping center serving alcohol so I didn't anticipate there being an issue there. I will ask about getting language regarding that.

Ryan

On Nov 18, 2019, at 5:01 PM, Rawlings, Gaby <grawlings@jw.com> wrote:

Ryan,

Based on our review of the zoning map and general review of the Code, commercial amusement (inside) is likely permitted by right at this location. The zoning map shows that the property is zoned MU-2(SAH). Sec. 51A-4.125(d)(2)(J) of the Code states that

commercial amusement (inside) uses may require a SUP in MU-2(SAH) districts if required under Sec. 51A-4.210(b)(7)(B). However, 51A-4.210(b)(7)(B) provides that commercial amusement (inside) is permitted by right in a mixed use district.

As previously discussed, this should be confirmed with the City with a zoning verification letter then following up with the Building Inspector. Additionally, please note that we did not review any potential issues that may arise with permitting or licensing particularly if alcohol will be served at this location. You may want to consider adding that to the language in the contingency provision of the proposal.

Please feel free to call us with any questions.

Thank you,

Gaby Rawlings

2323 Ross Avenue, Suite 600 | Dallas, TX | 75201
V: (214) 953-5924 | F: (214) 953-5822 | gawlings@jw.com

<image001.jpg>

From: Rawlings, Gaby

Sent: Monday, November 18, 2019 3:19 PM

To: Ryan Crow <ryan@texascardhouse.com>; Kedron, Suzan <skedron@jw.com>

Subject: RE: Please_DocuSign_Texas_Card_House_-_Sam_Moon.pdf

Ryan,

Taking a look at this now and will get back to you shortly.

Gaby Rawlings

2323 Ross Avenue, Suite 600 | Dallas, TX | 75201
V: (214) 953-5924 | F: (214) 953-5822 | gawlings@jw.com

<image001.jpg>

From: Ryan Crow <ryan@texascardhouse.com>

Sent: Monday, November 18, 2019 1:51 PM

To: Rawlings, Gaby <gawlings@jw.com>; Kedron, Suzan <skedron@jw.com>

Subject: Please_DocuSign_Texas_Card_House_-_Sam_Moon.pdf

****RECEIVED FROM EXTERNAL SENDER – USE CAUTION****

Suzan/Gaby-

We are about to sign this lease. It is in an shopping center zoned MU-2. It is our understanding that our use is allowed by right. We plan to have an out in our lease but just want to see if there is anything else we should do to confirm we can go into this spot before we sign on the dotted line.

Ryan

Sent from my iPhone

<Please_DocuSign_Texas_Card_House_-_Sam_Moon.pdf>

**18. February 25, 2020, City Staff (including
CAO and DPD) Site Meeting Sign-In Sheet.**

CASE NUMBER	DATE	TIME	ADDRESS
N/A	2/25/2020	11:30AM	TEXAS CARD HOUSE

NAME and IDENTIFICATION	S.A.F.E. TEAM PERSONNEL	CONTACT INFORMATION
Steven Jungw 6388	CASE OFFICER	214-670-6498
Michael Keller 9888	ASST. CASE OFFICER	214 790 8196
	SUPERVISOR	214-670-7247
David Wilkins / Charlotte Kiley	CITY ATTORNEY	214-601-1091
Hope Cawington	CODE INSPECTOR	214 490 4444
	CODE INSPECTOR	
Anthony Martinez	FIRE INSPECTOR	469 323 5915
	FIRE INSPECTOR	

NAME and IDENTIFICATION	PROPERTY INTEREST	PHONE	EMAIL
Ryan Crew		409-779-9299	Ryan@theTexasCardHouse.com
Darren Brown		512-773-2390	Darren@TexasCardHouse.com
Gabriel Candelaria 9326		805-968-8097	gabriel.candelaria@dallascityhall.com
Diane V. Robinson 8239		214-670-6058	diane.robinson@dallascityhall.com
Major Hadnot			Shirley.Hadnot

NOTES:

**19. May 20, 2021, Memorandum to City Plan
Commission re SUPs for “poker rooms”.**

Memorandum



CITY OF DALLAS

DATE May 20, 2021

TO Tony Shidid, Chair and
City Plan Commissioners

SUBJECT **City Plan Commission Authorized Hearing**

Commissioners Schwope, Blair, and Shidid request that the City Plan Commission authorize a public hearing to consider amending Chapter 51A of the Dallas Development Code with consideration to be given to requiring a specific use permit for commercial amusement (inside) limited to a poker room.

This is a hearing to consider the request to authorize the hearing and not amendments to the Dallas Development Code at this time.

A handwritten signature in cursive script that reads "Donna P. Moorman".

Donna Moorman, Chief Planner
Current Planning Division
Sustainable Development and Construction Department

Memorandum



City of Dallas

DATE [DATE]

TO Kris Sweckard, Director
Sustainable Development and Construction Department

SUBJECT **Request for an Agenda Item for an Authorized Hearing**

We respectfully request the following item be placed on the City Plan Commission agenda and advertised as required by Section 51A-4.701(a)(1) of the Dallas Development Code.

Consideration of a hearing to authorize a public hearing to amend Chapter 51A of the Dallas City Code to require a specific use permit for a commercial amusement (inside) limited to a poker room.

Thank you for your attention to this matter.

Kristine Schwoppe (D12)

Kristine Schwoppe, Commissioner

Lori Ann (D8)

Commissioner

Tommy Sagan (D5)

Commissioner

**20. June 3, 2021, Memorandum to City Plan
Commission re SUPs for “poker rooms”.**

Memorandum



CITY OF DALLAS

DATE June 3, 2021

TO Tony Shidid, Chair and
City Plan Commissioners

SUBJECT **City Plan Commission Authorized Hearing**

Commissioners Schwope, Blair, and Shidid request that the City Plan Commission authorize a public hearing to consider amending Chapter 51A of the Dallas Development Code with consideration to be given to requiring a specific use permit for commercial amusement (inside) limited to a poker room.

This is a hearing to consider the request to authorize the hearing and not amendments to the Dallas Development Code at this time.

A handwritten signature in cursive script that reads "Donna P. Moorman".

Donna Moorman, Chief Planner
Current Planning Division
Sustainable Development and Construction Department

PRIOR CPC ACTION: This item was held under advisement on May 20, 2021.

Memorandum



City of Dallas

DATE [DATE]

TO Kris Sweckard, Director
Sustainable Development and Construction Department

SUBJECT **Request for an Agenda Item for an Authorized Hearing**

We respectfully request the following item be placed on the City Plan Commission agenda and advertised as required by Section 51A-4.701(a)(1) of the Dallas Development Code.

Consideration of a hearing to authorize a public hearing to amend Chapter 51A of the Dallas City Code to require a specific use permit for a commercial amusement (inside) limited to a poker room.

Thank you for your attention to this matter.

Kristine Schwope (D12)
Kristine Schwope, Commissioner

Lori [Signature] (D8)
Commissioner

Tommy [Signature] (D5)
Commissioner

21. June 3, 2021, City Plan Commission

Minutes 14-0 vote to authorize hearing on S.U.P.s for “poker rooms”.

City Plan Commission
June 3, 2021

Authorization of a Hearing – Under Advisement:

Planner: Donna Moorman

Motion: It was moved to **authorize** a public hearing to consider amending Chapter 51A of the Dallas Development Code with consideration to be given to requiring a specific use permit for commercial amusement (inside) limited to a poker room. **This is a hearing to consider the request to authorize the hearing and not the amendment to the Code at this time.**

Maker: Schwope
Second: Suhler
Result: Carried: 14 to 0

For: 14 - MacGregor, Hampton, Stinson, Johnson, Shidid, Carpenter, Jackson, Blair, Jung, Suhler, Schwope, Murphy, Garcia, Rubin

Against: 0
Absent: 0
Vacancy: 1 - District 10

Speakers: None

Other Matters

Minutes:

Motion: It was moved to **approve** the May 20, 2021, City Plan Commission meeting minutes.

Maker: Jung
Second: MacGregor
Result: Carried: 14 to 0

For: 14 - MacGregor, Hampton, Stinson, Johnson, Shidid, Carpenter, Jackson, Blair, Jung, Suhler, Schwope, Murphy, Garcia, Rubin

Against: 0
Absent: 0
Vacancy: 1 - District 10

Speakers: None

BDA212-018_ATTACHMENT_C



February 9, 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 212-018; Texas Card House (TCH) at 11814 Harry Hines Blvd., Suite 135
("Applicant"); Appeal of Building Official's decision revoking TCH's certificate
of occupancy

Dear Board Members:

This letter and the attached materials are the City's written response to the above-listed Board of Adjustment appeal by the Applicant, set for hearing on Tuesday, February 22, 2022, at 1:00 p.m. This is an appeal from the revocation of Applicant's certificate of occupancy ("CO") originally issued on October 23, 2020. The City urges the Board of Adjustment to affirm the Building Official's decision because, as shown herein, Applicant's use of the Property to operate a commercial gambling business featuring poker betting violates state law – Texas Penal Code §47.04(a) which prohibits keeping a gambling place or operating a business featuring gambling with cards. Additionally, 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* Dall., Tex., Administrative Procedures of the Construction Codes, §§ 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 erroneously issued CO.

I. BACKGROUND

A. Revocation of Applicant's certificate of occupancy

Applicant's CO was issued on October 23, 2020. A copy of the CO Application (the "Application") is attached as **Exhibit 1**. A land use statement dated July 2, 2020, (copy attached as **Exhibit 2**) was submitted with the Application.

On 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 3**. 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 4**. 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 thereby revoked the CO.

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

A land use statement dated July 2, 2020 submitted by Ryan Crow on behalf of Applicant, (**Exhibit 2**) stated Applicant “will operate at this site as a private club offering poker and similar games to its members.” The land use statement makes clear that the only significant activity taking place at the TCH facility was poker. There was no food or alcohol sold on site and no coin operated machines on site. Poker and similar games were the only activities. The fee to become a member, or the “fee to enter,” was initially “\$10/Day, \$30/Month, \$300/Year.” The hours of operations were planned to be from 11 a.m. to 4 a.m. (Monday-Sunday).

C. Poker games in a commercial establishment where there is any economic benefit 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 they operate their 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 state law, therefore the Building Official properly revoked the CO.

II. DISCUSSION AND ARGUMENT

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

In Texas, 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.

Chapter 47 of the Texas Penal Code declares gambling illegal in Texas. Texas Penal Code §47.04(a) (copy attached as **Exhibit 5**) 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 6**) 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 defense¹ 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 fees and entrance fees, live streaming the activities on its YouTube Channel, and selling its branded merchandise to patrons. Gamblers at TCH participate knowing that such participation confers some benefit to the owners and operators, whether in terms of club membership fees or “fees to enter.” Additionally, according to the commentary on section 47.02(b)—“charges for the privilege of using the facilities”—the fees TCH charges would not fall within the affirmative defense because they served as a prerequisite for using the facilities. Therefore, the 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.

The Applicant makes no attempt to minimize the gambling aspect of its business operation where poker and similar games are the centerpiece of its business, if not the exclusive use. 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. In addition, the Applicant streams poker games on YouTube for the public to watch.² The definition of private place for purposes of the defense to keeping a gambling place is narrowly construed to exclude any place

¹ An affirmative defense means facts that a defendant must prove in order to avoid liability.

² See, e.g. <https://www.youtube.com/c/TCHLiVEPoker/videos>.

that the public has access to and instead applies to friendly poker games among friends such as in someone's private home. For the 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 prongs, therefore the use is in violation of state law and the 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 7**) 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", and the risks of losing were the same for all participants) and 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 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 8**) interprets the second "economic benefit" element of the section 47.02(b)(2) affirmative defense available to otherwise illegal gambling operations in Texas. (*Id.* at 910). Here, the jury convicted the defendant 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. Similarly, 'received' would always include the time period the craps game was being played." (*Id.* at 912).

Miller illustrates that when owner(s), operator(s), or others receive revenue from the gambling business they receive an “economic benefit” from keeping a gambling place, which is unlawful.

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,” but the penal code provides no definition of “economic.” (*Id.* at 911). Thus, the court here 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.*). The court also relies on commentary to section 47.02 of the Texas Penal Code, which states that “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 this defense.” (*Id.* at 912).

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 2**) makes it clear that Applicant intends to collect membership fees or a “fee to enter” from club members. Thus, Applicant plans to collect charges or assessments from persons who come to Applicant’s establishment to play poker. 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, which defeats the affirmative defense and means that Applicant is “keeping a gambling place.” The land use statement also makes clear that the Applicant intended to live stream the games played at TCH on YouTube, providing a possible “economic benefit” from any ad revenue the live streams generate. Furthermore, any employees who are paid or tipped to work at Applicant’s poker business derive an “economic benefit” from their employment, which means that Applicant cannot prove the affirmative defense.

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 concludes that because the transactions would generate an economic benefit to a third party, the defense to prosecution would not apply. As demonstrated by this Opinion, the requirement of the affirmative defense that “no person received any economic benefit” is viewed very broadly, such that if *any* person (either the host of the game(s), or a third party, or even an employee) derives any “economic benefit” from the gambling operation “other than personal

winnings” received by the players, the affirmative defense to a gambling offense fails. 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 person(s) will receive an economic benefit other than personal winnings. If a poker game is played in the host’s home (i.e., a “private place”) 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 games 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 that it is well established that the legislature may not authorize an action (such as gambling) that the Texas Constitution prohibits.

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”) constituted illegal gambling, so the CO was properly revoked. Not only does Applicant’s business derive an economic benefit from the poker games, but the business also does not constitute a “private place” because a private club (as suggested by Applicant) is not synonymous with a “private place” under the Texas gambling laws. The Board should reject Applicant’s appeal and affirm the Building Official’s correct revocation.

Sincerely,

Gary R. Powell
Senior Assistant City Attorney

Charlotta S. Riley
Senior Assistant City Attorney

DATE: 03/03/2020
 CO NO: (OFFICE USE ONLY)
 2003031040

CERTIFICATE OF OCCUPANCY APPLICATION



NAME OF BUSINESS (DBA) Texas Card House		STREET ADDRESS OF BUSINESS 11822 Harry Hines Blvd.		BLDG AND SUITE NUMBER 135
PROPERTY OWNER Anna Seo		ADDRESS 11818 Harry Hines Blvd.		CITY Dallas
STATE TX	ZIP CODE 75234	PHONE NO 972.421.2700	E-MAIL ADDRESS anna@sammoon.com	
MANAGER/OPERATOR OF USE OR BUSINESS Ryan Crow		ADDRESS 11826 Harry Hines Blvd. Suite 135		CITY Dallas
STATE TX	ZIP CODE 75234	PHONE NO 409.779.9299	E-MAIL ADDRESS ryan@texascardhouse.com	
APPLICANT (if different from manager/operator) Juan Santiago		ADDRESS 2532 Highlander Way Suite 100		CITY Carrollton
STATE TX	ZIP CODE 75006	PHONE NO 214.803.8600	E-MAIL ADDRESS juans@abstractconstruction.com	

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

What is the square footage of the tenant space or building? **7,607** square feet

<input checked="" type="checkbox"/> YES <input type="checkbox"/> NO	Is this a change in use of land, tenant space or building?	See CO Checklist for plan submittal requirements.
<input type="checkbox"/> YES <input checked="" type="checkbox"/> 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.
<input type="checkbox"/> YES <input checked="" type="checkbox"/> NO	Will potentially hazardous foods/open foods be sold and/or served?	Food Establishment Permit Application required (only available from City staff)
<input type="checkbox"/> YES <input checked="" type="checkbox"/> NO	Will alcohol be sold and/or served?	Provide completed Alcohol Measurement Certification Application Checklist and Alcohol Certification Affidavit Forms
<input type="checkbox"/> YES <input checked="" type="checkbox"/> 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.
<input type="checkbox"/> YES <input checked="" type="checkbox"/> 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-existing conditions & facts pertaining to the health care model for any doctor's, dentist, or other medical offices (except hospitals, emergency rooms & care clinics).
<input type="checkbox"/> YES <input checked="" type="checkbox"/> 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

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 7396	BASE ZONING MU-2(SAH)	PD	SUP	CONSTRUCTION TYPE YES	OCCUPANCY RZ	ACTIVITY	OWN	
LOT	BLOCK	REQUIRED PARKING	PROPOSED PARKING	SPRINKLER	OCCUPANT LOAD 329	FLOOD PLAIN	AIRPORT	
LOT AREA	CONSERVATION DIST	PARKING AGREEMENT	DELTA CREDITS	STORIES 1	DWELLING UNITS	BDA	HISTORIC DISTRICT	

ROUTE TO	REVIEWED	DATE	COMMENTS	FEE CALCULATIONS (\$)
PREScreen	K.H.T	3/3/20		CO APP FEE 215.00
ZONING				CE INSP FEE
BUILDING	DL	3-5-2020		HEALTH PERMIT APP FEE
CODE				OTHER FEES Def. 65.00
OTHER:				TOTAL FEES 280.00

EXHIBIT
1
 BDA 212-018

DATE: 03/03/2020

PERMIT APPLICATION

PLEASE TYPE OR PRINT CLEARLY

JOB NO: (OFFICE USE ONLY)

APPLICATION TYPE

REGULAR EXPRESS

PERMIT NO: (OFFICE USE ONLY)

2003031036



City of Dallas

Musten

STREET ADDRESS OF PROPOSED PROJECT 11822 Harry Hines Blvd.		SUITE/BLDG/FLOOR NO 135	USE OF PROPERTY Gaming Room	
APPLICANT Juan Santiago		ADDRESS 2532 Highlander Way 100	CITY Carrollton	STATE TX
DBA (IF APPLICABLE) Texas Card House		PHONE NO 214.779.9299	E-MAIL ADDRESS (MAY BE USED FOR OFFICIAL COMMUNICATION) ryan@texascardhouse.com	
CONTRACTOR-INDIVIDUAL Juan Santiago		CONTRACTOR NUMBER 	PIN 	COMPANY NAME Abstract Construction
CURRENT HOME REPAIR LICENSE ON FILE? <input type="radio"/> YES <input type="radio"/> NO	IF YES, LIST NUMBER 	PHONE NO 	E-MAIL ADDRESS (MAY BE USED FOR OFFICIAL COMMUNICATION) 	
PROPERTY OWNER (INDIVIDUAL CONTACT) Anna Seo		ADDRESS 11818 Harry Hines Blvd.	CITY Dallas	STATE TX
PROPERTY OWNER (COMPANY NAME) SAM MOON		PHONE NO 972.421.2700	E-MAIL ADDRESS (MAY BE USED FOR OFFICIAL COMMUNICATION) anna@sammoon.com	
DESCRIPTION OF PROPOSED PROJECT Gaming Room		VALUATION (\$) Commercial Only	NEW CONST	NEW CONST
			MFD OTHER	MFD OTHER
			REMODEL 380,000.00	REMODEL 7,669
			TOTAL VALUATION 380,000.00	TOTAL AREA 7,669

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

03/03/20

Masker

FOR OFFICE USE ONLY

STREET ADDRESS OF PROPOSED PROJECT 11827 Harry Hines	SUITE/BLDG/FLOOR NO 135	PROJECT/PERMIT NUMBER 2003031036
--	-----------------------------------	--

ZONING				BUILDING		MISCELLANEOUS	
LAND USE 1396	TYPE OF WORK	BASE ZONING MU-2(SAH)	PD	CONSTRUCTION TYPE 7B	OCCUPANCY A2	ACTIVITY	OWN
LOT	BLOCK	REQUIRED PARKING	PROPOSED PARKING	SPRINKLER ALL	OCCUPANT LOAD 324	FLOOD PLAIN	AIRPORT
LOT AREA	BDA	SUP	RAR	STORIES 1	DWELLING UNITS	SPECIAL INSPECTIONS	HISTORICAL
DIR	EARLY RELEASE	DEED RESTRICTION	PARKING AGREEMENT	NUMBER BEDROOMS	NUMBER BATHROOMS	DRY	LL

ROUTE TO	REVIEWER	DATE	APPLICATION REMARKS	FEE CALCULATIONS (\$)
PRE-SCREEN	K.N.T.	3/3/20		PERMIT FEE
ZONING				SURCHARGE
BUILDING	BAW	3-5-2020		PLAN REVIEW FEE
ELECTRICAL				PREQUALIFICATION REVIEW FEE
PLUMBING/MECHANICAL				EXPRESS PLAN REVIEW HOURLY FEE TOTAL
GREEN BUILDING				HEALTH PERMIT APPLICATION FEE
HEALTH				HEALTH PLAN REVIEW FEES
HISTORICAL/CONS DIST				OTHER FEES
ENGINEERING				OTHER FEES
WATER				TOTAL FEES
FIRE				\$
LANDSCAPING				
AVIATION				
OTHER:				

PLAN REVIEW NOTES

Blank area for plan review notes.

Land Use Statement

Texas Card House
11834 Harry Hines Blvd., #135
Dallas, Texas

The Texas Card House in Dallas Texas will operate at this site as a private club offering poker and similar game to its members. The location will include several poker tables, pool tables, and other gaming amenities for legal games in Texas.

- Will operate seven days a week and plan to be open from 11am -4am.
- Will operate as a private club that charges a fee to enter. The fee to become a member will initially be \$10/Day, \$30/Month, \$300/Year.
- There will be no alcohol sold on the premises or stored on site. Members will be able to BYOB but there will be no setup fees, charges, or any financial transactions associated with this.
- There will be no coin operated machines, slots, or other automated gaming devices.
- All payment collected from players is for access to the club and club memberships.
- All winnings from poker games will stay with the players and no person will receive an economic benefit from the game other than personal winnings.
 - As an added precaution we have created special "tip chips" that are used to tip staff so that players do not unknowingly violate this by giving poker winnings to others.
- Texas Card House will be streaming live shows on its YouTube channel TCH Live 2-3 days per week.
- T-shirts, Hats, playing cards and other TCH branded items will be sold at this location.

Name: Ryan Crow

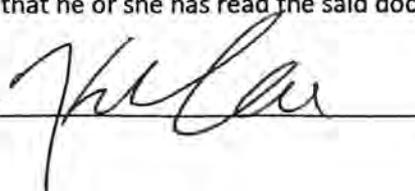
Title: CEO

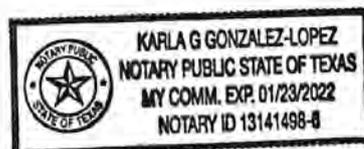
Date: 7/2/2020

Signature: 

Notary

BEFORE ME, the undersigned authority, on this 2nd day of July, 2020 the person whose name is signed to the foregoing document personally appeared and duly sworn by me, each states under oath that he or she has read the said document and that all facts therein set forth are true and correct.

SIGN HERE: 





CITY OF DALLAS

December 17, 2021

CERTIFIED MAIL NO. 7020 1290 0000 3631 0112

Ryan Crow, CEO
11834 Harry Hines Boulevard, #135
Dallas, TX 75234

RE: Revocation of Certificate of Occupancy No. 2003031040 for a commercial amusement (inside) use, dba Texas Card House at 11834 Harry Hines Boulevard, #135 (“the Property”)

Dear Mr. Crow:

This letter is to inform you that the above-referenced certificate of occupancy issued on October 23, 2020 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.

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;



 KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

Vernon's Texas Statutes and Codes Annotated

Penal Code (Refs & Annos)

Title 10. Offenses Against Public Health, Safety, and Morals (Refs & Annos)

Chapter 47. Gambling (Refs & Annos)

V.T.C.A., Penal Code § 47.04

§ 47.04. Keeping a Gambling Place

Currentness

(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.

Credits

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

Notes of Decisions (68)

V. T. C. A., Penal Code § 47.04, TX PENAL § 47.04

Current through the end of the 2021 Regular Session and Chapters 1 to 6 of the Second Called Session of the 87th

 KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

Vernon's Texas Statutes and Codes Annotated

Penal Code (Refs & Annos)

Title 10. Offenses Against Public Health, Safety, and Morals (Refs & Annos)

Chapter 47. Gambling (Refs & Annos)

V.T.C.A., Penal Code § 47.02

§ 47.02. Gambling

Effective: January 1, 2016

Currentness

(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;

1994 WL 67733

Only the Westlaw citation is currently available.

NOTICE: NOT DESIGNATED FOR PUBLICATION.
UNDER TX R RAP RULE 47.7, UNPUBLISHED
OPINIONS HAVE NO PRECEDENTIAL VALUE
BUT MAY BE CITED WITH THE NOTATION "(not
designated for publication)."

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,

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

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 misdemeanor¹ 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 defense² 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 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.

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 of 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 evidence³ 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.

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March 11, 2022

By Scan/Email to jennifer.munoz@dallascityhall.com

Hon. Chair and Members
Zoning Board of Adjustment, Panel A
c/o Ms. Jennifer Muñoz, 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 212-018; 11834 Harry Hines Boulevard;
Appeal of Administrative Official Decision.

Dear Members of Panel A:

As you will recall, we represent Texas Card House LLC (“TCH”), the Applicant in this appeal from a decision of the Administrative Official (revocation of an existing and validly-issued Certificate of Occupancy for a use which is clearly permitted by right) which we strongly believe to have been made in error. Our hearing before you on February 22 was continued to March 22, and therefore, we wanted to take this opportunity to provide additional information through the City Staff in preparation for that hearing.

We would also respectfully ask that you again review the two letters we had previously provided, both dated February 9, 2022, including the attachments to those letters, which we had provided to the Board Staff for inclusion in your previous packet, so you should still have those.

To reiterate just a couple of the main points of our arguments, however, TCH is fully confident that its operation as permitted, C.O.d, and ongoing, of the Commercial amusement (inside) use is completely legal under relevant Texas law, and specifically falls within the “safe harbor” provision of Sec. 47.02(b) of the Texas Penal Code, which says the following:

(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 be a “person” for this purpose, see Subsection (a) above]; and

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(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 again strongly emphasize is that the Applicant's use and operations falls squarely within this safe harbor provision – and evidently the District Attorneys in Travis, Bexar, and Hidalgo Counties agree, as per Mr. Ryan Crow's testimony last time and TCH's successful and uncontroversial operations in those Counties, which begs the question why it should be any different here.

Moreover, as stated before, this specific business model has been thoroughly reviewed for legality, and TCH's counsel has found that it is clearly legal under the safe harbor provision. We had previously provided a lengthy analysis by Kelly, Hart & Hallman, one of the leading firms in Fort Worth and Austin and an opinion from Austin-based administrative and regulatory law specialists Rentea & Associates, as attachments to our earlier letters. The City Attorney's Office may beg to differ with those analyses, but they have clearly been tasked with tailoring their position to reach a desired conclusion.

A question had arisen earlier about being able to apply for private club membership and being admitted on the same day. There are several private country clubs that operate in the Dallas area with varying criteria required to join. We found that many of these private clubs allow one to sign up and become a member on the same day, such as Brookhaven Country Club, Canyon Creek Country Club, and Eldorado Country Club (and likely others). All three of these clubs charge members to become a member and for the use of their facilities; all three of these allow betting by members to occur while playing golf; and all three of these allow and even facilitate the playing of poker as part of the club.

We point this out to show that the length of time required to become a member is not what determines if a location is private. The process of becoming a member typically consists of some type of agreement, along with consideration, to become a member. Once a person becomes a member, they will have access to members' facilities. Those who do not have a membership are not allowed entry.

The City Attorney had earlier asserted to you that “No provision of the Texas Constitution authorizes the operation of a gambling business featuring poker and similar games” (and since when does the Texas Constitution have to specifically authorize any kind of business?).

However, in reality, the Texas Constitution, Art. III, Section 47 (*attached so you can read it for yourselves*) says only that the Legislature “shall pass laws prohibiting **lotteries and gift enterprises** in this State other than those authorized...” *It does not prohibit poker.* That is exactly how the safe harbor provision could be validly enacted by the Texas Legislature.

The City Attorney has also cited several cases and Attorney General's Opinions to try to support their position - but none of these apply here. In the *Gaudio* case they cite, there was a

“rake” from the pot, specifically to pay the rent for the apartment. In the *Miller* case, the profits *from the game* were split between the owner and his investor, and the odds were set to favor the “house”. In both instances these arrangements violated the “safe harbor” provision, and we view these as among the ways *not* to operate within the bounds of the law.

The City Attorney also cites several Texas Attorney General’s Opinions, but again, for various reasons, these do not apply. For example, In GA-0335, the issue was TABC licensing – and you need to know that after in-depth discussions with the TABC about our business, TABC approved both of the TABC licenses we applied for. In LO 90-88, the issue was calling to another state to place bets – not at all our situation.

In DM-344, the Opinion specifies that a “private place” is determined by the scope of access – and we are a fully private members-only club. GA-0358 says County gaming districts are not authorized – again, not relevant at all.

One Attorney General’s Opinion which the City Attorney conveniently did *not* mention is JM-1267 (1990), which says that “*the Legislature, without amending section 47 of article III of the Texas Constitution, may amend chapter 47 of the Penal Code to authorize the holding of those gaming activities that do not comprise the elements of a lottery*”, which it characterizes as “consideration, prize, and chance”. Poker is a game of skill *and* chance, and legal under the safe harbor provision as enacted. This also contradicts the City Attorney’s assertion about what Art. III, Sec. 47 of the Texas Constitution says.

In fact, as we showed you in the video at our last hearing, the Dallas City Attorney, Chris Caso, has publicly stated to the City Council, in the context of a zoning case *where TCH was the Applicant*, that the membership fees that are charged in a private club do not constitute economic benefit from the game. As we have previously stated and shown, it was only after media and political attention beginning last August that the City began to deny these C.O.s, and ultimately, in TCH’s case, revoke their C.O. that had already been issued about 17 months ago.

Finally, we ask that you do not allow the reversal of the Administrative Official’s original, correct determination, and our appeal of that reversal, to turn into a “prosecution”, which is really the purview of the Dallas County District Attorney. For the purposes of this appeal, we have demonstrated that the initial position of the City Staff was correct, after due investigation and deliberation, and nothing has been presented which would support their subsequent complete reversal of that position.

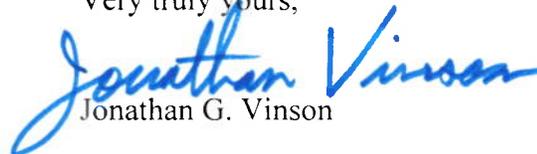
The City, at every level, up to and including the City Council and the City Attorney, has known about this business model and has reviewed it thoroughly at every turn for about two and one half years now (*see attached timeline, as also previously provided to you*). The City has completely reversed its position, despite every level of review and public statements over the previous two and one half years – all as detailed in our longer February 9 letter, with attachments

(including the City's own documents), to which we again would refer you and respectfully ask you to review again.

What has changed since at least December of 2017, when discussions with the City first began? The answer is, nothing has changed. There has been no change in the Texas Constitution, no change in the Texas Penal Code, no new cases have been decided by any courts, and no new Attorney General Opinions have been issued. Our operations were correctly determined to be legal then, and continue to be legal now.

We very much look forward to our opportunity to appear before you at the continuation of our public hearing on March 22, at which time we will respectfully ask you to grant our appeal and to direct the reissuance of TCH's Certificate of Occupancy. Thank you very much.

Very truly yours,


Jonathan G. Vinson

cc: Ryan Crow
Mike Gruber
Brian Mason
Zach Tobolowsky
Bogdan Rentea
Suzan Kedron
Luke Franz

THE TEXAS CONSTITUTION

ARTICLE 3. LEGISLATIVE DEPARTMENT

Sec. 47. PROHIBITION ON LOTTERIES AND GIFT ENTERPRISES; EXCEPTIONS FOR CHARITABLE BINGO, CHARITABLE RAFFLES, AND STATE LOTTERIES. (a) The Legislature shall pass laws prohibiting lotteries and gift enterprises in this State other than those authorized by Subsections (b), (d), (d-1), and (e) of this section.

(b) The Legislature by law may authorize and regulate bingo games conducted by a church, synagogue, religious society, volunteer fire department, nonprofit veterans organization, fraternal organization, or nonprofit organization supporting medical research or treatment programs. A law enacted under this subsection must permit the qualified voters of any county, justice precinct, or incorporated city or town to determine from time to time by a majority vote of the qualified voters voting on the question at an election whether bingo games may be held in the county, justice precinct, or city or town. The law must also require that:

(1) all proceeds from the games are spent in Texas for charitable purposes of the organizations;

(2) the games are limited to one location as defined by law on property owned or leased by the church, synagogue, religious society, volunteer fire department, nonprofit veterans organization, fraternal organization, or nonprofit organization supporting medical research or treatment programs; and

(3) the games are conducted, promoted, and administered by members of the church, synagogue, religious society, volunteer fire department, nonprofit veterans organization, fraternal organization, or nonprofit organization supporting medical research or treatment programs.

(c) The law enacted by the Legislature authorizing bingo games must include:

(1) a requirement that the entities conducting the games report quarterly to the Comptroller of Public Accounts about the amount of proceeds that the entities collect from the games and

the purposes for which the proceeds are spent; and

(2) criminal or civil penalties to enforce the reporting requirement.

(d) The Legislature by general law may permit charitable raffles conducted by a qualified religious society, qualified volunteer fire department, qualified volunteer emergency medical service, or qualified nonprofit organizations under the terms and conditions imposed by general law.

The law must also require that:

(1) all proceeds from the sale of tickets for the raffle must be spent for the charitable purposes of the organizations; and

(2) the charitable raffle is conducted, promoted, and administered exclusively by members of the qualified religious society, qualified volunteer fire department, qualified volunteer emergency medical service, or qualified nonprofit organization.

(d-1) The legislature by general law may permit a professional sports team charitable foundation to conduct charitable raffles under the terms and conditions imposed by general law. The law may authorize the charitable foundation to pay with the raffle proceeds reasonable advertising, promotional, and administrative expenses. A law enacted under this subsection applies only to an entity defined as a professional sports team charitable foundation under that law and may only allow charitable raffles to be conducted at games or rodeo events hosted at the home venue of the professional sports team associated with a professional sports team charitable foundation. In this subsection, "professional sports team" means:

(1) a team organized in this state that is a member of Major League Baseball, the National Basketball Association, the National Hockey League, the National Football League, Major League Soccer, the American Hockey League, the East Coast Hockey League, the American Association of Independent Professional Baseball, the Atlantic League of Professional Baseball, Minor League Baseball, the National Basketball Association Development League, the National Women's Soccer League, the Major Arena Soccer League, the United Soccer League, or the Women's National Basketball

Association;

(2) a person hosting a motorsports racing team event sanctioned by the National Association for Stock Car Auto Racing (NASCAR), INDYCar, or another nationally recognized motorsports racing association at a venue in this state with a permanent seating capacity of not less than 75,000;

(3) an organization hosting a Professional Golf Association event;

(4) an organization sanctioned by the Professional Rodeo Cowboys Association or the Women's Professional Rodeo Association; or

(5) any other professional sports team defined by law.

(d-2) Subsection (a) of this section does not prohibit the legislature from authorizing credit unions and other financial institutions to conduct, under the terms and conditions imposed by general law, promotional activities to promote savings in which prizes are awarded to one or more of the credit union's or financial institution's depositors selected by lot.

(e) The Legislature by general law may authorize the State to operate lotteries and may authorize the State to enter into a contract with one or more legal entities that will operate lotteries on behalf of the State.

(Feb. 15, 1876. Subsec. (a) amended and (b) and (c) added Nov. 4, 1980; Subsec. (a) amended and (d) added Nov. 7, 1989; Subsec. (a) amended and (e) added Nov. 5, 1991; Subsec. (a) amended and (d-1) added Nov. 3, 2015; Subsec. (d-1) amended and (d-2) added Nov. 7, 2017; Subsec. (d-1) amended Nov. 2, 2021.)



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 20, 2005

The Honorable John W. Smith
Ector County District Attorney
300 North Grant, Room 305
Odessa, Texas 79761

Opinion No. GA-0335

Re: Whether a business that holds an on-premises
alcoholic beverage permit may host a poker
tournament (RQ-0305-GA)

Dear Mr. Smith:

You ask whether a business that holds an on-premises alcoholic beverage permit may host a poker tournament under two specific fact scenarios.¹ The first situation you describe as follows:

Persons of an unknown number would pay a nominal fee to enter the "Texas Hold-Em" Tournament. The fee is probably negotiable but would be in the range of Twenty Five to Fifty Dollars (\$25 to \$50) per person. A "Texas Hold-Em" Poker Tournament would ensue with the registered players participating at various tables and using chips that although have a money denomination actually represent no money changing hands. (For the Fifty Dollar (\$50.00) buy in the player would receive One Thousand Dollars (\$1,000.00) in chips that have no actual cash value.) As the Tournament progresses the players that accumulate the most chips will by skill force out the less skilled players and at the end of the evening the winners at each table will accumulate and play a final table at which a certain number of prize places will be paid by the establishment to those persons winning the Tournament. The house intends to take no cut of the entry fee of each player and the entire prize pool that is generated by the number of players times their entry fee will be paid back to the winner players

¹Letter from Honorable John W. Smith, Ector County District Attorney, to Honorable Greg Abbott, Texas Attorney General (Dec. 17, 2004) (on file with Opinion Committee, *also available at* <http://www.oag.state.tx.us>) [hereinafter Request Letter]; *see also* Supplemental Letter from Honorable John W. Smith, Ector County District Attorney, to Honorable Greg Abbott, Texas Attorney General at 2 (Dec. 30, 2004) (on file with Opinion Committee, *also available at* <http://www.oag.state.tx.us>) [hereinafter Supplemental Request Letter].

at the end of the night either in a first through third or first through fifth or first through eighth combination depending on the number of players.

Request Letter, *supra* note 1, at 2.

Section 47.04 creates the offense of “keeping a gambling place.” That statute provides, in relevant part:

(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) (Vernon 2003). “Gambling place” is defined as “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.” *Id.* § 47.01(3). “Bet” is defined in section 47.01 as “an agreement to win or lose something of value solely or partially by chance.” *Id.* § 47.01(1).

The statutory definition of “bet” as a noun is inartfully drafted, in that it does not directly state that a person must risk something of value in order to fall within the definition.² In *Odle v. State*, 139 S.W.2d 595 (Tex. Crim. App. 1940), however, the court approved the following language: “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 a trial of chance, or skill, or both combined.” *Id.* at 597. Furthermore, in Attorney General Opinion JM-412, this office concluded that a “casino nite” held by a school district in which “no person gives or promises to give anything of value in order to participate lacks the element of consideration that is essential to the offense of gambling under section 47.02 of the Texas Penal Code.” Tex. Att’y Gen. Op. No. JM-412 (1985) at 2. The opinion declared that “[t]he legal meaning of ‘bet’ involves not only the ultimate winning of something of value but the initial giving or agreement to give something of value.” *Id.* Thus, a “bet,” for purposes of section 47.01(3) of the Penal Code, which defines “gambling place,” *inter alia*, as a place for the making or settling of bets, requires the elements of prize and consideration. Under the facts you have described, a participant in the referenced poker tournament would be required to risk a sum of money ranging from \$25 to \$50 for the opportunity to win a prize that necessarily includes part of the money the participant has paid. It seems clear that,

²By contrast, a New Jersey statute defines “gambling” to mean “*staking or risking something of value upon the outcome of a contest of chance or a future contingent event not under the actor’s control or influence, upon an agreement or understanding that he will receive something of value in the event of a certain outcome.*” See N.J. STAT. ANN. § 2C:37-1(b) (West 1995) (emphasis added); Brief from Charles E. Humphrey, Jr., to Honorable Greg Abbott, Texas Attorney General (Jan. 25, 2005) (on file with Opinion Committee) (*Glick v. MTV Networks*, 796 F. Supp. 743, 746 (S.D.N.Y. 1992) attached which quotes the New Jersey statute) (attachment to Brief).

under such circumstances, the participant “plays and bets for money or other thing of value.” TEX. PEN. CODE ANN. § 47.02(a)(3) (Vernon 2003).³

In order to constitute a “bet” under section 47.01(1), an agreement “to win or lose something of value” must also possess the element of chance, either “solely or partially.” *Id.* § 47.01(1); *see also Odle*, 139 S.W.2d at 597 (legal meaning of 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 chance or skill or both combined*). Thus, we must determine whether “Texas-Hold-Em,” a form of poker, wholly or partially embraces the element of chance. In a recent opinion, the Attorney General of South Carolina considered the issue of whether “the game of poker constitutes a game of skill or one of chance.” *See Op. S.C. Att’y Gen.* (Jan. 22, 2004), 2004 WL 235411, at *2. In concluding that the element of chance predominates in poker, the opinion acknowledged that “[w]hile there is a split of authority, several courts have concluded that a live poker game is a game of chance rather than skill.” *Id.* *See, e.g., Indoor Recreation Enters., Inc. v. Douglas*, 235 N.W.2d 398, 400 (Neb. 1975) (evidence supported trial court’s conclusion that poker is predominantly a game of chance); *State v. Taylor*, 16 S.E. 168 (N.C. 1892) (“It is a matter of universal knowledge that no game played with the ordinary playing cards is unattended with risk, whatever may be the skill, experience, or intelligence of the gamesters engaged in it.”).

On the other hand, a number of state courts have held that poker is not predominantly a game of chance. *See, e.g., Ginsberg v. Centennial Turf Club, Inc.*, 251 P.2d 926, 929 (Colo. 1952); *State ex rel. Evans v. Bhd. of Friends*, 247 P.2d 787, 797 (Wash. 1952); *State v. Coats*, 74 P.2d 1102, 1106 (Ore. 1938). In Texas, several attorney general opinions have declared that a particular game is a “game of chance” if chance predominates over skill. *See Tex. Att’y Gen. Op. Nos.* JM-1267 (1990), C-619 (1966), WW-222 (1957), V-1483 (1952), V-544 (1948), V-238 (1947). *See also Adams v. Antonio*, 88 S.W.2d 503, 505 (Tex. Civ. App.—Waco 1935, writ ref’d) (dicta to the effect that gaming statute was violated in instance in which chance predominates over skill). Attorney General Opinion JM-1267 stated that “[w]hether any of the gaming activities about which you ask [including poker] involves the dominating element of skill, as opposed to chance, is a question of fact that cannot be resolved in the opinion process.” *Tex. Att’y Gen. Op. No.* JM-1267 (1990) at 6.

In our view, however, the plain language of section 47.01(1) of the Penal Code renders irrelevant the matter of whether poker is predominantly a game of chance or skill. As we have indicated, the word “bet” is defined as “an agreement to win or lose something of value *solely or*

³It 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.

partially by chance.” TEX. PEN. CODE ANN. § 47.01(1) (Vernon 2003) (emphasis added). If an element of chance is involved in a particular game, it is embraced within the definition of “bet.” We have not found any authority holding that there is *no* element of chance involved in a game played with cards, including poker, other than the chance attendant upon every human endeavor.

Moreover, section 47.01 provides that the term “bet” does *not* include, *inter alia*:

(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.

Id. § 47.01(1)(B). In *People v. Mitchell*, an Illinois court examined a statute that contained language virtually identical to that quoted above. The court declared:

In our opinion, the poker game played under the circumstances of the instant case [hold ‘em poker] is precisely the type of “game of chance or skill” which falls squarely within the plain meaning of the activity proscribed under subsection (a)(1). Although there was some testimony tending to indicate that the poker games involved some degree of skill, we do not find the jury’s implicit conclusion that they were not “bona fide contests for the determination of skill” so improbable as to warrant a reversal. Both direct and circumstantial evidence was introduced to support the conclusion that the games, in fact, required a combination of skill and chance, and that they were definitely not the type of “bona fide contests” excepted from subsection (a)(1).

People v. Mitchell, 444 N.E.2d 1153, 1155 (Ill. App. 1983). We agree with this court that a bet in a game of poker, of whatever type, is not excepted from the definition of “bet” in section 47.01(1) of the Penal Code on the ground that it is a “bona fide contest for the determination of skill.” TEX. PEN. CODE ANN. § 47.01(1)(B) (Vernon 2003). In addition, because at least some element of chance is present in a game of poker, a “bet” in such a game constitutes an agreement to win a thing of value at least “partially by chance.” *Id.* § 47.01(1).

Under the scenario you have described, then, a bar or restaurant that hosts a “Texas Hold-Em” poker tournament would violate the prohibition against “keeping a gambling place.” See Request Letter, *supra* note 1, at 2; TEX. PEN. CODE ANN. § 47.04(a) (Vernon 2003). Chapter 47 of the Penal Code does not contain any specific reference to a person or company that holds an on-premises alcoholic beverage permit. But pursuant to Rule 35.31 promulgated by the Alcoholic Beverage Commission (the “Commission”), a permittee contravenes section 11.61(b)(7) or section 61.71(a)(17) of the Alcoholic Beverage Code if he or she violates or negligently allows another to violate “any gambling offense described in Chapter 47 of the Texas Penal Code” on the licensed

premises.⁴ See 16 TEX. ADMIN. CODE § 35.31(b)(14) (2004). Thus, committing the offense of “keeping a gambling place” permits the Commission, after notice and hearing, to suspend or cancel the license of a permittee pursuant to either section 11.61(b) or section 61.71(a) of the Alcoholic Beverage Code. The fact that the permittee does not profit directly from the gambling is irrelevant to the question of whether the permittee has violated either section 47.04(a) of the Penal Code or the Commission’s Rule 35.31. In specific answer to your first question, a holder of an on-premises alcoholic beverage permit may not, without violating both section 47.04(a) of the Penal Code and Rule 35.31 of the Alcoholic Beverage Commission, host a poker tournament in which participants risk money or any other thing of value for the opportunity to win a prize.

You describe the second scenario in the following terms:

[A] question has arisen about retailers, bars and restaurants who hold Texas Hold-‘Em Poker tournaments. In these tournaments, consumers do not pay to play and do not risk any of their own money at any time during the tournament. Chips are assigned point values and those players with the most points at the end of the tournament are provided prizes, anywhere from t-shirts to gift certificates. In progressive tournaments, winners are awarded a chance to play at the next level tournament with an opportunity to win even greater prizes such as vacations to Las Vegas, Nevada, and entry into World of Poker Tour events (\$10,000 value). Since participants are not betting or risking their money or anything of value during the game and nothing is lost by participants, do these tournaments constitute gambling under Texas Penal Code Ann. Sec. 47.02?

Supplemental Request Letter, *supra* note 1, at 2.

⁴Section 11.61(b) of the Alcoholic Beverage Code provides that “[t]he [Alcoholic Beverage] commission or administrator may suspend for not more than 60 days or cancel an original or renewal permit if it is found, after notice and hearing, that any of the following is true:

....

(7) the place or manner in which the permittee conducts his business warrants the cancellation or suspension of the permit based on the general welfare, health, peace, morals, and safety of the people and on the public sense of decency[.]

TEX. ALCO. BEV. CODE ANN. § 11.61(b) (Vernon Supp. 2004-05). Likewise, section 61.71(a) provides that “[t]he commission or administrator may suspend for not more than 60 days or cancel an original or renewal retail dealer’s on- or off-premise license if it is found, after notice and hearing, that the licensee:

....

(17) conducted his business in a place or manner which warrants the cancellation or suspension of the license based on the general welfare, health, peace, morals, safety, and sense of decency of the people[.]

Id. § 61.71(a).

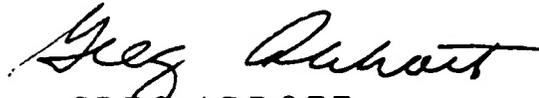
Again, we note that section 47.04(a) of the Penal Code provides, in relevant part, that a person commits an offense if the person knowingly uses or permits another to use as a gambling place any real estate, building, room, tent, vehicle, boat, or other property whatsoever owned by him or under his control, or rents or lets any such property with a view or expectation that it be so used. *See* TEX. PEN. CODE ANN. § 47.04(a) (Vernon 2003). Under the facts you have presented in this second scenario, “consumers do not pay to play and do not risk any of their own money at any time during the tournament.” Supplemental Request Letter, *supra* note 1, at 2. Pursuant to the test promulgated by the court in *Odle*, this lack of “tender of a gift of something valuable” means that no “bet” has occurred. *Odle*, 139 S.W.2d at 597. In such case, the property does not meet the statutory definition of “gambling place.” As we have indicated, a “gambling place” is property used in “the making or settling of bets.” TEX. PEN. CODE ANN. § 47.01(3) (Vernon 2003). As a result, the establishment does not commit an offense under section 47.04 of the Penal Code.

In specific answer to your second question, a holder of an on-premises alcoholic beverage permit may, without violating both section 47.04(a) of the Penal Code and, as a corollary, Rule 35.31 of the Alcoholic Beverage Commission, host a poker tournament in which participants do not risk money or any other thing of value for the opportunity to win a prize. *See id* § 47.04(a); 16 TEX. ADMIN. CODE § 35.31(b)(14) (2004).

S U M M A R Y

A holder of an on-premises alcoholic beverage permit may not, without violating both section 47.04(a) of the Penal Code and Rule 35.31 of the Alcoholic Beverage Commission, host a poker tournament in which participants risk money or any other thing of value for the opportunity to win a prize. A holder of an on-premises alcoholic beverage permit may, without violating either section 47.04(a) of the Penal Code or Rule 35.31 of the Alcoholic Beverage Commission, host a poker tournament in which participants do not risk money or any other thing of value for the opportunity to win a prize.

Yours very truly,



GREG ABBOTT
Attorney General of Texas

BARRY R. MCBEE
First Assistant Attorney General

DON R. WILLETT
Deputy Attorney General for Legal Counsel

NANCY S. FULLER
Chair, Opinion Committee

Rick Gilpin
Assistant Attorney General, Opinion Committee



Office of the Attorney General State of Texas

November 3, 1990

<p>Honorable Hugh Parmer Chairman Committee on Intergovernmental Relations Texas State Senate P.O. Box 12068 Austin, Texas 78711</p>	<p>Letter Opinion No. 90-088</p>
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Dear Senator Parmer:

You ask a number of questions about gambling. Your first question is:

Currently, can a person, while in Texas, call another state to have a computer play lottery games (i.e. Lotto) or bingo games for them and pay by a 900 number or credit card?

A person commits an offense in Texas if he or she "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." Penal Code s 47.02(a)(1). A "bet" is "an agreement that, dependent on chance even though accompanied by some skill, one stands to win or lose something of value." Id. s 47.01(1). It appears from your question that a person who participates in the computer games you describe would be placing a bet for purposes of section 47.02(a)(1) of the Penal Code.

It is a defense to prosecution for placing a bet 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.

Id. s 47.02(b). 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.

Your second question is:

Currently, can a person, while in Texas, legally participate in lottery games or bingo games in another state in any other way other than as described in question 1?

It is outside the scope of the opinion process to determine whether there is any imaginable way for a person to participate in an out-of-state lottery without leaving Texas.

Your third question is:

Currently, can retailers (a) sell lottery or bingo cards in Texas or (b) display automatic telephones in Texas for the purchase of lottery or bingo cards?

The sale of lottery tickets would be prohibited under section 47.03(a)(5) of the Penal Code, which prohibits the sale of a ticket designed to serve as evidence of participation in any lottery. See generally Penal Code s 47.01(6) (defining "lottery").

You also ask about the sale of bingo cards. Section 47.07 of the Penal Code prohibits the commercial transfer of gambling paraphernalia. "Gambling paraphernalia" is "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." Penal Code s 47.01(5). Whether the sale of bingo cards would constitute the commercial transfer of gambling paraphernalia would have to be determined on the facts of a particular case. See *Morrison v. Habeeb*, 246 S.W.2d 217 (Tex.Civ.App.--Galveston), rev'd on other grounds, 252 S.W.2d 148 (Tex.1952) (fact that dice could be used as gambling paraphernalia insufficient to constitute dice as gambling paraphernalia per se. The sale of travel bingo cards at roadside convenience stores, for example, is not likely to constitute the commercial transfer of gambling paraphernalia. The sale of bingo tickets for bingo games that would fall within the definition of "bingo" in the Bingo Enabling Act is governed by that act. V.T.C.S. art. 179d, s 2(2) (defining "bingo"); see also id. ss 2(18), 11(o), 13b(a), 39(b)(3)--(4) (regarding distribution of bingo supplies); Penal Code s 47.10 (providing that it is a defense to prosecution for an offense under chapter 47 of the Penal Code that the conduct was authorized under the Bingo Enabling Act).

You also ask whether retailers may display automatic telephones in Texas for the purchase of lottery or bingo cards. Although you provide no details about the telephones in question, it is likely that providing such telephones would be in violation of section 47.05 of the Penal Code, which provides:

(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) An offense under this section is a felony of the third degree.

Your fourth question is:

Currently, can retailers advertise in Texas (a) lottery or bingo cards for sale in Texas or (b) automatic telephones for use in Texas for the purchase of lottery or

bingo cards?

Subsection (5) of section 47.03(a) makes it an offense to promote any lottery or offer to sell a lottery ticket. Whether any particular activity constitutes the promotion of a lottery or an offer to sell a lottery ticket depends on the facts of a particular case. See e.g., Attorney General Opinion JM-341 (1985); see also V.T.C.S. art. 179d, s 39(b) (making it an offense to promote bingo unless permitted to do so by Bingo Enabling Act).

Your fifth and sixth questions are:

If any of the activities in questions 1 through 4 are already authorized, could the Texas Legislature, without a constitutional amendment, levy taxes on any such activity?

If any of the activities in questions 1 through 4 are not currently authorized, could the Texas Legislature, without a constitutional amendment, authorize such activity and levy a tax on such activity?

Although we cannot give a definitive response to your general questions, we can provide some background in regard to the legal issues you raise.

Article III, section 47, of the Texas Constitution provides in subsection (a):

The Legislature shall pass laws prohibiting lotteries and gift enterprises in this State other than those authorized by Subsections (b) and (d) of this section.

Before section 47 was amended in 1980 to permit the legislature to authorize bingo games under certain circumstances, it provided:

The Legislature shall pass laws prohibiting the establishment of lotteries and gift enterprises in this State, as well as the sale of tickets in lotteries, gift enterprises or other evasions involving the lottery principal, established or existing in other States."

It is certainly possible that the 1980 amendment narrowed the range of activities that the legislature must prohibit in accordance with article III, section 47. If you would like this office to consider whether the substance of a specific provision of chapter 47 of the Penal Code is or is not mandated by article III, section 47, please bring the specific provision to our attention and we will address the scope of article III, section 47, in that context.

Your questions also raise the issue of taxation of illegal activities. We note in this regard that in 1898 the Texas Court of Criminal Appeals considered the validity of a legislative attempt to levy an occupation tax on persons operating a certain type of game. *Barry v. State*, 45 S.W. 571 (Tex.Crim.App.1898). The court wrote:

However sweeping may be the taxing power of the legislature in this state, it is not broad enough to set at naught the plain provisions of the constitution.... The quotation from article 5049 above would indicate that the matters therein specified would constitute lotteries, they being simply matters of chance. This being true, the legislature would not be authorized to license or tax these games.

We have found no subsequent application or modification of that statement by either the Court of Criminal Appeals or the Texas Supreme Court. See also *Grosso v. United States*, 390 US 62 (1968); *Marchetti v. United States*, 390 US 39 (1968) (both holding that Fifth Amendment is valid defense for failure to register as gambler and pay related occupational and gambling excise taxes); *United States v. Sullivan*, 274 U.S. 259 (1927) (holding that Fifth Amendment is not valid defense to failure to file a tax return even if income is from illegal sources). Whether a particular tax measure would be valid under the Texas and United States Constitutions would depend on the nature of the particular measure. See generally Tax Code ch. 159 (tax on controlled substances).

Yours very truly,

Sarah Woelk
Chief Letter Opinion Section Opinion Committee

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Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

May 2, 1995

Honorable Kenny Marchant
Chair
Financial Institution Committee
Texas House of Representatives
P.O. Box 2910
Austin, Texas 78768-2910

Opinion No. DM-344

Re: Whether persons may play and bet on card games using computers with modems or other transmission devices and related questions (RQ-763)

Dear Representative Marchant:

You ask:

(1) May two or more persons, each using a separate personal computer and modem or other data transmission device in a private place, play a card game with each other and bet on the outcome of the card game?

(2) May a third party operating a bulletin board service assist persons in playing the card games located on that bulletin board service and charge a fee for the amount of computer time and processing charges used by the persons playing the game?

(3) May a third party operating a bulletin board service act as the custodian of money placed in escrow with that bulletin board service by users of the service for the specific purpose of playing card games with other users of the service?

You qualify your questions as follows:

For the purpose of this request, "bet" and "private place" have the meanings assigned [to] those terms by Section 47.01, Penal Code, and the term "bulletin board service" means an on-line computer service that allows a person to use the person's personal computer and modem to connect to the service and that offers the person the ability to play card games with other users of the service. In addition, any actions taken by any party in this request are presumed to be taken entirely in Texas by Texas residents.

Section 47.01(1), Penal Code, provides, with exceptions which do not appear to be relevant here, that for purposes of chapter 47, "bet" "means an agreement to win or lose something of value solely or partially by chance." Subsection (8) defines "private place" as "a place to which the public does not have access, and excludes, among other places, streets, highways, restaurants, taverns, nightclubs, schools, hospitals, and common

areas of apartment houses, hotels, motels, office buildings, transportation facilities, and shops.”

Section 47.02(a)(3) provides that “[a] person commits an offense if he . . . plays and bets for money or other thing of value at any game played with cards, dice, balls, or any other gambling device.” Subsection (b), however, provides that it is a defense to prosecution under the 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 [the game] were the same for all participants.

The activities described in your first question would appear to be within the kind of playing and betting described in subsection (a)(3) of section 47.02. The question is whether the defense to prosecution set out in subsection (b) could be effectively raised. We do not believe that the facts you stipulate--that the actors are acting in “private places,” within the Penal Code definition, and communicating bets through data transmission devices--resolve whether the elements of the defense are met. Even assuming that the risks “were the same for all participants,” if a public generally, or a significant number of others, had access to the games, such access would, we believe, defeat a claim that the actors “engaged in gambling in a private place.”

Whether a place is private for such purposes has been determined by the scope of access by others. *See, e.g., Comer v. State*, 10 S.W. 106 (1889) (private room at inn); *Heath v. State*, 276 S.W.2d 534 (Tex. Crim. App. 1955) (“We do not think that one might circumvent the law [pertaining to ‘gambling houses’] by the simple expediency of extending invitations”). *See generally* Howard J. Alperin, Annotation, *Gambling in Private Residence as Prohibited or Permitted by Anti-Gambling Laws*, 27 A.L.R.3d 1074 (1969). Just as a private residence would not be a “private place” for purposes of the defense if the public had access to gambling there, neither would it be consistent with the defense here if, for example, anyone who knew the proper “telephone number” and had a computer with a modem could join the games you refer to. *See, e.g., Morgan v. State*, 60 S.W. 763, 764 (Tex. Crim. App. 1901) (private residence); *People v. Weithoff*, 16 N.W. 442 (Mich. 1883) (physical presence of bettors at game not required). However, determining whether the scope of such access here would defeat the defense would require fact finding.

Also, if there is a charge attributable to the transmissions by which the players communicate, it would appear that other persons would also receive an economic benefit from the games, thus defeating the second element of the defense. *See Attorney General*

Letter Opinion No. 90-88 (1990) (no defense where telephoned bets made using either a credit card or a 900-number).

Where the defense did not obtain, and the actors were thus “gambling” in violation of section 47.02, we think that on particular facts they might also be prosecuted under other sections of chapter 47. See Penal Code §§ 47.03 (“Gambling Promotion”), .04 (“Keeping a Gambling Place”), .05 (“Communicating Gambling Information”), .06 (“Possession of Gambling Device, Equipment or Paraphernalia”). We note that on proper facts, courts have upheld, against double jeopardy arguments, convictions under more than one chapter 47 section arising from one series of events. See, e.g., *Rush v. State*, 576 S.W.2d 628 (Tex. Crim. App. 1978).¹

Also, where the activity was an offense under the Penal Code, federal law criminalizing “transmission of wagering information” in interstate commerce by one “engaged in the business of betting or wagering,” 18 U.S.C. § 1084, could also apply. That the activities in question take place entirely in Texas, as you stipulate, may not in all cases be sufficient to keep them from having an interstate character under that statute. See *United States v. Yaquinta*, 204 F. Supp. 276 (N.D.W. Va. 1962) (where part of telephone facilities used for call between points in state were located in another state, transmission was in interstate commerce for purposes of section 1084). Even if the transmissions are found to be in interstate commerce, however, determining whether the actors in your scenario would be “engaged in the business” of gambling would also require more extensive fact finding. For instance, cases under section 1084 indicate that while the provisions do not embrace “social betting,” a person may be “in the business” under the statute even if only “in business” on his own behalf and even if gambling is not his exclusive business. See, e.g., *United States v. Baborian*, 528 F. Supp. 324 (D.R.I. 1981); *United States v. Scavo*, 593 F.2d 837 (8th Cir. 1979).²

Your second scenario, where a third party, for a fee, operates a “bulletin board” service to “assist” persons in playing “games located on that bulletin board service,” in our opinion implicates sections 47.03, (“Gambling Promotion”), 47.04 (“Keeping a Gambling Place”), 47.05, (“Communicating Gambling Information”), and 47.06, (“Possession of Gambling Device, Equipment, or Paraphernalia”), if the players bet on the card games.

¹On the other hand, we note that the facially overlapping nature of such provisions has in the past been one basis for successful contentions that the provisions were unconstitutionally vague, that is, that they did not sufficiently apprise actors whether contemplated conduct was criminalized thereunder. See, e.g., *Adley v. State*, 718 S.W.2d 682 (Tex. Crim. App. 1985), *cert. denied*, 479 U.S. 815 (1986). Since issues both as to the adequacy of notice given by a penal provision, and as to which specific provisions among somewhat overlapping ones are more appropriate for prosecution, depend ultimately on the facts of the particular case, we do not attempt to resolve these questions here.

²If the activities rise to the level of a “gambling business” involving five or more persons, the federal provisions in 18 U.S.C. § 1955, “Prohibition of Illegal Gambling Businesses,” could also be implicated. Notably, interstate activity is not expressly a necessary element to the section 1955 offense. Section 1955 is discussed in more detail below in relation to your second and third questions.

The term "gambling place" is integral to the portions of sections 47.03 and 47.04 we think are implicated here. Section 47.01(3) defines "gambling place" as "any real estate, building, room . . . vehicle, or other property whatsoever, one of the uses of which is the making or settling of bets." Section 47.03 makes it an offense for a person knowingly or intentionally to "operate[] or participate[] in the earnings of a gambling place." Section 47.04 makes it an offense if he "knowingly uses or permits another [person] to use as a gambling place . . . property . . . owned by him or under his control." Section 47.04 provides the same defense to prosecution under that section as does section 47.02, "Gambling," discussed above, but since you stipulate that the operator of the bulletin board service receives a fee apart from "personal winnings," the defense would not apply here.

That the players may not be present at the "gambling place" here does not we think take these activities out of the provisions of sections 47.03 and 47.04. Notably, the court in *State v. Taylor*, 805 S.W.2d 440 (Tex. Crim. App. 1991), found that a place used for the "telephonic receiving of bets" was a "gambling place." We see no distinction here albeit the transmission devices may also include computers and modems or other means of transmission than just telephones and telephone lines. The main hurdle to prosecution, on the facts you stipulate, would rather be proving the requisite knowledge or intent: in effect, proving that the service operator *knew* that the players were "betting" something of value on the games. Assuming such knowledge could be shown, we believe the activities you describe violate either or both of sections 47.03 and section 47.04.

We note too that, assuming the requisite knowledge on the service operator's part, section 47.05, "Communicating Gambling Information" making it an offense, "with the intent to further gambling," to knowingly communicate "information as to bets" or to "maintain[] equipment for the transmission or receipt of such information," may be violated as well. It is not wholly clear to us, however, from your description of the "bulletin board" service here as "assisting persons in playing the card games located on that bulletin board service," precisely what the bulletin board devices do. Similarly, again assuming the requisite knowledge, and depending on how the "bulletin board" actually works, the activities could fall within the broad language of section 47.06, which in subsection (c) makes it an offense "with the intent to further gambling" to knowingly own . . . or possess gambling paraphernalia."³ "Gambling paraphernalia" is broadly defined in section 47.01(6) as "any . . . apparatus by means of which bets . . . may be recorded or registered" or "any record, ticket, certificate, bill, slip, . . . or other means of carrying on bookmaking, wagering pools, . . . policy, or similar games." Depending on the facts, we believe that charges might be brought under more than one of these sections for the operations you ask about. *See Rush*, 576 S.W.2d 628.

³Section 47.06 sets out the same defense as section 47.04, which, again, because of the fee charged by the service, would not apply here.

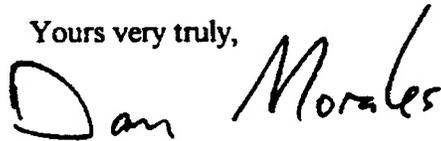
In your third scenario you add the element that the operator of the bulletin board service "acts as custodian of money" placed with him by service users for purposes of their play. Section 47.03, "Gambling Promotion," discussed above with respect to your second scenario, also makes it an offense, in subsection (a)(3), if a person "for gain, becomes a custodian of anything of value bet or offered to be bet." We assume here that you mean that the operator acts as custodian of money from which bets are to be paid, but you do not indicate whether he does this "for gain." If he does, we believe that this activity comes within the offense described in subsection (a)(3). In any case, his acting as custodian, whether "for gain" or not, would certainly be a strong indication that the service operator *knew* the players were betting, thus supplying the requisite knowledge element with which, as we concluded above, mere operation of the bulletin board service would itself come within one or more of the chapter 47 penal provisions.

Finally, given the illegality of these activities under state law, federal law at 18 U.S.C. § 1084, criminalizing "transmission of wagering information" in interstate commerce by one "engaged in the business of betting or wagering," could also apply, as well as the provisions of 18 U.S.C. § 1955, "Prohibition of Illegal Gambling Businesses." As noted above in our discussion regarding your first question, while it is an element of the section 1084 offense that the transmission be "in interstate commerce," even transmissions from one place in Texas to another might, on proper facts, be found to within the section's ambit. For the section 1955 offense, five or more persons must be involved in a "gambling business" illegal under state law; the section does not require specific proof that the activities were in interstate commerce. *See, e.g., United States v. Meese*, 479 F.2d 41 (8th Cir. 1973). Both sections have generally been broadly construed. For example, neither requires that the actors have themselves placed bets. *Cohen v. United States*, 378 F.2d 751 (9th Cir.) (section 1084 includes "assisting" in placing of bets), *cert. denied*, 389 U.S. 897 (1967); *United States v. Hawes*, 529 F.2d 472 (5th Cir. 1976) (section 1955 defendants need not themselves have gambled).

S U M M A R Y

Where two or more persons, each using a separate personal computer and modem or other data transmission device in a private place, play a card game with each other and bet on the outcome of the card game, the activities would be illegal under the gambling provisions set out in chapter 47 of the Penal Code unless there was no "public" access to the games, no one benefited other than by personal winnings, and the risk of winning or losing was the same for all participants. A third party's operation of a bulletin board service, by means of which he knowingly assisted persons in playing and betting on card games located on that bulletin board service and charged for the services used by the persons playing the game, would violate one or more of the penal provisions of chapter 47, Penal Code.

Yours very truly,

A handwritten signature in black ink that reads "Dan Morales". The signature is written in a cursive style with a large, looped "D" and "M".

DAN MORALES
Attorney General of Texas

JORGE VEGA
First Assistant Attorney General

SARAH J. SHIRLEY
Chair, Opinion Committee

Prepared by William Walker
Assistant Attorney General



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 20, 2005

The Honorable Jane Nelson, Chair
Committee on Health and Human Services
Texas State Senate
Post Office Box 12068
Austin, Texas 78711-2068

Opinion No. GA-0358

Re: 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 (RQ-0332-GA)

Dear Senator Nelson:

You ask whether a bill, proposed but not enacted during the regular session of the Seventy-ninth Legislature, would have been effective in the absence of a constitutional amendment.¹ Senate Bill 1326 sought, by adding chapter 328 to the Local Government Code, to authorize the creation of county gaming districts on a local option basis to administer a state video lottery. *See* Tex. S.B. 1326, 79th Leg., R.S. (2005).

Article III, section 47(a) of the Texas Constitution requires the legislature to “pass laws prohibiting lotteries and gift enterprises.” TEX. CONST. art. III, § 47(a). In the 1980s, the legislature proposed and the voters approved three amendments to article III, section 47 that permitted the operation of bingo games and charitable raffles by specific religious and nonprofit organizations. *See id.* § 47(b)-(d). In 1991 the electorate adopted an amendment that permits the legislature to “authorize the State to operate lotteries and [to] authorize the State to enter into a contract with one or more legal entities that will operate lotteries on behalf of the State.” *See id.* § 47(e); Tex. Att’y Gen. Op. No. GA-0103 (2003) at 4-7.

In Attorney General Opinion GA-0103, this office was asked to determine “whether the Texas Legislature may authorize the operation of video lottery terminals without an amendment to the Texas Constitution.” Tex. Att’y Gen. Op. No. GA-0103 (2003) at 2. The opinion first considered the historical meaning of the term “lottery” under article III, section 47(a) of the constitution. *See* TEX. CONST. art. III, § 47(a) (requiring the legislature to “pass laws prohibiting lotteries and gift enterprises”). On the basis of long-standing decisions of the Texas Supreme Court

¹Letter from Honorable Jane Nelson, Chair, Senate Committee on Health and Human Services, to Honorable Greg Abbott, Texas Attorney General (Mar. 10, 2005) (on file with Opinion Committee, also available at <http://www.oag.state.tx.us>).

and the Texas Court of Criminal Appeals, the opinion found that any game that contains the elements of prize, chance, and consideration constitutes a “lottery.”

Section 328.051 of the proposed legislation would have permitted the commissioners court of any county to “call an election on the question of creating a county gaming district in the county . . . to permit the conduct of video lottery games in the district.” Tex. S.B. 1326, 79th Leg., R.S., § 1, sec. 328.051 (2005). Section 328.001 would have defined “video lottery” as “the conduct of video lottery games on behalf of this state as authorized under this chapter,” and “video lottery game” as “any game of chance, including a game of chance in which the outcome may be partially determined by skill or ability, that for consideration may be played by an individual on an electronic machine or video display.” *Id.* sec. 328.001(3)-(4). If the proposition to create a county gaming district were supported by a majority of the voters in the election, the district would be created. *See id.* sec. 328.051(d).

An individual or a company interested in obtaining a “video lottery retailer” license would apply to the Texas Lottery Commission (the “Commission”), which could by rule establish the minimum qualifications therefor. *Id.* sec. 328.101(a), (c). A person holding a video lottery retailer license would be authorized to “operate video lottery games in accordance with this chapter and commission rules at one location approved by the commission within the boundaries of each district.” *Id.* sec. 328.101(b). The bill would also have established procedures for regulating the conduct of games, for issuing, suspending and revoking licenses, and for division of the proceeds realized from the operation of games. *See id.* secs. 328.104-.105, .151, .153-.154.

Senate Bill 1326, as we have indicated, would have authorized “a person that holds a license . . . [to] operate video lottery games in accordance with this chapter and [Lottery] [C]ommission rules.” *Id.* sec. 328.101(b). The principal difference between the substance of the bill under consideration here and the facts presented in Attorney General Opinion GA-0103 is that, in the situation you pose, there was a specific bill detailing precisely the method by which a person would have been authorized to operate video lottery terminals, whereas in the latter we were considering the question in the abstract. Senate Bill 1326 basically would have authorized local option elections by which the voters in each county or precinct could approve the establishment of a gaming district and delegated to the various commissioners courts the power to initiate the process of permitting the operation of video lottery terminals.

It is well established that the legislature may not authorize an action that the Texas Constitution prohibits. *Tex. Mun. League Intergovernmental Risk Pool v. Tex. Workers' Comp. Comm'n*, 74 S.W.3d 377, 381 (Tex. 2002); *Maher v. Lasater*, 354 S.W.2d 923, 925 (Tex. 1962). Furthermore, the legislature is not empowered to delegate authority that it does not possess. *City of Amarillo v. Tutor*, 267 S.W. 697, 699 (Tex. 1924). Because the operation of video lottery terminals is not allowed by article III, section 47(e) of the Texas Constitution, we conclude that the legislature may not, absent a constitutional amendment, authorize the creation of county gaming districts on a local option basis that would then permit the Commission to administer a video lottery in those counties.

S U M M A R Y

The legislature may not, absent a constitutional amendment, authorize the creation of county gaming districts on a local option basis that would then permit the Texas Lottery Commission to administer a video lottery in those counties.

Very truly yours,



GREG ABBOTT
Attorney General of Texas

BARRY R. MCBEE
First Assistant Attorney General

NANCY S. FULLER
Chair, Opinion Committee

Rick Gilpin
Assistant Attorney General, Opinion Committee



**THE ATTORNEY GENERAL
OF TEXAS**

**JIM MATTOX
ATTORNEY GENERAL**

December 20, 1990

Honorable Terral Smith
Chairman
Natural Resources Committee
House of Representatives
P. O. Box 2910
Austin, Texas 78768-2910

Opinion No. JM-1267

Re: Authority of the legisla-
ture to permit casino games of
chance without a constitutional
amendment (RQ-2102)

Dear Representative Smith:

Article III, section 47, of the Texas Constitution provides that the legislature "shall pass laws prohibiting lotteries and gift enterprises," while permitting the holding of certain charitable bingo games and raffles. The legislature has so provided, forbidding in chapter 47 of the Penal Code the holding of lotteries. In addition, the definitions and prohibitions set forth in chapter 47, which proscribes "gambling" as defined in that chapter, are broad enough to effectively prohibit those types of games typically conducted in gambling casinos. See Searcy & Patterson, Practice Commentary, Tex. Penal Code § 47.02 (Vernon 1973).¹

You ask about the proper construction of section 47 of article III. Specifically you ask the following three questions:

1. The Practice Commentary to section 47.02 provides in pertinent part:

Section 47.02 as enacted appears to proscribe all forms of gambling, from coinmatching and the weekly football pool to lotteries and roulette to parimutuel betting whether on track or with a bookie. As such the section preserves, although with much greater economy, the basic scheme of prior law that in Penal Code arts. 615 to 618, 644, 645, and 646 to 652 outlawed most forms of gambling.

1. May the legislature, without an amendment to Article III, Section 47, of the Texas Constitution, authorize any of the following casino gambling games [in] this state:

- (a) roulette;
- (b) dice;
- (c) slot machines; or
- (d) other games awarding a prize solely by chance?

2. May the legislature, without an amendment to Article III, Section 47, of the Texas Constitution, authorize any of the following casino gambling games in this state:

- (a) poker;
- (b) blackjack;
- (c) sports pools; or
- (d) other games involving an element of skill?

3. May the legislature, without an amendment to Article III, Section 47, of the Texas Constitution, authorize casino gambling to exist only on Port Arthur's Pleasure Island?

There is no question that chapter 47 of the Penal Code proscribes those gaming activities about which you ask. See Penal Code §§ 47.01, 47.02. The issue is whether those gaming activities fall within the ambit of the phrase "lotteries and gift enterprises" set forth in section 47 of article III and are thereby prohibited by the Texas Constitution. If they do, then the legislature may not authorize those activities by amending the Penal Code; if not, then it may. See Tussey v. State, 494 S.W.2d 866 (Tex. Crim. App. 1973); Barry v. State, 45 S.W. 571 (Tex. Crim. App. 1898).

The Texas Constitutions of 1845, 1861, 1866, and 1869 each contained the following prohibition regarding lotteries:

No lottery shall be authorized by this State; and the buying or selling of lottery tickets within this State is prohibited.

Tex. Const. art. XII, § 36 (1869); Tex. Const. art. VII, § 17 (1866); Tex. Const. art. VII, § 17 (1861); Tex. Const. art. VII, § 17 (1845). The constitution of 1876 contained the following prohibition of lotteries set forth in section 47 of article III:

The Legislature shall pass laws prohibiting the establishment of lotteries and gift enterprises in this State, as well as the sale of tickets in lotteries, gift enterprises or other evasions involving the lottery principle, established or existing in other States.

The addition of the language prohibiting "gift enterprises or other evasions of the lottery principle"² apparently was included in order to indicate the drafters' support of two Texas Supreme Court cases that held that the 13th Legislature did not license the operation of "gift enterprises" by the enactment of an occupation tax on them and that a "gift enterprise," as then understood, was essentially a lottery.³ See Randle v. State, 42 Tex. 580 (1875); State v. Randle, 41 Tex. 292 (1874); 1 G. Braden, The Constitution of the State of Texas: An Annotated and Comparative Analysis 192 (1977).

2. It is apparent that the phrase was intended to proscribe other forms of lotteries. See also City of Wink v. Griffith Amusement Co., 100 S.W.2d 695 (Tex. 1936); State v. Randle, 41 Tex. 292 (1874).

3. The licensing statute defined "gift enterprises" in the following fashion:

Every person, firm, or corporation who shall sell anything with a promise, either expressed or implied, to give anything in consideration of such sale and purchase, shall be regarded as the proprietor of a gift enterprise.

Acts 1873, 13th Leg., ch. 121, § 3, at 200.

Section 47 of article III was amended in 1980 to permit the operation of bingo games by charitable organizations and again in 1989 to permit such organizations to hold raffles. Acts 1989, 71st Leg., H.J.R. 32, § 1; Acts 1979, 66th Leg., S.J.R. 18, § 1. Subsection (a) of section 47 of article III of the Texas Constitution now provides the following:

The Legislature shall pass laws prohibiting lotteries and gift enterprises in this State other than those authorized by Subsections (b) and (d) of this section [which authorize the legislature to permit under certain circumstances the conducting of charitable bingo games and raffles]. (Emphasis added.)

The Texas Supreme Court has declared that section 47 was not intended to condemn merely lotteries, but was intended also to condemn separately stated schemes, which were not lotteries, but which involved the lottery principle, or chance:

In general, it may be said that chance is the basic element of a lottery. Unless a scheme for the awarding of a prize requires that it be awarded by a chance, it is not a lottery. . . .

There are, however, in a lottery, according to the authorities, three necessary elements, namely, the offering of a prize, the award of the prize by chance, and the giving of a consideration for an opportunity to win the prize. 38 C.J. p. 289, § 2. But the Constitution condemns those things which fall short of containing all the essential elements of a lottery, namely, those things which involve the lottery principle, of which "chance" is the one which constitutes the very basis of a lottery, and without which it would not be a lottery. (Emphasis added.)

City of Wink v. Griffith Amusement Co., 100 S.W.2d 695, 701 (Tex. 1936).

But it is equally clear that the drafters did not intend section 47 of article III to proscribe all forms of gambling. During the drafting of the constitution, an amendment to section 47 was offered to add the words "and

shall pass laws prohibiting gambling of every character in all places." The amendment was not adopted. 1875 Texas Constitutional Convention, Journal of the Constitutional Convention of the State of Texas, Begun and Held at the City of Austin, September 6, 1875, at 269. Moreover, it is clear that the term "lottery" was not thought at the time that section 47 was adopted to include all forms of gambling either. See Panas v. Texas Breeders & Racing Ass'n, 80 S.W.2d 1020 (Tex. Civ. App. - Galveston 1935, writ dismiss'd) (construing section 47 not to prohibit wagering on horse races); State v. Randle, 41 Tex. 292 (1874); V.T.C.S. art. 179e (creating the Texas Racing Commission and permitting parimutuel wagering on horse races and greyhound races).

Texas courts uniformly have held that three elements comprise a lottery:

- (1) a prize in money or other thing of value;
- (2) its distribution by chance; and
- (3) payment, either directly or indirectly, of a valuable consideration for the chance to win the prize.

City of Wink, supra; Brice v. State, 242 S.W.2d 433, 434 (Tex. Crim. App. 1951); Cole v. State, 112 S.W.2d 725 (Tex. Crim. App. 1937); State v. Socony Mobil Oil Co., 386 S.W.2d 169 (Tex. Civ. App. - San Antonio 1964, writ ref'd n.r.e.);⁴ see also Attorney General Opinions JM-513 (1986); H-820 (1976).

With your first two questions, you ask whether a list of gaming activities typically conducted in gambling casinos falls within the ambit of the phrase "lotteries and gift

4. Subdivision (6) of section 47.01 of the Penal Code defines "lottery" in the following fashion:

'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.

enterprises." For purposes of this opinion, we assume that two of the necessary three elements of a lottery would be present during the holding of the gaming activities about which you inquire, i.e., the payment of consideration and the awarding of a prize. We understand you to ask whether the necessary third element, the award of the prize by chance, as opposed to an award determined by skill, would also be present.

In Attorney General Opinion C-619 (1966), this office was asked whether a certain referral selling plan called a "representative purchasing commission agreement" constituted a lottery. In discussing the necessary element of chance, the opinion declared:

The second element, the distribution of the prize by chance, requires a closer analysis in the light of the decisions as to whether the dominating element of the entire scheme was that of chance, or that of skill, judgment, or ingenuity, 54 C.J.S. 846, Lotteries, Sec. 2b(2), and cases cited. If the plan or game depends entirely on skill, it is not a lottery although prizes are offered for the best solution. Boatright v. State, 118 Tex. Crim. 381, 38 S.W.2d 87 (1931). If chance predominates over skill or judgment and permeates the whole plan, a lottery is established. Sherwood & Roberts-Yakima, Inc. v. Clyde G. Leach, 67 W.D.2d 618, 409 P.2d 160 (Wash. Sup. 1965).

Id. at 5-6 (emphasis in original). See Adams v. Antonio, 88 S.W.2d 503, 505 (Tex. Civ. App. - Waco 1935, writ ref'd) (dicta to the effect that gaming statute was violated in instance in which chance predominates over skill); see also Attorney General Opinions WW-222 (1957); V-1483 (1952); V-544 (1948); V-238 (1947).

We conclude that the legislature, without amending section 47 of article III of the Texas Constitution, may amend chapter 47 of the Penal Code to permit the holding of those gaming activities that do not constitute a lottery, i.e., that do not comprise the elements of consideration, a prize, and chance. Whether any of the gaming activities about which you ask involves the dominating element of skill, as opposed to chance, is a question of fact that cannot be resolved in the opinion process. It is the character of the game, and not the skill or want of skill of

the player, that determines whether the game is one of skill or chance. See Adams v. Antonio, supra (authorities cited therein). Therefore, we cannot answer your first two questions.

Your third question is whether the legislature may, without amending section 47 of article III of the Texas Constitution, permit the holding of those gaming activities typically comprising casino gambling only in Port Arthur. You have not provided us with a draft of any proposed amendment to chapter 47 of the Penal Code. We do not provide general guidance or answer speculative questions in the opinion process. Accordingly, we decline to answer your third question. We note, however, that any amendment to chapter 47 of the Penal Code that permitted in Port Arthur alone the holding of otherwise proscribed gaming activities should be considered in light of article III, section 56, of the Texas Constitution.⁵ But see V.T.C.S. art. 179e, § 6.14(c) (provides that each greyhound track licensed under the act must be located in a county that has a population of more than 190,000 according to the most recent federal census, and that includes all or part of an island that borders the Gulf of Mexico).

We conclude that the legislature may, without amending section 47 of article III of the Texas Constitution, amend chapter 47 of the Penal Code to authorize gaming activities that do not constitute a lottery or gift enterprise, i.e.,

5. Article III, section 56, of the Texas Constitution prohibits the legislature from enacting, except as provided, local and special laws and provides in pertinent part:

The Legislature shall not, except as otherwise provided in this Constitution, pass any local or special law, authorizing:

. . . .

For limitation of civil or criminal actions;

. . . .

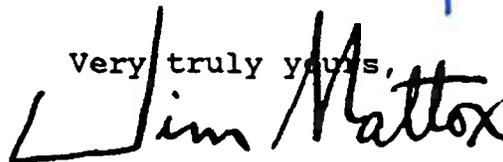
And in all other cases where a general law can be made applicable, no local or special law shall be enacted.

that do not comprise the three elements of consideration, prize, and chance. Whether any specific gaming activity involves the dominating element of skill, as opposed to chance, is a question of fact that this office cannot resolve in the opinion process. Therefore, we cannot answer as a matter of law your first two questions. Because we do not answer speculative questions in the opinion process, we cannot answer your third question.

S U M M A R Y

The legislature, without amending section 47 of article III of the Texas Constitution, may amend chapter 47 of the Penal Code to authorize the holding of those gaming activities that do not comprise the elements of a lottery, i.e., consideration, prize, and chance. Whether any specific gaming activity involves the dominating element of skill, as opposed to chance, is a question of fact that this office cannot resolve in the opinion process.

Very truly yours,



J I M M A T T O X
Attorney General of Texas

MARY KELLER
First Assistant Attorney General

LOU MCCREARY
Executive Assistant Attorney General

JUDGE ZOLLIE STEAKLEY
Special Assistant Attorney General

RENEA HICKS
Special Assistant Attorney General

RICK GILPIN
Chairman, Opinion Committee

Prepared by Jim Moellinger
Assistant Attorney General

TCH -Sam Moon Location

Dec 2017

TCH reaches out to Dallas District Attorney to discuss TCH Business Model

11/13/2018

TCH gets model approved by TABC

6/1/2019

TCH starts looking for alternative sites with the guidance from city officials while continuing to pursue SUP for Midtown location

6/1/2019

TCH identifies Sam Moon location and requests zoning verification letter for commercial amusement inside from the city.

12/2/2019

CoDallas Verifies that card houses should be zoned Commercial Amusement inside

2/25/2020

City requests meeting with TCH. TCH meets with 9-10 officials from the city including city staff, city attorneys, vice, and Dallas PD. Detailed discussions regarding the business and operations are discussed.

10/22/2020

Fire Marshall does on site inspection and approves location.

10/23/2020

On site inspection for final CO by city

12/27/2021

TCH receives letter in mail stating CO was issued in error

2018

2019

2020

2021

12/13/2018

Zoning Commission unanimously approves TCH Zoning Application

11/8/2018

TCH Meets with Dallas Zoning Commissioner Schultz

9/27/2018

TCH Meets with Dallas City Councilman Lee Kleinman

10/7/2019

TCH Resubmits application for SUP. Previous opposition provides letter of support.

1/23/2019

City Council votes 8-6 in favor of TCH specific use permit. City Attorney Caso tells city council on record that TCH business model is legal. Supermajority needed so SUP not granted.

2/12/2020

City Council unanimously approves SUP for Texas Card House

1/9/2020

Second Zoning Commission Meeting. TCH approved.

TCH – Midtown Location

Panel A

03-22-22

BDA212-018

11814 Harry Hines Blvd. #135

(Support Reference)

From: [Max Arco](#)
To: [Jackson, Latonia](#)
Subject: In regards to Dallas Board of Adjustments - case: BDA 212-018
Date: Tuesday, February 22, 2022 10:05:27 AM

External Email!

Hello,

I have visited Texas 3 times in the past 18 months. I stayed in a local hotel and came solely just to play poker. 2 of those trips I spent at Dallas Texas card house specifically. I had also previously played in other Dallas games. This above the board game is amazing. I have played all over the United States for poker and the setup and environment around these games are amazing. The room is run well and it feels very safe. Please take all this into consideration.

Thank you,
Max Arco
Woodville, WI resident

CAUTION: This email originated from outside of the organization. Please, do not click links or open attachments unless you recognize the sender and know the content is safe.

From: [REDACTED]
To: [Jackson, Latonia](#)
Subject: Texas Card House board case: BDA 212-018
Date: Tuesday, February 22, 2022 11:17:41 AM

External Email!

Dear Ms. Jackson,

I support the Texas Card House because they are legal; just as women's and men's social and business clubs are legal: and just as family country clubs are legal. The biggest difference I see is that The Texas Card House is open to every card playing like minded friendly person of any race, ethnicity, and gender that enjoys socializing with everyone and making new friends in a safe and friendly environment. They are a broad welcoming community unto themselves. God bless freedom and friendship!

Sincerely,
Ricky Brown

Sent from my iPhone

CAUTION: This email originated from outside of the organization. Please, do not click links or open attachments unless you recognize the sender and know the content is safe.

From: [REDACTED]
To: [Jackson, Latonia](#)
Subject: TEXAS CARD HOUSE - DALLAS
Date: Tuesday, February 22, 2022 12:05:41 PM

External Email!

Hi Latonia Jackson,

Hope you are doing great, my name is Vicente Candelas, I live in Texas for the past 5 years and I am here in support of Texas Card House of Dallas, I play poker for the last 20 years and I have played in places like South America, Caribbean and United States.Y

You may wonder why I support TCH?, Well, just as there is a community for golf, bowling and other great games that this great city has, there is also a community that play poker like me, and having a poker club like Texas Card House of Dallas gives us a certain security and comfort. Security because their business model is very clear, and comfort since we do not have to travel to other states to play.

There are many good things I could say about Texas Card House, but as an accountant I see this opportunity for the City differently, for me the business model that Texas Card House of Dallas presents to the city and to the poker community is very transparent in everything they do and that should be important.

We should also ask ourselves how this business model of TCH helps the city? Well, may be im wrong in the numbers but I think Texas card house of dallas has about 150 direct employees helping families who might have to travel further in search of a job. On the other hand, this type of business model generates income for the city, so for me thats why it does not make sense to revoke the permits to Texas Card House of Dallas, on the contrary, this business model of TCH should be used as a model to bring new poker clubs to the city of Dallas.

So I conclude my presentation here saying that Texas Card House of Dallas is good for the City and is good for the poker community. So please, think about this twice before make a decision and thanks for the opportunity.

Vicente Candelas

From: [REDACTED]
To: [Jackson, Latonia](#)
Subject: Regarding Dallas Board of Adjustments - case: BDA 212-018
Date: Tuesday, February 22, 2022 10:19:46 AM

External Email!

Hello,

I believe that this card club should remain open as it provides a safe place for many to play cards and satisfying employment for those that work there.

This establishment has not in any way been a detriment to the surrounding community. They provide security to their patrons and make sure everyone feels safe while playing there.

I ask you to please reconsider your decision for removing their Certificate of Occupancy.

Best Regards!

Chris Wilbert

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Panel A

03-22-22

BDA212-018

11814 Harry Hines Blvd. #135

(Opposition Reference)

From: [Redacted] Latonia
Subject: Poker in Dallas
Date: Tuesday, March 15, 2022 10:22:26 AM

External Email!

Hello- I wanted to give my insight on how I question the legality of poker rooms. If you play a poker tournament at Texas card house, it s clear the house makes money off of gambling patrons. When I walk in to sign up for the tourney they immediately take a \$10 daily membership fee. I agree with that. However if you look at the breakdowns on how each players buy in is distributed it s clear the House makes money outside of the \$10 daily membership fee! I will give an example.

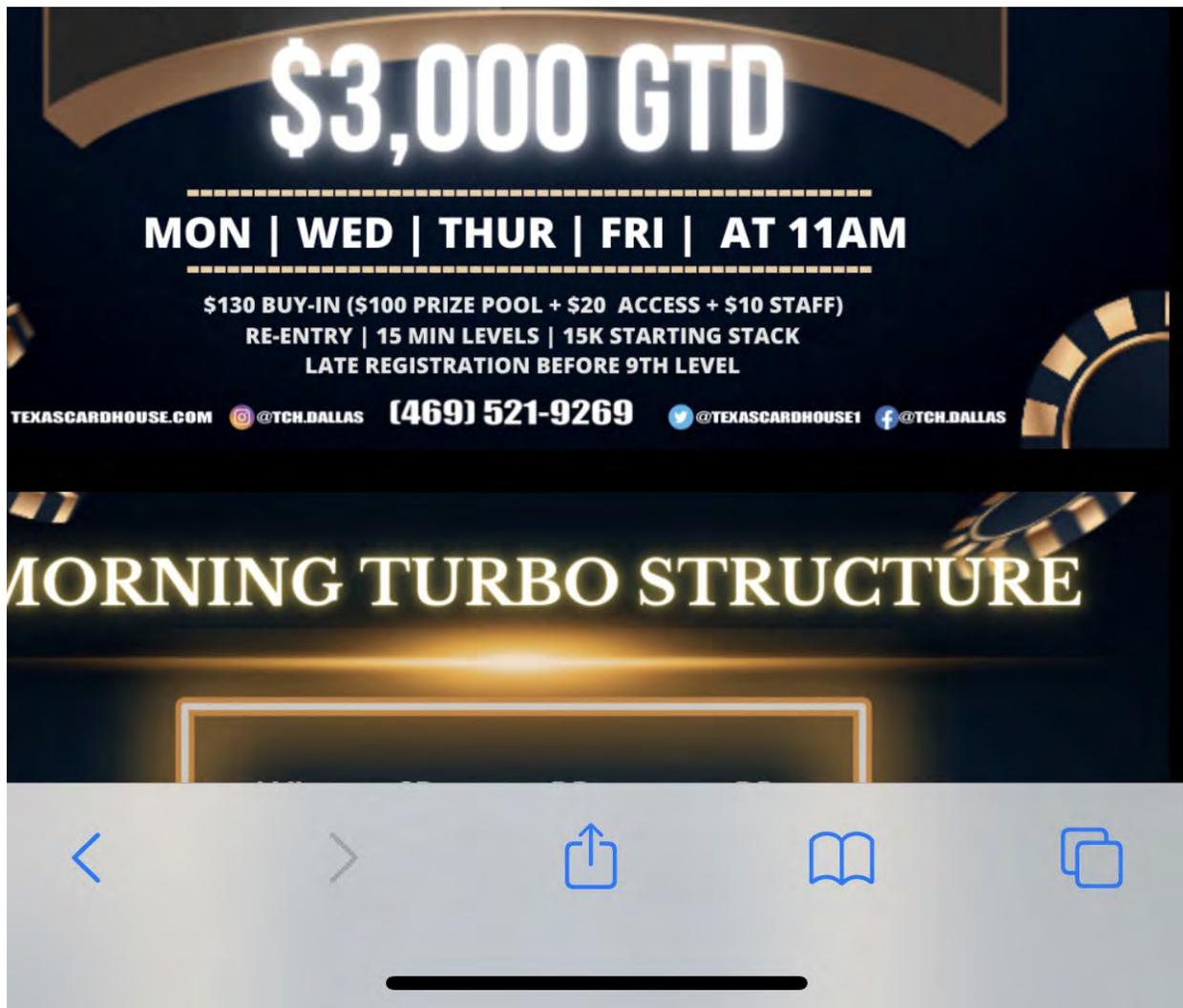
CAUTION This email originated from outside of the organization. Please, do not click links or open attachments unless you recognize the sender and know the content is safe.

4:05

AA texascardhouse.com

DALLAS TEXAS CARD HOUSE
11834 HARRY HINES STE 135 Dallas, TX 75234

MORNING TURBO
Tournament



If you look under the days, it shows you the breakdown of the buy in amount.

\$130 buy in

1. \$100 to the prize pool
2. \$20 "access" (but I ve already paid my daily \$10.00 daily fee to the house)
3. \$10 to the staff
4. If 180 people join the tourney, the house has made \$1800 off of daily membership fee s collected at the door and \$3600 from players tournament buy in amount.

So if the house is taking \$20 from each patron gambling from their buy in amount then it clearly shows the house is making money off the amount going towards the tournament pool from each player playing poker! That is how this is illegal. Casinos do the same thing, but they re allowed to profit money off of gambling at play. In order for this to be a legal way of gambling the house cannot benefit outside of the membership fee s or hourly chair rental costs! I d like my email to remain anonymous.

Thank you

FILE NUMBER: BDA201-125(JM)

BUILDING OFFICIAL'S REPORT: Application of Patrick Griot for a variance to the front yard setback regulations, and for a special exception to the fence height regulations, and for a special exception to the fence standards regulations, and for a special exception to the visibility obstruction regulations at **9943 Coppedge Lane**. This property is more fully described as Lot 8, Block 1/6220, and is zoned an R-7.5(A) Single Family District, which **(1)** limits the height of a fence in the front yard to four feet; **(2)** requires a fence panel with a surface area that is less than 50 percent open may not be located less than five feet from the front lot line; **(3)** requires a 20-foot visibility triangle at driveway approaches and alleys; and, **(4)** requires a front yard setback of 25 feet. The applicant proposes to construct a nine-foot-high fence with a fence panel having less than 50 percent open surface area located less than five feet from the front lot line in a required front yard with portions of the fence structure located in required visibility obstruction triangles, which will require a five-foot special exception to the fence regulation, a second special exception to the fence regulations relating to the solid nature of the fence, and special exceptions to the visibility obstruction regulations. The fence will surround the single-family residential accessory pool structure and provide an 11-foot six-inch front yard setback, which will require a 13-foot six-inch variance to the front yard setback regulations.

LOCATION: 9943 Coppedge Lane

APPLICANT: Patrick Griot

REQUEST:

The applicant is redeveloping the 10,450-square-foot site with a 3,742-square-foot single-family structure that meets the setback requirements. The encroachment into the southern Coppedge Lane second front yard is for a swimming pool. The pool and second front yard area are proposed to be enclosed by an eight-foot-tall solid wood fence. Portions of the fence sit atop a three-foot-high solid retaining wall making the maximum fence and gate height nine feet. Portions of the solid fence located approximately on the property line are located in three 20-foot visibility triangles at the southwest corner of the property from the alleyway, and from the driveway beside the alleyway, onto Coppedge Lane from the south.

UPDATES:

On February 11, 2022, the applicant submitted revised plans indicating a reduction in the overall fence height from 11 feet to nine feet. On February 22, 2022, Panel A held a

public hearing for the requests and delayed action until March 22, 2022 to allow time for neighborhood interaction. On March 7, 2022, the applicant's representative submitted a request to rescind the requests for special exceptions to the fence standards relating to height and the visual obstruction regulations. ***The remaining request is for a variance to allow the pool structure in the southern Coppedge Lane second front yard setback.***

STANDARD FOR A SPECIAL EXCEPTION TO FENCE STANDARDS:

Section 51A-4.602 of the Dallas Development Code states that the board may grant a special exception to the fence standards when in the opinion of the board, the special exception will not adversely affect neighboring property.

STAFF RECOMMENDATION (fence height and opacity):

No staff recommendation is made on this or any request for a special exception to the fence standards since the basis for this type of appeal is when in the opinion of the board, the special exception will not adversely affect neighboring property. The applicant provided evidence comparing the prospective solid fence on the secondary frontage of the corner lot, to seven other corner lots in the area with solid fences on one of the two street frontages (**Attachment B**).

STANDARD FOR A SPECIAL EXCEPTION TO THE VISUAL OBSTRUCTION REGULATIONS:

Section 51A-4.602(d)(3) of the Dallas Development Code states that the board shall grant a special exception to the requirements of the visual obstruction regulations when, in the opinion of the board, the item will not constitute a traffic hazard.

STAFF RECOMMENDATION:

No staff recommendation is made on this or any request for a special exception to the visual obstruction regulations since the basis for this type of appeal is when in the opinion of the board, the special exception will not constitute a traffic hazard. However, staff does provide a technical opinion to assist in the board's decision-making.

The Sustainable Development and Construction Senior Engineer reviewed the proposed obstructions for the fence and has no objection to the requests (**Attachment C**).

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 zoned an R-7.5(A) Single Family District in that it is slightly sloped, and, according to the

application, contains 10,450 square feet in area. Lots in this district are a minimum of 7,500 square feet in area. However, evidence submitted by the applicant (**Attachments A and B**) identified six lots in the immediate vicinity with an average of 10,680 square feet of lot area.

- The evidence also showed the average house size is about 3,836 square feet. The proposed development is for a commensurate 3,742 square feet.
- Finally, the subject site is encumbered with the unnecessary hardship of two front yards. Between the slight slope and additional front yard setback, the evidence presented notes the site in its current condition has less developable area than other lots in the vicinity with one required front yard. The applicant is seeking relief from the additional front yard setback along the southern frontage of Coppedge Lane and plans to provide a minimum of 30 feet along the eastern frontage, as required. The southern portion is to be used as a backyard. The variance will allow for the construction of a swimming pool. The main structure is maintaining both front yard setbacks of 30 feet, as established by the build line on the existing plat.

BACKGROUND INFORMATION:

Zoning:

Site: R-7.5(A) Single Family District
North: R-7.5(A) Single Family District
South: R-7.5(A) Single Family District
East: R-7.5(A) Single Family District
West: R-7.5(A) Single Family District

Land Use:

The subject site is being redeveloped with a single-family structure. All surrounding properties are developed with single-family uses.

Zoning/BDA History:

There have not been any recent related board or zoning cases recorded either on or near the subject site.

GENERAL FACTS /STAFF ANALYSIS:

This request for a variance to the front yard setback regulations is made to construct and maintain a swimming pool structure. The site is being redeveloped with a single-family structure and is located in an R-7.5(A) Single Family District which requires a minimum front yard setback of 25 feet. However, this property is encumbered with two front yards due to a provision in the Dallas Development Code meant to maintain block continuity when lots face upon a street and provide a front yard setback. This second

front yard setback is required to maintain block continuity established by lots to the north and west of the subject site, which all front along the meandering Coppedge Lane. Furthermore, the plat for this property requires a 30-foot build line on both the eastern and southern frontages along Coppedge Lane. The board cannot provide relief to this requirement. Only a replat of the property to remove the build line will resolve the encumbrance.

The applicant is seeking relief from the additional front yard setback along the southern frontage of Coppedge Lane and plans to provide a minimum of 25 feet along the eastern frontage, as required. Additionally, use of the southern portion of the lot for the swimming pool, backyard, and driveway surrounded by a fence and retaining wall solid in nature and located along the property line. The submitted site plan indicates:

- the proposed pool structure would be located as close as 11-feet six-inches from the front property line along the southern Coppedge Lane frontage or as much as 13-feet six-inches into the 25-foot front yard setback.
- A six-foot solid wood fence is proposed along the northern, western, and southern portions of the lot. Southern portions are proposed atop a three-foot solid retaining wall due to the slope of the site, making the fence and driveway gates up to nine feet-in-height.
- Portions of the solid fence located approximately on the property line are located in three 20-foot visibility triangles at the southwest corner of the property from the alleyway, and from the driveway beside the alleyway.

In all, the southern portion of the lot would function as a backyard with a tall privacy fence, driveway into the garage, and swimming pool. The main structure is maintaining both front yard setbacks.

Lots in this district are a minimum of 7,500 square feet in area. However, evidence submitted by the applicant (**Attachment A**) identified six lots in the immediate vicinity with an average of 10,680 square feet of lot area. The subject site is unique and different from most lots zoned an R-7.5(A) Single Family District because it is slightly sloped, and, according to the application, contains 10,450 square feet in area—slightly less than the average.

The evidence also showed the average house size is about 3,836 square feet. The proposed development is for a commensurate 3,742 square feet.

Finally, the subject site is encumbered with the unnecessary hardship of two front yards. Between the slight slope and additional front yard setback, the evidence presented notes the site in its current condition has less developable area than other lots in the vicinity with one required front yard. The applicant is seeking relief from the additional

front yard setback along the southern frontage of Coppedge Lane and plans to provide a minimum of 25 feet along the eastern frontage, as required.

According to DCAD records, the new house was constructed in 2021 and contains 3,601 square feet of floor area.

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

- That granting the variance to the front 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 R-7.5(A) zoning classification.
- 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 R-7.5(A) zoning classification.

The Dallas Development Code states that in all residential districts except multifamily districts, a fence may not exceed four feet above grade when located in the required front yard. Additionally, the Dallas Development Code states that in single family districts, a fence panel with a surface area that is less than 50 percent open may not be located less than five from the front lot line.

Staff conducted a field visit of the site and surrounding area and did not notice other fences within a 400-foot radius of the property that seemed taller than four feet-in-height or solid in nature located in obvious front yards.

The applicant has the burden of proof in establishing that the special exception to the fence height regulation of up to seven feet and having fence panels less than 50 percent open will not adversely affect neighboring properties.

The last request is due to the proposed obstruction of three visibility triangles according to Section 51A-4.602(d) of the Dallas Development Code which states that a person shall not erect, place, or maintain a structure, berm, plant life, or any other item on a lot if the item is:

- in a visibility triangle as defined in the Code (45-foot visibility triangles at street intersections and 20-foot visibility triangles at drive approaches and alleys on properties zoned single family); and

- between two-and-a-half and eight-feet-in-height measured from the top of the adjacent street curb (or the grade of the portion on the street adjacent to the visibility triangle).

The Sustainable Development Department Senior Engineer has no objections to the request (**Attachment C**).

If the board were to grant the variance request and impose the submitted site plan as a condition, the proposed swimming pool structure located within the front yard setback along the southern frontage of Coppedge Lane would be limited to what is shown on this document. No additional relief is provided with this request, including relief from the platted build line which will require a replat. The applicant was also made aware of sidewalk requirements for the southern frontage of the property. Additionally, the applicant has the burden of proof in establishing how granting these special exceptions to allow the fence in the front yard will not adversely affect neighboring properties. Finally, the applicant must prove how maintaining portions of a six-foot-tall solid wood fence atop a three-foot retaining wall for a total height of nine feet located in two 20-foot visibility triangles at the intersection of the alley and driveway approach into the property from the southern Coppedge Lane frontage, and the 20-foot visibility triangle at the intersection of the alleyway and Coppedge Lane does not constitute a traffic hazard.

Timeline:

- Nov. 18, 2021: The applicant submitted an “Application/Appeal to the Board of Adjustment” and related documents which have been included as part of this case report.
- Nov. 23, 2021: The Board Administrator assigned this case to Board of Adjustment Panel A.
- Dec. 16, 2021: The Board Administrator 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 December 29, 2021 deadline to submit additional evidence for staff to factor into their analysis; and the January 7, 2022 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.

Dec. 28-29, 2021: The representative submitted evidence (**Attachment A and B**) to staff.

Dec. 30, 2021: The Board of Adjustment staff review team meeting was held regarding this request and the others scheduled for the January public hearing. The review team members in attendance included: the Planning and Urban Design Interim Assistant Director, the Board of Adjustment Chief Planner/Board Administrator, the Chief Arborist, the Development Code Specialist, the Senior Sign Inspector, the Transportation Senior Engineer, the Board of Adjustment Senior Planner, and the Assistant City Attorney to the Board.

Dec. 31, 2021: The Transportation Senior Engineer submitted a review sheet marked “no objection” to the visual obstructions (**Attachment C**).

January 18, 2022: Panel A held this case under advisement until February 22, 2022.

February 11, 2022: The applicant submitted revised plans to staff (**Attachment D**).

February 14, 2022: A revised BO report (**Attachment E**) was issued reducing the overall height of the request by two feet. No changes to the front yard variance or visual obstructions proposed.

February 22, 2022: Panel A held this case under advisement until March 22, 2022.

March 7, 2022: The applicant’s representative requested to rescind the special exceptions to the fence height and visual obstruction regulations, leaving solely the request for a variance to the front yard setback regulations along the southern Coppedge Lane frontage for the pool structure (**Attachment F**).

BOARD OF ADJUSTMENT ACTION: February 22, 2022

APPEARING IN FAVOR: Patrick Griot 3901 Sailmaker Ln. Plano, TX

APPEARING IN OPPOSITION: Michael Ayer 9961 Coppedge Ln. Dallas, TX

MOTION#1: Halcomb

I move that the Board of Adjustment, in Appeal No. BDA 201-125, on application of Patrick Griot, **grant** the 13-foot six-inch variance to the front yard setback regulations requested by this applicant because our evaluation of the property and testimony shows that the physical character of this property is such that a literal enforcement of the provisions of the Dallas Development Code, as amended, would result in unnecessary hardship to this applicant.

I further move that the following condition be imposed to further the purpose and intent of the Dallas Development Code:

Compliance with the submitted site plan is required.

SECONDED: Lamb

AYES: 3 – Lamb, Halcomb, Neumann

NAYS: 2- Narey, Frankford

MOTION FAILED: 3-2

MOTION#2: Narey

I move that the Board of Adjustment, in Appeal No. BDA 201-125, on application of Patrick Griot, **deny** the variance to the front yard setback regulations requested by this applicant **without** prejudice, because our evaluation of the property and the testimony shows that the physical character of this property is such that a literal enforcement of the provisions of the Dallas Development Code, as amended, would NOT result in unnecessary hardship to this applicant.

SECONDED: Frankford

AYES: 0 –

NAYS: 0-

MOTION WITHDRAWN:

MOTION#3: Narey

I move that the Board of Adjustment, in Appeal No. BDA 201-125, **hold** this matter under advisement until **March 22, 2022**.

SECONDED: Frankford

AYES: 5 – Lamb, Halcomb, Narey, Frankford, Neumann

NAYS: 0-

MOTION PASSED: 5-0 (unanimously)

BOARD OF ADJUSTMENT ACTION: January 18, 2022

APPEARING IN FAVOR: Patrick Griot 3901 Sailmaker Ln. Plano, TX

APPEARING IN OPPOSITION: None

MOTION#1: Narey

I move that the Board of Adjustment, in Appeal No. BDA 201-125, on application of Patrick Griot, **deny** the variance to the front yard setback regulations requested by this applicant **without** prejudice, because our evaluation of the property and the testimony shows that the physical character of this property is such that a literal enforcement of the provisions of the Dallas Development Code, as amended, would NOT result in unnecessary hardship to this applicant.

SECONDED: **Frankford**

AYES: 2 – Narey, Frankford

NAYS: 3 - Lamb, Halcomb, Neumann

MOTION FAILED: 2-3

MOTION#2: **Narey**

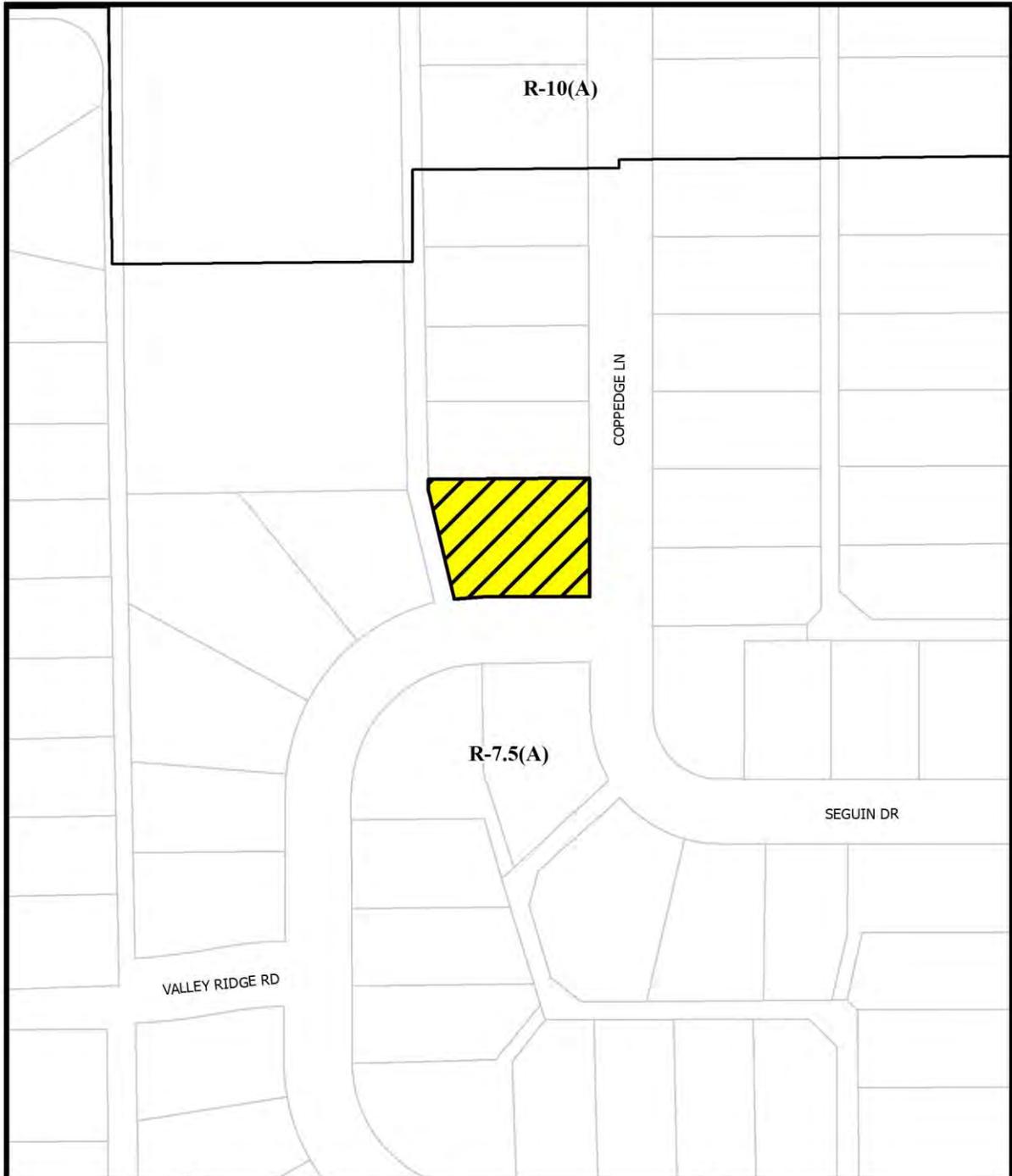
I move that the Board of Adjustment, in Appeal No. BDA 201-125, **hold** this matter under advisement until **February 22, 2022**.

SECONDED: **Lamb**

AYES: 5 – Lamb, Halcomb, Narey, Frankford, Neumann

NAYS: 0-

MOTION PASSED: 5-0 (unanimously)

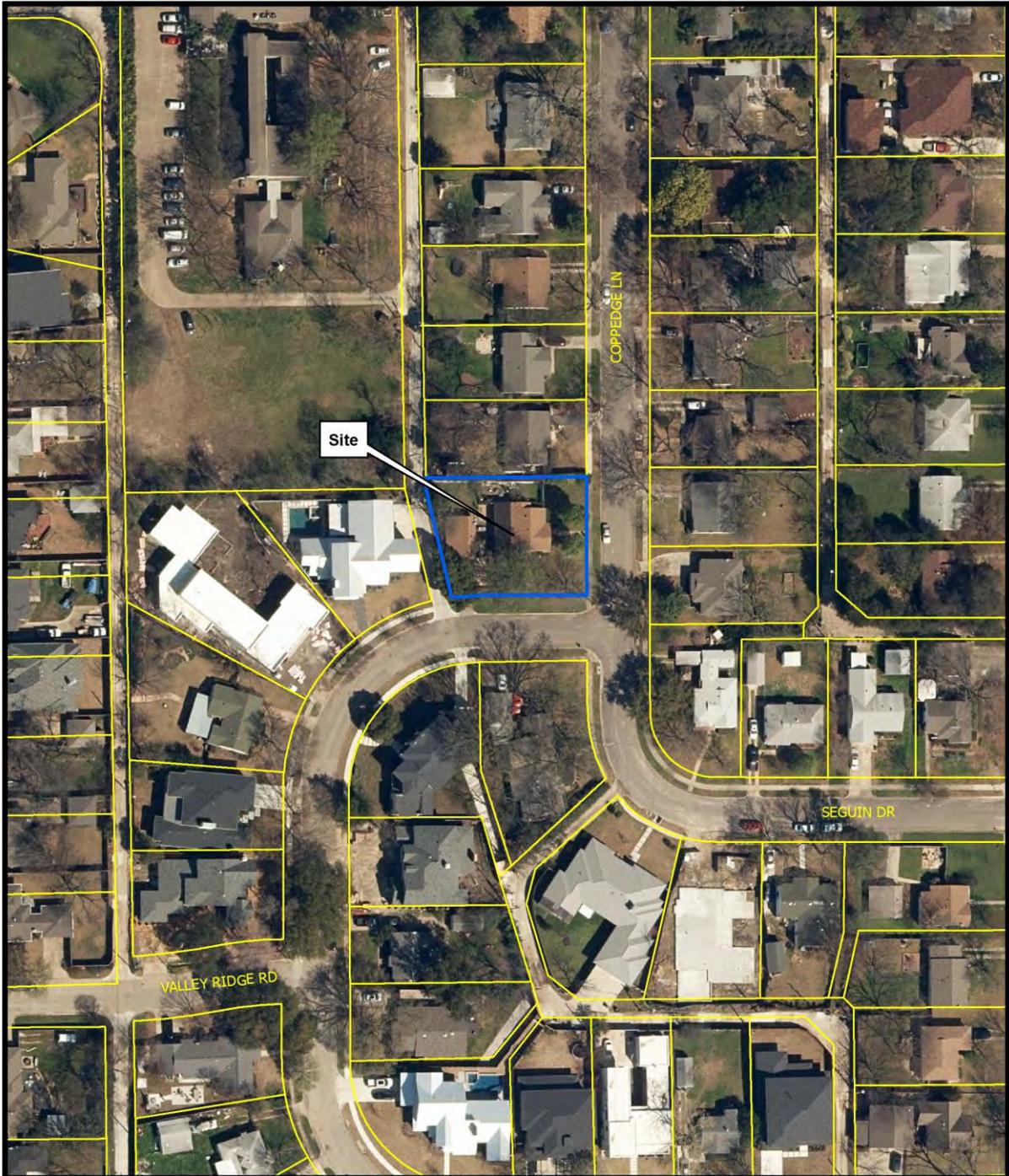


1:1,200

ZONING MAP

Case no: BDA201-125

Date: 12/22/2021

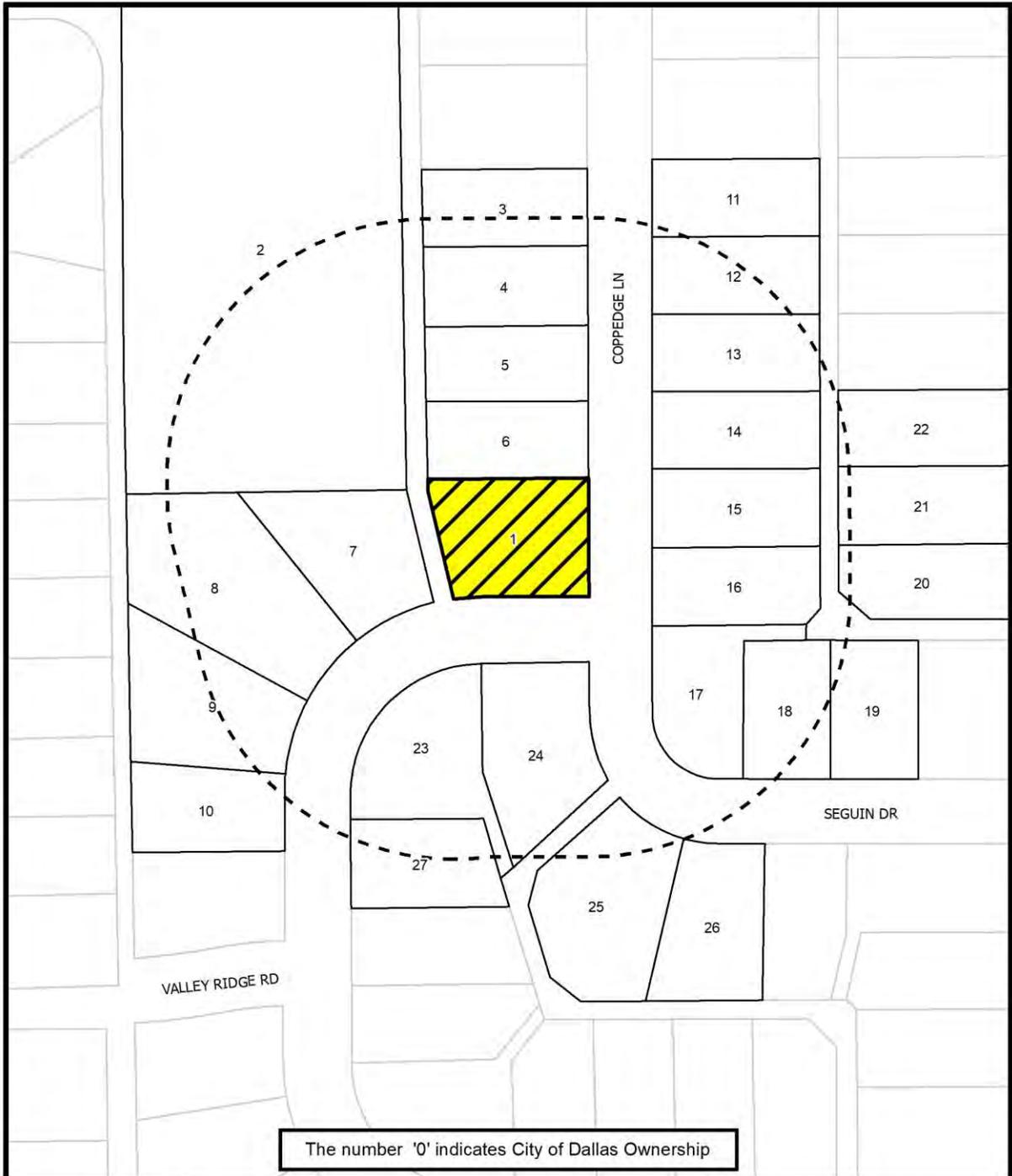


1:1,200

AERIAL MAP

Case no: BDA201-125

Date: 12/22/2021



1:1,200

NOTIFICATION

200' AREA OF NOTIFICATION
27 NUMBER OF PROPERTY OWNERS NOTIFIED

Case no: **BDA201-125**
 Date: **12/22/2021**

12/22/2021

Notification List of Property Owners

BDA201-125

27 Property Owners Notified

<i>Label #</i>	<i>Address</i>	<i>Owner</i>
1	9943 COPPEDGE LN	JAIMES ALEJANDRO
2	3838 WALNUT HILL LN	CORPORATION OF EPISCOPAL
3	9961 COPPEDGE LN	AYER MICHAEL & STEPHANIE C
4	9957 COPPEDGE LN	PEACO REAL ESTATE HOLDINGS LLC
5	9951 COPPEDGE LN	SMITH SAMUEL & ELISE
6	9947 COPPEDGE LN	CHASTAIN SHAWN JAMESON
7	9941 COPPEDGE LN	BACERRA CARLOS &
8	9939 COPPEDGE LN	HOEHNE JOHN & JENNIFER
9	9935 COPPEDGE LN	MAGEE SUSAN REV TRUST
10	9929 COPPEDGE LN	DEVOS FAMILY REVOCABLE LIVING
11	9960 COPPEDGE LN	HALL PAUL S
12	9956 COPPEDGE LN	SHEARIN STACI M & GEORGE
13	9950 COPPEDGE LN	JONES NICOLE M
14	9946 COPPEDGE LN	SAPP EDWIN CLAYTON
15	9942 COPPEDGE LN	AVANT EQUITY PARTNERS IV LLC
16	9936 COPPEDGE LN	LEIJA ANTONIO R JR
17	3823 SEGUIN DR	ANDERSON SARAH
18	3829 SEGUIN DR	BAKER SANDY
19	3835 SEGUIN DR	DUNCAN BRIAN & KATHERINE
20	9937 DRESDEN DR	HILLMAN BENJAMIN D
21	9943 DRESDEN DR	ALEXANDER JENNIFER
22	9947 DRESDEN DR	KAISER GUADALUPE
23	9924 COPPEDGE LN	ROCKAMORE CEDRIC & ERICKA
24	3810 SEGUIN DR	MATT & PAUL LLC
25	3814 SEGUIN DR	CADEDU JEFFREY
26	3820 SEGUIN DR	OSBORNGOETZE JAMI & JOSEPH
27	9920 COPPEDGE LN	DISIMILE MEGAN MCGUIRE &



City of Dallas

APPLICATION/APPEAL TO THE BOARD OF ADJUSTMENT

Case No.: BDA 201-125

Date: ~~10/28/2021~~ 11-18-21

Data Relative to Subject Property:

Location address: 9943 Coppedge Ln Dallas TX 75220 Zoning District: R-7.5(A)

Lot No.: 8 Block No.: 1/6220 Acreage: 0.24 Census Tract: 0094.01

Street Frontage (in Feet): 1) 90 2) 104 3) _____ 4) _____ 5) _____

To the Honorable Board of Adjustment :

Owner of Property (per Warranty Deed): Alejandro Jaimes

Applicant: Patrick Griot Telephone: 714-357-5404

Mailing Address: 3901 Sailmaker Ln Plano Tx Zip Code: 75023

E-mail Address: patrick@spgenco.com

Represented by: _____ Telephone: _____

Mailing Address: _____ Zip Code: _____

E-mail Address: _____

Affirm that an appeal has been made for a Variance ✓, or Special Exception ✓, of 13'6" Encroachment & provide an 11'6" FYSB the required FYSB is 25', and 7' to the required 4' Fy Fence Height for a total Fence Height of 11', and less than 50% open panel, and 20x20 visibility at Driveway + alley.

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:

Encumber by 2 front setbacks of 25 feet as a corner lot I would like the opportunity to use the second front yard as a side yard

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

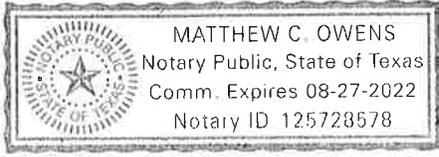
Before me the undersigned on this day personally appeared Patrick Griot (Affiant/Applicant's name printed)

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: [Signature] (Affiant/Applicant's signature)

Subscribed and sworn to before me this 11 day of November, 2021

(Rev. 08-01-11)



[Signature]
Notary Public in and for Dallas County, Texas

MEMORANDUM OF
ACTION TAKEN BY THE
BOARD OF ADJUSTMENT

Date of Hearing _____

Appeal was--Granted OR Denied

Remarks

Chairman

Building Official's Report

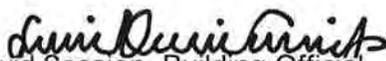
I hereby certify that Patrick Griot

did submit a request for a variance to the front yard setback regulations, and for a special exception to the fence height regulations, and for a special exception to the fence standards regulations, and for a special exception to the visibility obstruction regulations

at 9943 Coppedge Lane

BDA201-125. Application of Patrick Griot for a variance to the front yard setback regulations, and for a special exception to the fence height regulations, and for a special exception to the fence standards regulations, and for a special exception to the visibility obstruction regulations at 9943 COPPEDGE LN. This property is more fully described as Lot 8, Block 1/6220, and is zoned R-7.5(A), which limits the height of a fence in the front yard to 4 feet and requires a 20 foot visibility triangle at driveway approaches and alley and requires a fence panel with a surface area that is less than 50 percent open may not be located less than 5 feet from the front lot line and requires a front yard setback of 25 feet. The applicant proposes to construct a single family residential accessory pool structure and provide a 11 foot 6 inch front yard setback, which will require a 13 foot 6 inch variance to the front yard setback regulations, and to construct an 11 foot high fence in a required front yard, which will require a 7 foot special exception to the fence regulations, and to construct a fence in a required front yard with a fence panel having less than 50 percent open surface area located less than 5 feet from the front lot line, which will require a special exception to the fence regulations, and to construct a single family residential fence structure in a required visibility obstruction triangle, which will require a special exception to the visibility obstruction regulation.

Sincerely,


David Session, Building Official



CITY OF DALLAS
AFFIDAVIT

Appeal number: BDA 201-125

I. Alejandro Jaimes DBA Fourteen Development Group . Owner of the subject property
(Owner or "Grantee" of property as it appears on the Warranty Deed)

at: 9943 Coppedge Ln Dallas TX 75220, Map 24/N ,BLK 1/6220 LT 8
(Address of property as stated on application)

Authorize: Patrick Griot
(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)
- Other Appeal (specify below)

Specify: Variance to the front yard setback regulations and Special Exceptions to the fence standards regulations at 9943 Coppedge Lane Dallas (Lot 8, Block 1/6220)

Alejandro Jaimes
Print name of property owner or registered agent

[Signature]
Signature of property owner or registered agent

Date 11/2/21

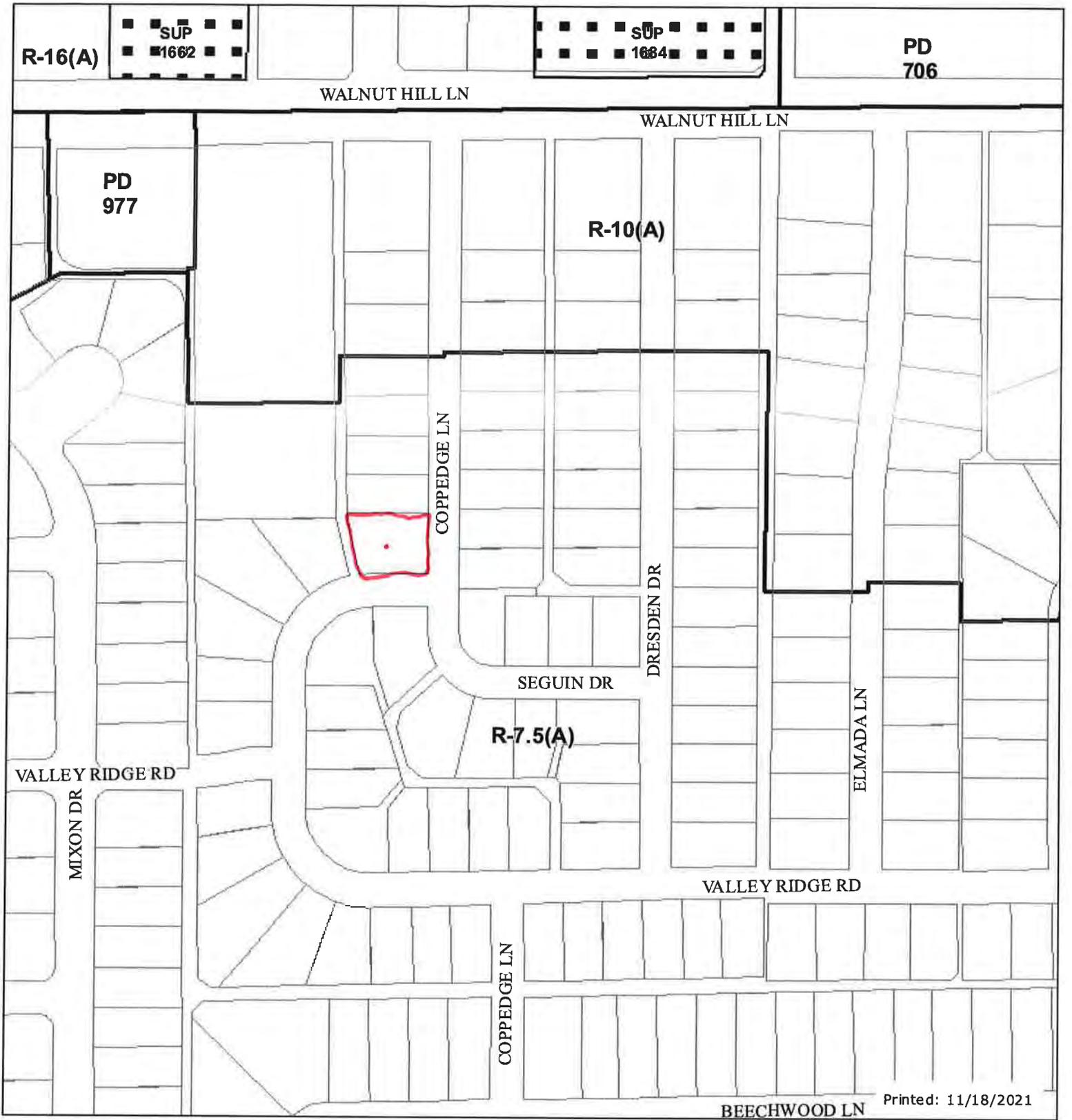
Before me, the undersigned, on this day personally appeared ALEJANDRO JAIMES

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 02 day of NOVEMBER, 2021



[Signature]
Notary Public for Dallas County, Texas
Commission expires on OCT 07, 2023



Printed: 11/18/2021

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)

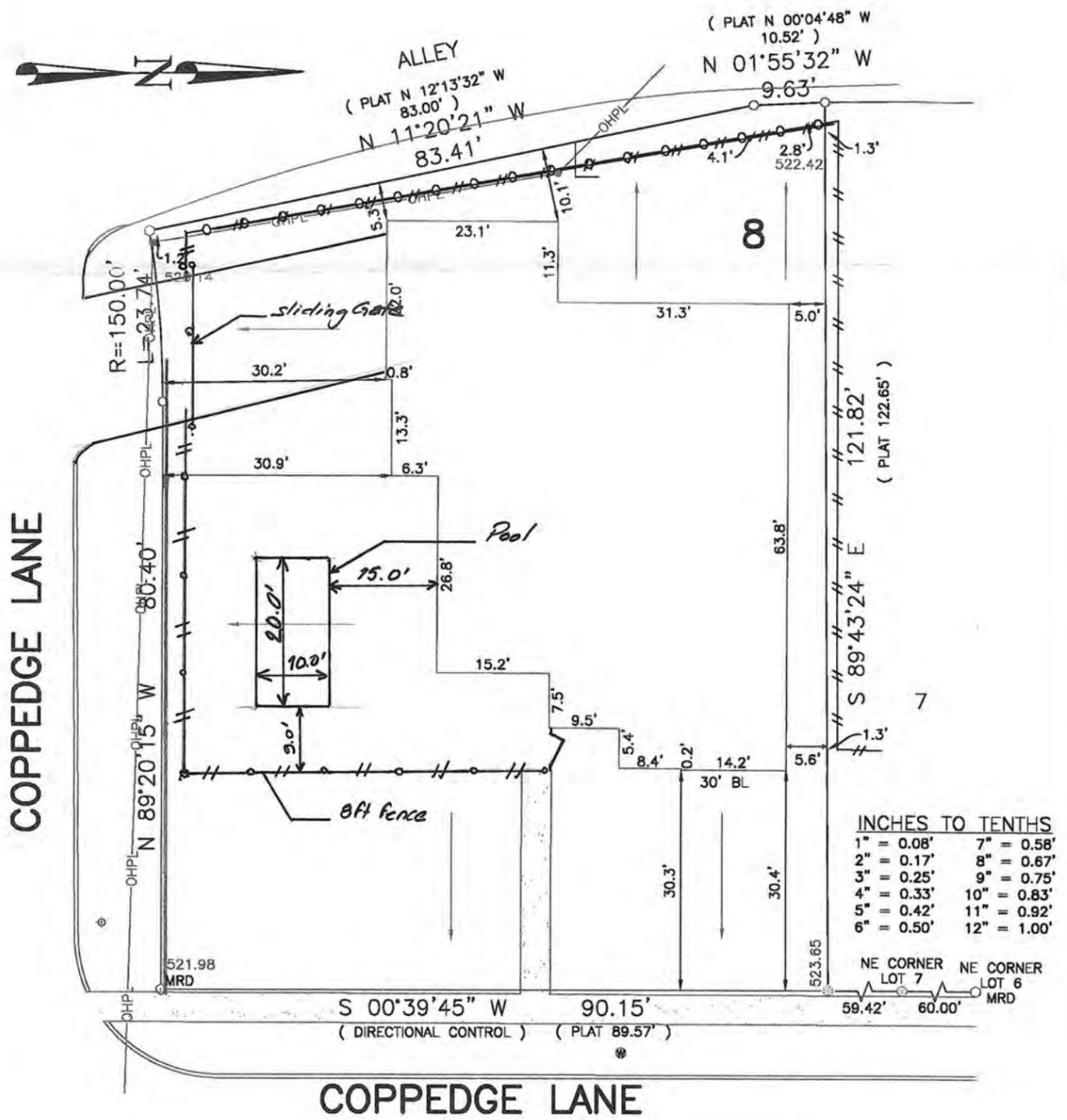


1819



PPG

Provide 11' 6" FYSB
 Encroach 13' 6" into the FYSB
 Required FYSB is 25'
 Fence Height of 11'
 Less than 50% open panel
 Located less than 5' from
 Front lot line.



INCHES TO TENTHS

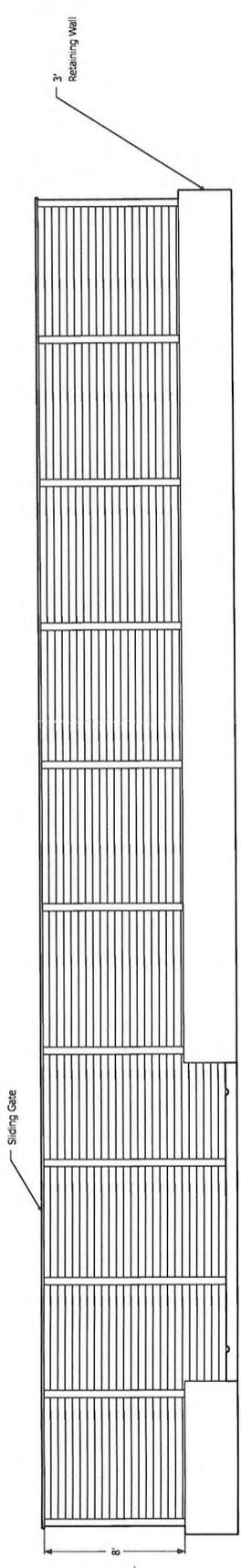
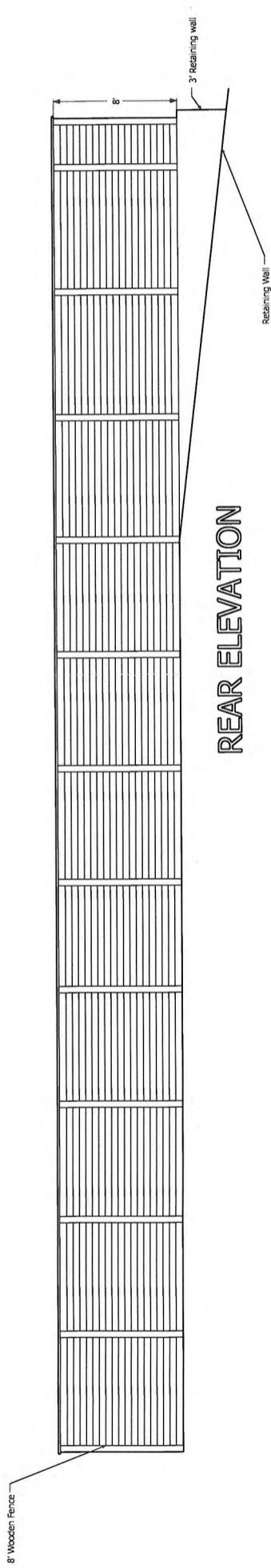
1" = 0.08'	7" = 0.58'
2" = 0.17'	8" = 0.67'
3" = 0.25'	9" = 0.75'
4" = 0.33'	10" = 0.83'
5" = 0.42'	11" = 0.92'
6" = 0.50'	12" = 1.00'

LEGEND

WOOD FENCE	--- TEXT	■
CHAIN LINK	--- IMPROVEMENTS	■
IRON FENCE	--- BOUNDARY LINE	■
WIRE FENCE	--- RESIDENCE/BUILDING	■
MRD - MONUMENTS OF RECORD DIGNITY		
○ 1/2" IRON ROD FOUND		
○ 1/2" RED-CAPPED IRON ROD SET		
○ SET 'X'		
○ FOUND 'X'		
○ 3/8" IRON ROD FOUND		
○ 1/2" RED-CAPPED IRON ROD FOUND		
○ - CABLE	--- GUY-WIRE	
○ - CLEAN OUT	○ - ELECTRIC	
○ - GAS METER	○ - POWER POLE	
○ - FIRE HYDRANT	○ - TELEPHONE	
○ - LIGHT POLE	○ - WATER METER	
○ - MANHOLE	○ - WATER VALVE	
(UNLESS OTHERWISE NOTED)		

201-125

2-1-10



SCALE
1" = 10'

SIDE ELEVATION

BDA201-125_ATTACHMENT_A

9943 Coppedge Lane Dallas TX 75220

1 – Zoning is R-7.5A requires a lot to be a minimum of 7,500 square feet. Average lot is 10,680 square feet. My lot is 10,450 square feet.

2- Average structure size is 3836 square feet. My structure is only 3,742 square feet.

3- The three properties listed last are all corners' properties, similar to mine and they all have only one front yard and a fence on the side yard 12 ft or less from the street curb.

My property has 2 front yards with 25 foot setback each.

9941 Coppedge Lane	10,020 Sq/ft lot	4,975 sq/ft structure
--------------------	------------------	-----------------------

9939 Coppedge Lane	16,522 Sq/ft lot	5,860 sq/ft structure
--------------------	------------------	-----------------------

9924 Coppedge Lane	10,450 Sq/ft lot	3,668 sq/ft structure
--------------------	------------------	-----------------------

Corner Lots:

9923 Coppedge Lane	8,677 Sq/ft lot	3,818 sq/ft structure
--------------------	-----------------	-----------------------

9918 Mixon drive	11,325 Sq/ft lot	1,208 sq/ft structure
------------------	------------------	-----------------------

3230 Valley Ridge Road	7,057 Sq/ft lot	3,489 sq/ft structure
------------------------	-----------------	-----------------------

BDA201-125_ATTACHMENT_B

9943 Coppedge Lane Dallas TX 75220

The properties listed are all corners' properties, like mine and they all have only one front yard and a fence on the second front yard 12 ft or less from the street curb. Those fences are 7 to 8 feet tall.

Their lots being flat do not require a retaining wall. Our property is on a slope and requires a retaining wall.

I would like to have the same opportunity to develop our lot as all those other properties listed below.

9923 Coppedge Lane Lot on corner of Valley ridge road and Coppedge Lane. Property has a pool on the second front yard with a solid wood fence 8 feet tall around it.

9918 Mixon drive Lot on corner of Valley ridge road and Mixon Drive. Property has a solid wood fence 8 feet tall in the second front yard.

9917 Mixon drive Lot on corner of Valley ridge road and Mixon Drive. Property has a solid wood fence 8 feet tall in the second front yard.

9917 Seguin drive Lot on corner of Seguin Drive and Juniper Drive. Property has a solid wood fence 8 feet tall in the second front yard.

3830 Valley Ridge Road Lot on corner of Seguin Drive and Coppedge Lane. Property has a solid wood fence 8 feet tall in the second front yard.

3820 Valley Ridge Road Lot on corner of Seguin Drive and Coppedge Lane. Property has a solid wood fence 7 feet tall in the second front yard.

9919 Dresden Drive Lot on corner of Dresden Drive and Seguin Drive. Property has a solid wood fence 7 feet tall in the second front yard.

BDA201-125_ATTACHMENT_C

REVIEW COMMENT SHEET
BOARD OF ADJUSTMENT
HEARING OF JANUARY 18, 2022 (A)

Has no objections

Has no objections if certain conditions
are met (see comments below or attached)

Recommends denial
(see comments below or attached)

No comments

BDA 201-121(PD)

BDA 201-122(PD)

BDA 201-124 (PD)

BDA 201-125 (JM)

COMMENTS:

David Nevarez, PE, PTOE, TRN/Engineering

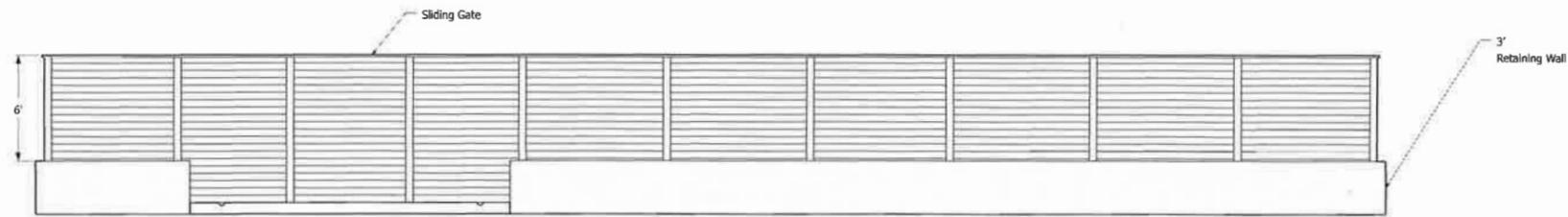
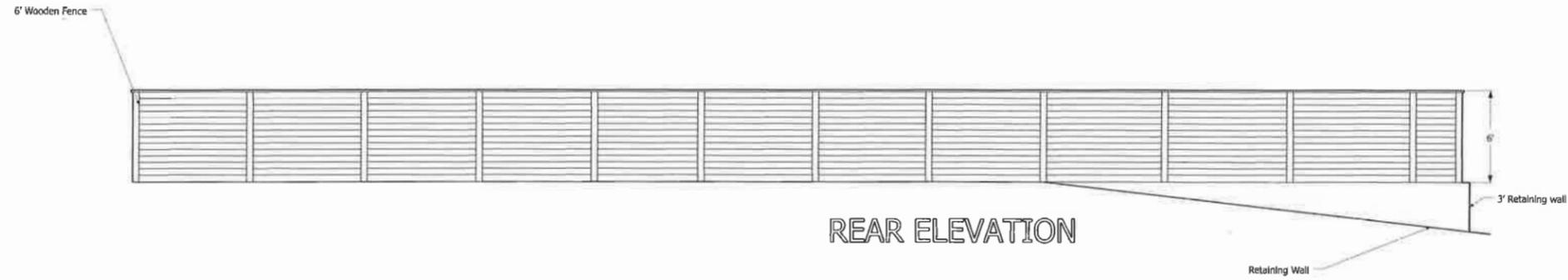
Name/Title/Department

12/31/2021

Date

Please respond to each case and provide comments that justify or elaborate on your response. Dockets distributed to the Board will indicate those who have attended the review team meeting and who have responded in writing with comments.

BDA201-125_ATTACHMENT_D



SIDE ELEVATION

SCALE



1" = 10'

Revised Elevation

MEMORANDUM OF
ACTION TAKEN BY THE
BOARD OF ADJUSTMENT

Date of Hearing _____

Appeal was--Granted OR Denied

Remarks _____

Chairman

Building Official's Report

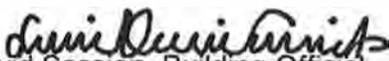
I hereby certify that Patrick Griot

did submit a request for a variance to the front yard setback regulations, and for a special exception to the fence height regulations, and for a special exception to the fence standards regulations, and for a special exception to the visibility obstruction regulations

at 9943 Coppedge Lane

BDA201-125. Application of Patrick Griot for a variance to the front yard setback regulations, and for a special exception to the fence height regulations, and for a special exception to the fence standards regulations, and for a special exception to the visibility obstruction regulations at 9943 COPPEDGE LN. This property is more fully described as Lot 8, Block 1/6220, and is zoned R-7.5(A), which limits the height of a fence in the front yard to 4 feet and requires a 20 foot visibility triangle at driveway approaches and alley and requires a fence panel with a surface area that is less than 50 percent open may not be located less than 5 feet from the front lot line and requires a front yard setback of 25 feet. The applicant proposes to construct a single family residential accessory pool structure and provide a 11 foot 6 inch front yard setback, which will require a 13 foot 6 inch variance to the front yard setback regulations, and to construct an 9 foot high fence in a required front yard, which will require a 5 foot special exception to the fence regulations, and to construct a fence in a required front yard with a fence panel having less than 50 percent open surface area located less than 5 feet from the front lot line, which will require a special exception to the fence regulations, and to construct a single family residential fence structure in a required visibility obstruction triangle, which will require a special exception to the visibility obstruction regulation.

Sincerely,


David Session, Building Official

BDA201-125_ATTACHMENT_F

From: [REDACTED]
To: [Jackson, Latonia](#)
Cc: [Munoz, Jennifer](#); [Trammell, Charles](#)
Subject: RE: B201-125 (02-22-22)
Date: Monday, March 7, 2022 2:19:57 PM
Attachments: [attachment.png](#)
[attachment.png](#)
[attachment.png](#)
[attachment.png](#)
[attachment.png](#)

External Email!

Hello,

We are going to rescind our request for special exceptions for the fence, it will be 4 feet tall, not on the top of the retaining wall and will not be encroaching on the triangle of visibility for the driveway and alley as the fence not continue to the corner of the property but will be attached to the garage wall before the driveway.

Please, advise which documents you need to be submitted.

Thank you for your help,



Patrick Griot

SP GENCO LLC
Plano TX 75093

[REDACTED]
[REDACTED]
www.spgenco.com

Panel A

02-22-22

BOA201-125

9943 Coppedge Lane

(Support Reference)

From: [REDACTED]
To: [Munoz, Jennifer](#)
Subject: 9943 Coppedge Lane
Date: Thursday, January 20, 2022 11:33:47 AM

External Email!

Hello how are you? My name is Ericka Rockamore! I live at 9924 Coppedge Ln, Dallas TX 75220! I'm ok with the pool/fence for 9943 Coppedge Lane! Feel free to call if you have anymore questions! Thanks, Ericka Rockamore
901-337-2471

Sent from my iPhone

CAUTION: This email originated from outside of the organization. Please, do not click links or open attachments unless you recognize the sender and know the content is safe.

Panel A

02-22-22

BOA201-125

9943 Coppedge Lane

(Opposition Reference)

-----Original Message-----

From: Stephanie [REDACTED]
Sent: Thursday, January 13, 2022 7:07 PM
To: Munoz, Jennifer <jennifer.munoz@dallascityhall.com>
Subject: Response to 9943 Coppedge Lane request

External Email!

Hi Jennifer,

I am responding to the building request of Patrick Griot at 9943 Coppedge Lane. We neighbors of Coppedge Lane all appreciate the opportunity to voice our opinion. My apologies for not being able to attend the upcoming videoconference or come in person as my job as a school teacher does not allow for this. Personally, I have long hated the construction happening in our neighborhood and especially dislike it when builders create their own rules. I would like to formally deny Mr. Griot's request for the following reasons: 1) The fence would create a considerable blind spot and an accident is inevitable due to fools speeding down the street. We have lived in our home for 16 years and there is frequent speeding by our home. We do drive that direction quite often and the proposed fence would affect our ability to see oncoming cars. 2) Proposed Fence is a hazard to those walking on the street at that corner. My child and I like to walk along there with our 15 year old golden retriever and we do need the grass "sidewalk area" to evade car traffic fairly often. 3) An 11ft fence does not fit our neighborhood. The reason why we moved to this neighborhood was for the charm and character of the houses. These builders are taking that away and raising our taxes to boot. We are already angry. We put up with the noise and inconvenience too often. Mr. Griot asks too much. 4) My biggest argument is there are already strict rules in place and Mr. Griot has the gall to try to buck those rules. This is not okay.

Jennifer, I truly thank you for giving me your time and appreciate you! Please tell me if there is anything else I must do.

Sincerely,
Stephanie Ayer

Sent from my iPhone

CAUTION: This email originated from outside of the organization. Please, do not click links or open attachments unless you recognize the sender and know the content is safe.

From: [REDACTED]
To: [Munoz, Jennifer](#)
Subject: 9943 Coppedge Ln- OPPOSE appeal
Date: Wednesday, January 12, 2022 11:59:44 AM

External Email!

Hello,

I am the owner of a residence on 9967 Coppedge Lane near the property 9943 Coppedge Ln for which several appeals were issued. The appeals include exceptions to fence height, visibility, and front yard setback.

I strongly oppose the measure for the following reasons:

1. Danger to drivers: reduced visibility may lead to car accidents as this corner does not go all ways in 90 degree angles. The entire street uses this way to go to Marsh Ln.
2. Danger to pedestrians: besides reduced visibility, corner lots already benefit the homeowner by only requiring sidewalk on one side of the lot. Reducing space makes it worse.
3. Diminished aesthetic: Our street prides in and stands out due to all of the houses following setback and fence rules. This would set a bad precedent for future new builds, which continue at a rapid pace.
4. Lack of planning: The house itself is mostly complete. The original plan of the house should have considered the pool to comply with city rules and be modified as needed before construction started. Lot size is already larger than average for Dallas new builds.

I appreciate your consideration and am available for questions as I cannot attend the appeal hearing. All these new builds increase the property tax valuations of existing homeowners like myself. As such, I believe that new owners should fully comply with existing regulations. We love our house and would like to stay on Coppedge for many years to come.

Thanks and have a great day!

Jorge Garcés
Cell 254-498-3620

CAUTION: This email originated from outside of the organization. Please, do not click links or open attachments unless you recognize the sender and know the content is safe.

From: [REDACTED]
To: [Munoz, Jennifer](#)
Subject: Opposition to 9943 Coppedge Ln 11 foot fence
Date: Thursday, January 13, 2022 10:39:00 PM

External Email!

Dear Ms. Munoz,

My name is Nicole Jones and I am a long-time resident and homeowner on Coppedge Lane. I am responding to the building request of Patrick Griot at 9943 Coppedge Lane. The neighbors of Coppedge Lane all appreciate the opportunity to voice our opinion. I will not be able to attend the videoconference or come in person as my job as an elementary school teacher does not provide me the flexibility to do so.

I am saddened by all of the construction happening in the Midway Hollow neighborhood, as the numerous new builds have completely changed the face of this neighborhood. I would like to formally deny Mr. Griot's request to add an 11 foot fence to conceal a side yard pool. I oppose this request for the following reasons: 1) The fence would create a considerable blind spot, and an accident is inevitable due to the many cars that are often speeding down the street. I have lived in my home for over 15 years and there is frequent speeding past my home to reach Walnut Hill. A stop sign was added at Coppedge and Seguin some years back, but I have watched many cars completely ignore it. I drive that direction daily and a proposed fence would impede my ability to see oncoming cars. 2) The proposed fence is a hazard to those walking on the street at that corner. Neighbors often need the grass "sidewalk area" to avoid car traffic. 3) An 11 foot fence does not fit the neighborhood. Neither does the boxy build of a house at 9943. One of the many reasons why I moved to this neighborhood was for the charm and character of the 1950s homes. These builders are erasing that charm, reducing the number of smaller/affordable housing in Dallas, and skyrocketing our property taxes. We are already sad about the destruction and now angry about all of the construction. We have put up with the noise and inconvenience of all this construction for too long. Mr. Griot has often had workers on Sundays and after 7pm. This is not ok! 4) Lastly, there are already strict rules and guidelines in place for construction in the city of Dallas. Mr. Griot should have followed these guidelines if he wanted to put in a pool. Perhaps he will better plan his next build and not put such a large home on a small lot.

Please let me know if there is anything else I can do to make sure that this does not get approved. I sincerely appreciate you giving us the chance to voice our opinion and concern over this matter.

Sincerely,
Nicole Jones
[Sent from AT&T Yahoo Mail for iPhone](#)

CAUTION: This email originated from outside of the organization. Please, do not click links or open attachments unless you recognize the sender and know the content is safe.

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 four-foot side yard setback on the northeast side, which will require a six-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 four 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.

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 475-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 northeastern façade of the structure.

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 4,242-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 four-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 March 11, 2022, no letters have been submitted in support of nor in opposition 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:

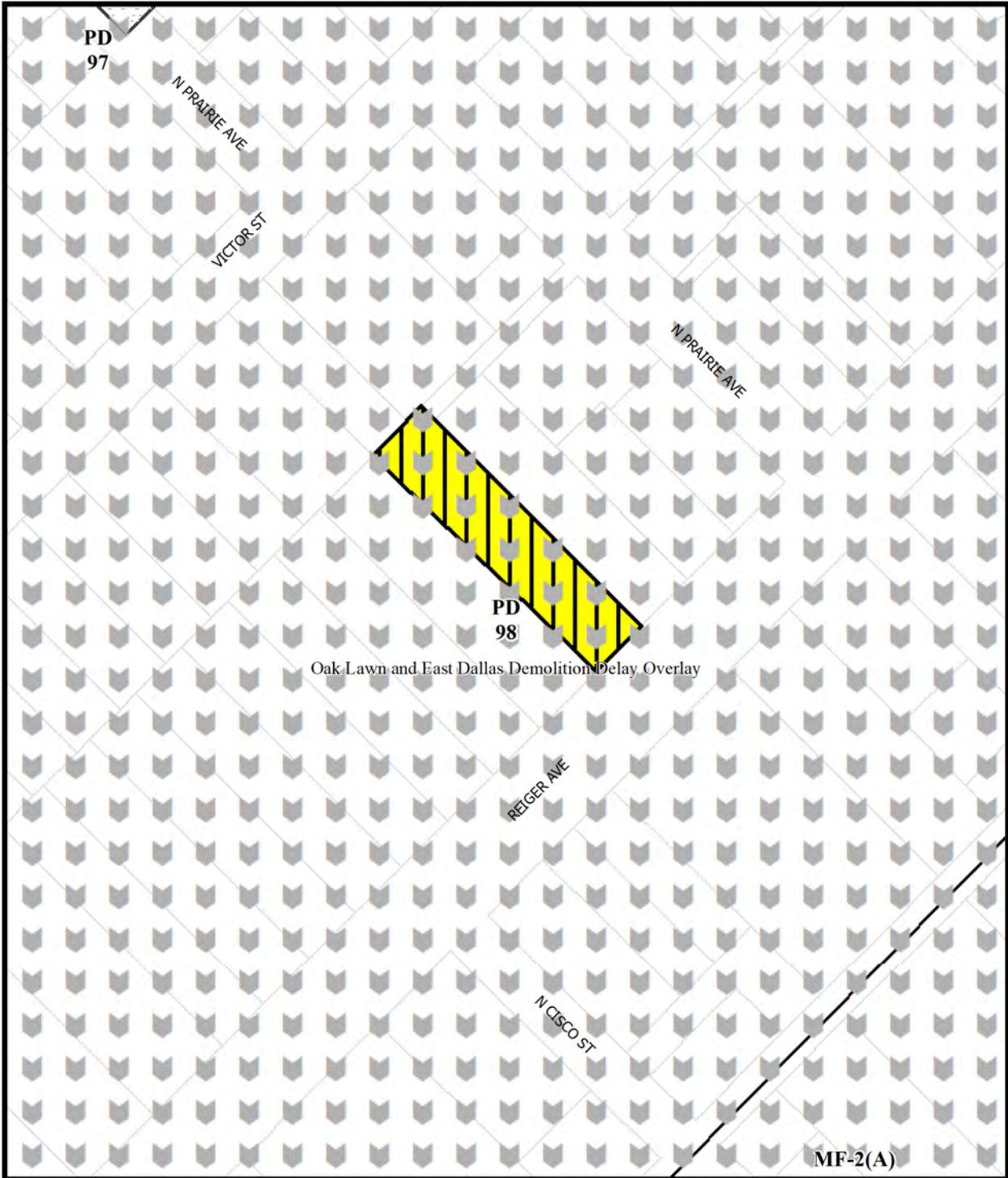
- a copy of the application materials including the Building Official’s report on the application;
- an attachment that provided the public hearing date and panel that will consider the application; the February 23rd deadline to submit additional evidence for staff to factor into their analysis; and 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.

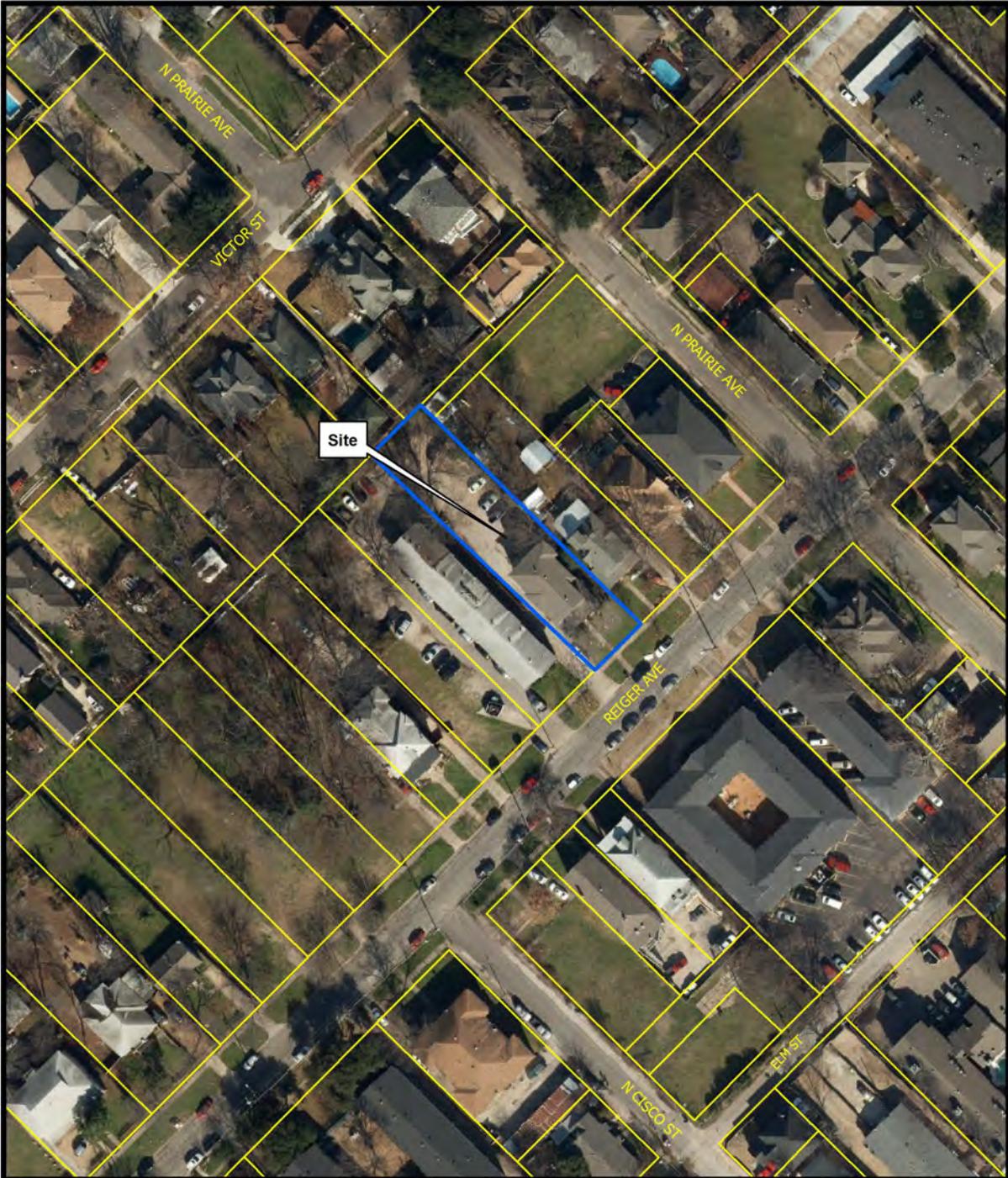


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ZONING MAP

Case no: BDA212-017

Date: 2/1/2022

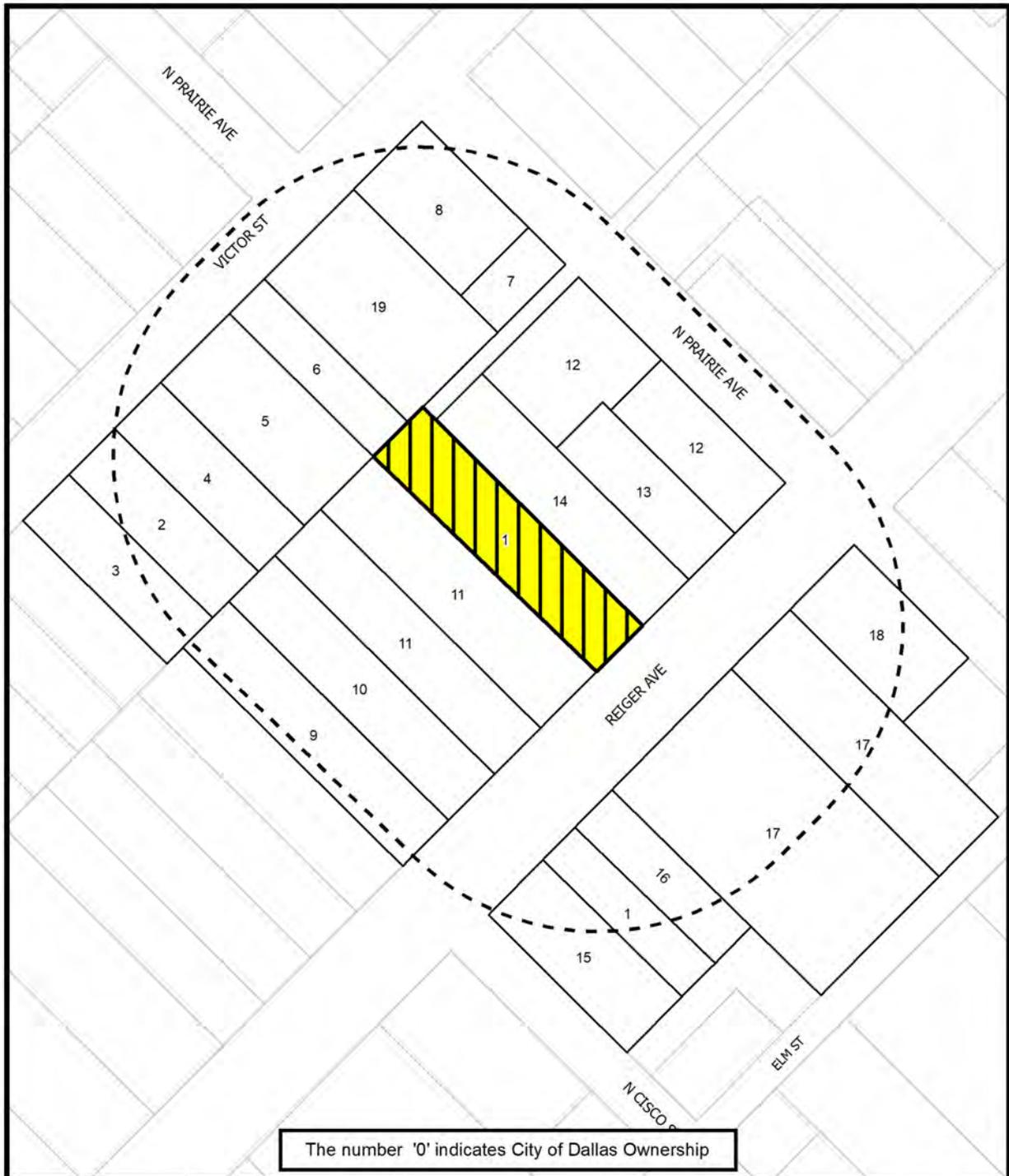


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AERIAL MAP

Case no: BDA212-017

Date: 2/1/2022



1:1,200

NOTIFICATION

200' AREA OF NOTIFICATION
19 NUMBER OF PROPERTY OWNERS NOTIFIED

Case no: **BDA212-017**

Date: **2/1/2022**

02/01/2022

Notification List of Property Owners

BDA212-017

19 Property Owners Notified

<i>Label #</i>	<i>Address</i>	<i>Owner</i>
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 JORGE 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



APPLICATION/APEAL TO THE BOARD OF ADJUSTMENT

Case No.: BDA 212-017

Data Relative to Subject Property: 4715 Reiger Ave.

Date: 1-3-22

Location address: Dallas, Texas 75246 Zoning District: PD 98

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

of LT 1 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

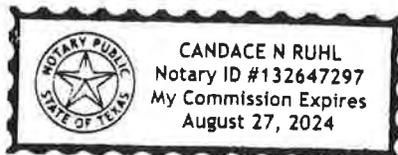
(Affiant/Applicant's name printed)

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

(Rev. 08-01-11)



Notary Public in and for Dallas County, Texas

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

**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
<i>Directly across the street</i>		
4718 Reiger Ave.	29,250	17,900
4722 Reiger Ave.	14,625	8,542
<i>Property on left when viewed from street</i>		
4711 Reiger Ave.	14,518	8,032
<i>Average</i>	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.

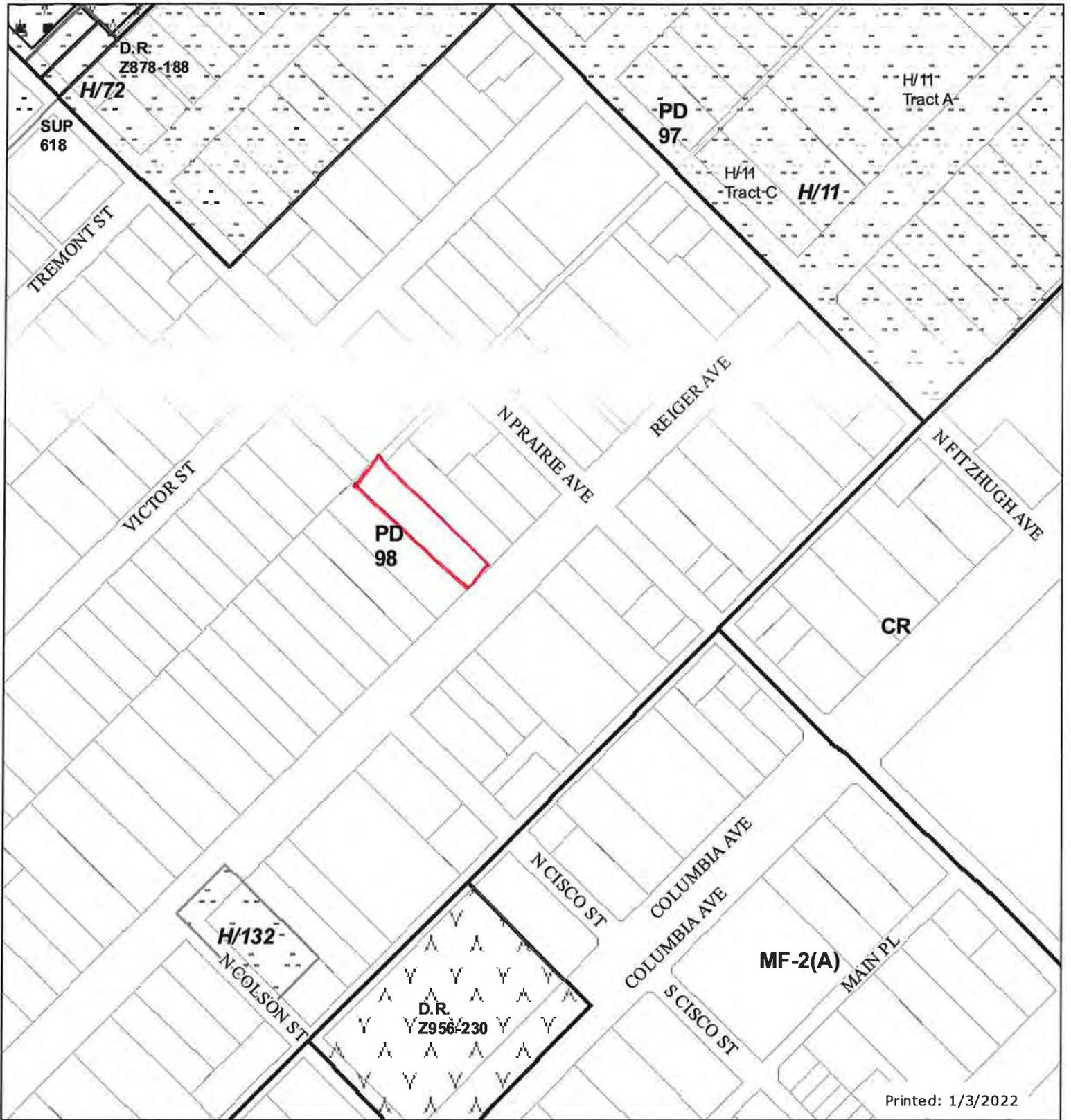
Local Government Code § 211.009(b-1), effective September 1, 2021.

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.



Printed: 1/3/2022

Legend

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



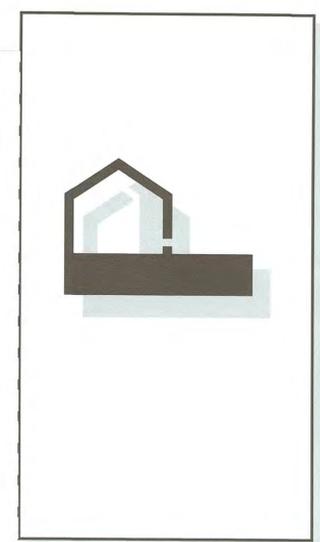


CITY OF DALLAS PLAT BOOKS
ADDITION
SCALE 80 FT. EQUALS 1 INCH
HON. I. STUBBS

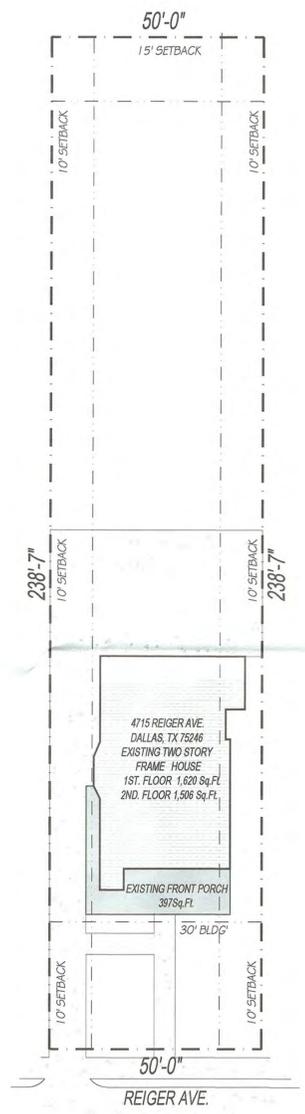


VICINITY MAP
for reference only

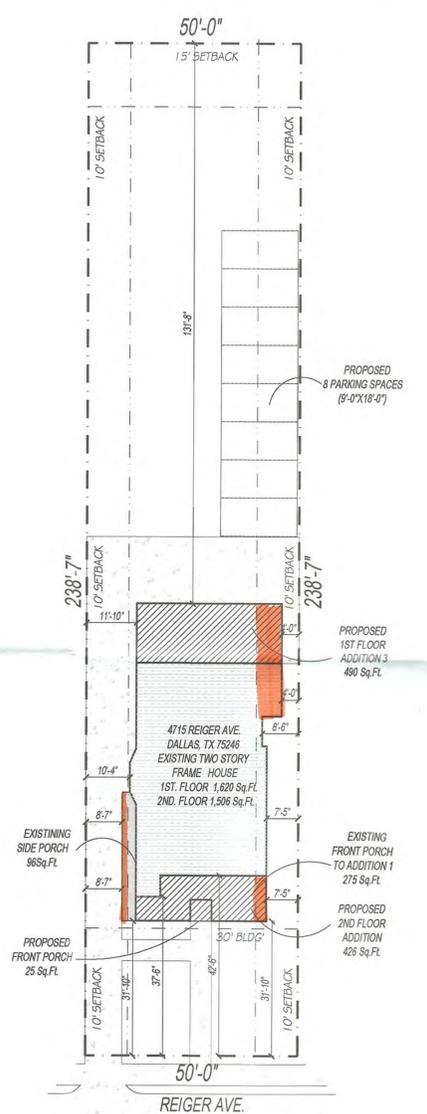
ONLINE PERMIT ONLY



Revision	Date



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



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

212-917

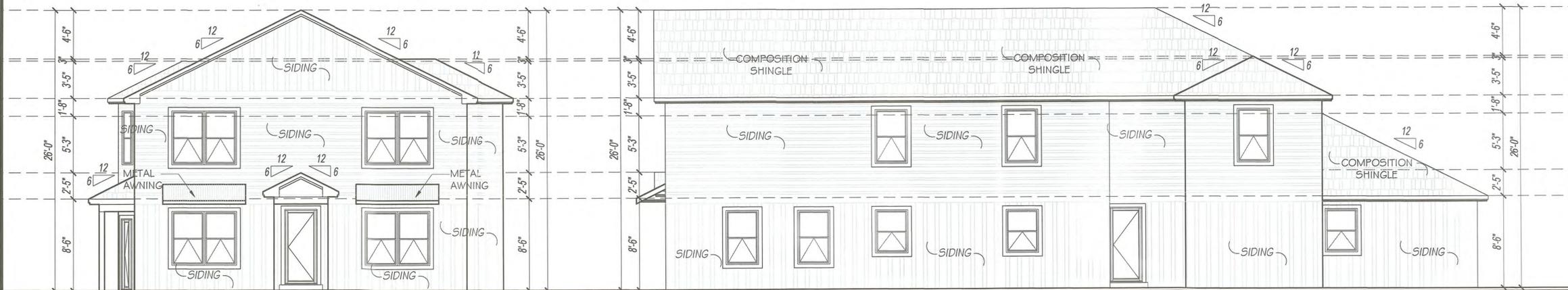
THESE PLANS ARE INTENDED TO PROVIDE BASIC CONSTRUCTION INFORMATION NECESSARY TO SUBSTANTIALLY BUILD THIS STRUCTURE. THESE PLANS MUST BE VERIFIED AND CHECKED BY THE BUILDER, HOMEOWNER, AND ALL CONTRACTORS OF THIS JOB PRIOR TO CONSTRUCTION. BUILDER SHOULD OBTAIN COMPLETE ENGINEERING SERVICES, H.V.A.C., 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.

GREAT CARE AND EFFORT HAVE GONE INTO THE CREATION OF THESE BLUEPRINTS. HOWEVER, BECAUSE OF THE VARIANCE IN GEOGRAPHIC LOCATIONS, FC & AH WILL NOT ASSUME LIABILITY FOR ANY DAMAGES DUE TO ERRORS, OMISSIONS, OR DEFICIENCIES ON THESE PLANS. OWNER/BUILDER MUST COMPLY WITH LOCAL BUILDING CODES PRIOR TO COMMENCEMENT OF CONSTRUCTION.

THE PURCHASE OF THESE PLANS ENTITLES THE BUYER TO CONSTRUCT THIS HOUSE ONLY ONCE. ANY COPYING, TRACING, OR ALTERING OF THESE PLANS IS NOT PERMITTED. VIOLATORS WILL BE SUBJECT TO PROSECUTION UNDER COPYRIGHT LAWS.

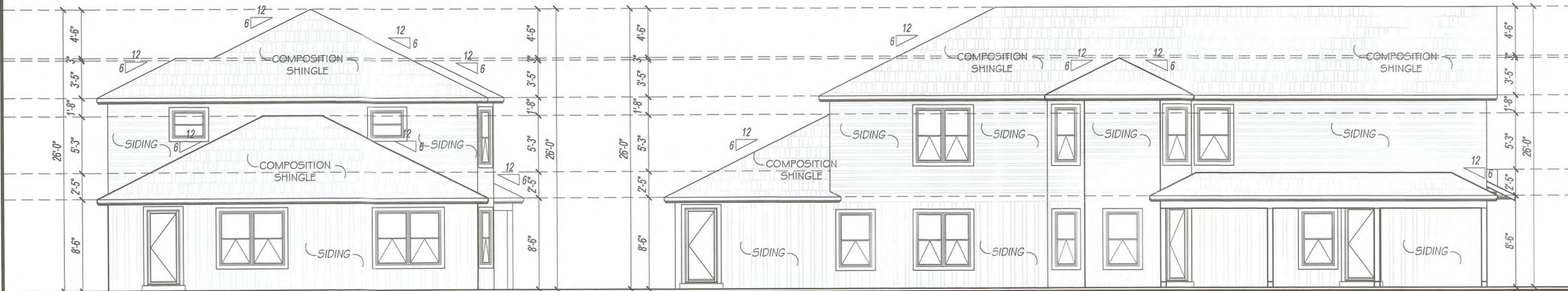
Project Name & Address
4715 REIGER AVE.
DALLAS, TX
75246

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



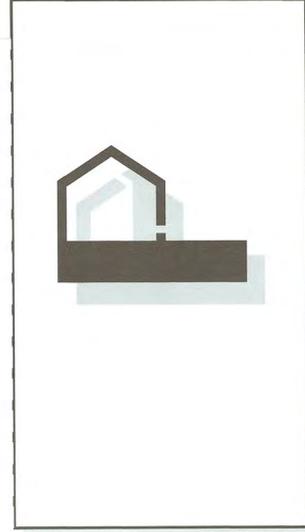
1 FRONT ELEVATION
Scale: 3/16"=1'-0"

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



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

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



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

512-417
2-417

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
<i>Directly across the street</i>		
4718 Reiger Ave.	29,250	17,900
4722 Reiger Ave.	14,625	8,542
<i>Property on left when viewed from street</i>		
4711 Reiger Ave.	14,518	8,032
<i>Average</i>	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.

FILE NUMBER: BDA212-019(PD)

BUILDING OFFICIAL'S REPORT: Application of Mark Drumm represented by Nate Parrott of KFM Engineering and Design for a special exception to the landscape regulations at 536 W. 9th Street. This property is more fully described as Part of Lots 18, 19, and 20, in City Block 35/3155, and is zoned (Subdistrict 3) within Planned Development District No. 830, which requires mandatory landscaping. The applicant proposes to construct a multifamily structure and provide an alternate landscape plan, which will require a special exception to the landscape regulations.

LOCATION: 536 W. 9th Street

APPLICANT: Mark Drumm represented by Nate Parrott of KFM Engineering and Design

REQUEST:

A request for a special exception to the landscape regulations is made to demolish the existing structure and construct a 9,779-square-foot retail structure that will not meet the landscape regulations or, more specifically, will not provide the required street buffer zone along the street frontage due to an existing underground 12-inch water utility and overhead electrical lines along the property boundary which prohibit planting in the right-of-way and within ten feet of the utility line.

STANDARD FOR A SPECIAL EXCEPTION TO THE LANDSCAPE AND TREE PRESERVATION REGULATIONS:

The board may grant a special exception to the landscape and tree preservation regulations of this article upon making a special finding from the evidence presented that:

- (1) strict compliance with the requirements of this article will unreasonably burden the use of the property.
- (2) the special exception will not adversely affect neighboring property; and
- (3) the requirements are not imposed by a site-specific landscape plan approved by the city plan commission or city council.

In determining whether to grant a special exception, the board shall consider the following factors:

- the extent to which there is residential adjacency.

- the topography of the site.
- the extent to which landscaping exists for which no credit is given under this article.
- the extent to which other existing or proposed amenities will compensate for the reduction of landscaping.

STAFF RECOMMENDATION:

The City of Dallas chief arborist submitted a memo regarding the applicant’s request and recommending approval(**Attachment A**).

Rationale:

- The chief arborist recommends approval of the proposed revised alternate landscape plan. While the landscape plan has several deficiencies, these deficiencies are based primarily on building proximity to the street right-of-way and the amount of lot coverage relative to open space, all allowed by city zoning regulations. The conditions of PDD No. 830 made supportive conditions to allow 1) site trees to be planted in the right-of-way, and 2) for street trees to be minimized to small trees due to reduced planting spaces as well as the location of public utilities. Thus, staff believes that strict compliance with the landscaping regulations in Article X unreasonably burdens this use of this property under this design.

BACKGROUND INFORMATION:

Zoning

<u>Site:</u>	Subdistrict 3 within PDD No. 830
<u>Northwest:</u>	Subdistrict 8 within PDD No. 830
<u>North:</u>	Subdistrict 3 within PDD No. 830
<u>East:</u>	Subdistrict 3 within PDD No. 830
<u>South:</u>	Subdistrict 3 within PDD No. 830
<u>West:</u>	Subdistrict 8 within PDD No. 830

Land Use:

The subject sites are developed with single family dwelling units. Surrounding properties to the northwest and west are developed with single-family dwelling units while the properties immediately adjacent to the south and east are developed with multifamily dwelling units. The property immediately adjacent to the north across, W. 9th Street is developed with a public school [Bishop Arts Academy].

Zoning/BDA History:

There have not been any recent board or zoning cases in the vicinity within the last five years.

GENERAL FACTS/STAFF ANALYSIS:

The request for a special exception to the landscape regulations is made to raze the existing single-family dwelling units and construct a multifamily structure that will not meet the minimum landscape requirements.

The subject site consists of three parcels (Lots 18, 19, and 20). at the intersection of N. Llewellyn Avenue and W. 9th Street. The first parcel (Pt Lots 19 & 20) is developed with two one-story, single family dwelling units consisting of approximately 1,057 square feet and 1,252 square feet, respectively, and constructed in 1945, according to Dallas County Appraisal District records. The second parcel (Lot 19) is developed with a one-story, dilapidated, single-family dwelling unit and detached garage consisting of approximately 1,806 square feet, constructed in 1945. The third and last parcel (Lot 18) is developed with a one-story, single family dwelling units and a detached garage consisting of approximately 1,638 square feet and constructed in 1945.

The Dallas Development Code requires full compliance with the landscape regulations when nonpermeable coverage on a lot or tract is increased by more than 2,000 square feet, or when work on an application is made for a building permit for construction work that increases the number of stories in a building on the lot or increases by more than 35 percent or 10,000 square feet, whichever is less, the combined floor areas of all buildings on the lot within a 24-month period. In this case, the existing structure will be demolished. The construction of the proposed multifamily structure triggers compliance with landscape regulations.

The City of Dallas chief arborist submitted a memo regarding the applicant's request (**Attachment A**).

The chief arborist's memo states the following with regard to "request":

The applicant is seeking a special exception to the landscaping requirements of Article X. The property is in the PDD No. 830 Subdistrict 3 which contains additional requirements for street trees.

The chief arborist's memo states the following with regard to "provision":

The proposed landscape plan provides a narrow strip of landscaping on the property at the edge of the building foundation on both street fronts and two enclosed areas facing 9th Street.

- Street buffer zone: Meets Article X urban streetscape (street buffer zone) requirements on 9th Street, but not on Llewellyn Street.
- Street trees are provided with two small trees for a required one large tree, as

allowed by PDD No. 830. All street trees are small trees.

- The requirement for site trees is met on the parkway, as allowed by PDD No. 830.

The chief arborist’s memo states the following with regard to “deficiencies”:

- The plan does not provide for the Article X urban streetscape conditions along Llewellyn Street. Requirements include a minimum six-foot wide planting area and one design option.
- The property requires 15 landscape design option points (Sec. 10.126) but are not provided for, or listed, on the landscape plan. Partial points may have been provided but are not stated.

The chief arborist’s revised memo states the following with regard to the “recommendation”:

The chief arborist recommends approval of the proposed revised alternate landscape plan. The landscape plan has several deficiencies based primarily on building proximity to the street right-of-way and the amount of lot coverage relative to open space, all allowed by city zoning regulations. The conditions of PDD No. 830 made supportive conditions to allow 1) site trees to be planted in the right-of-way, and 2) for street trees to be minimized to small trees due to reduced planting spaces as well as the location of public utilities. I believe that strict compliance with the landscaping regulations in Article X unreasonably burdens this use of this property under this design.

As of March 11, 2022, no letters have been submitted in support of nor in opposition of the request.

If the board were to grant this request and impose the submitted alternate revised landscape plan as a condition to the request, the site would be provided an exception from compliance with minimum landscape requirements for the street buffer zone requirements.

Timeline:

January 6, 2022: The applicant submitted an “Application/Appeal to the Board of Adjustment” and related documents that have been included as part of this case report.

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

February 3, 2022: The Board 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;

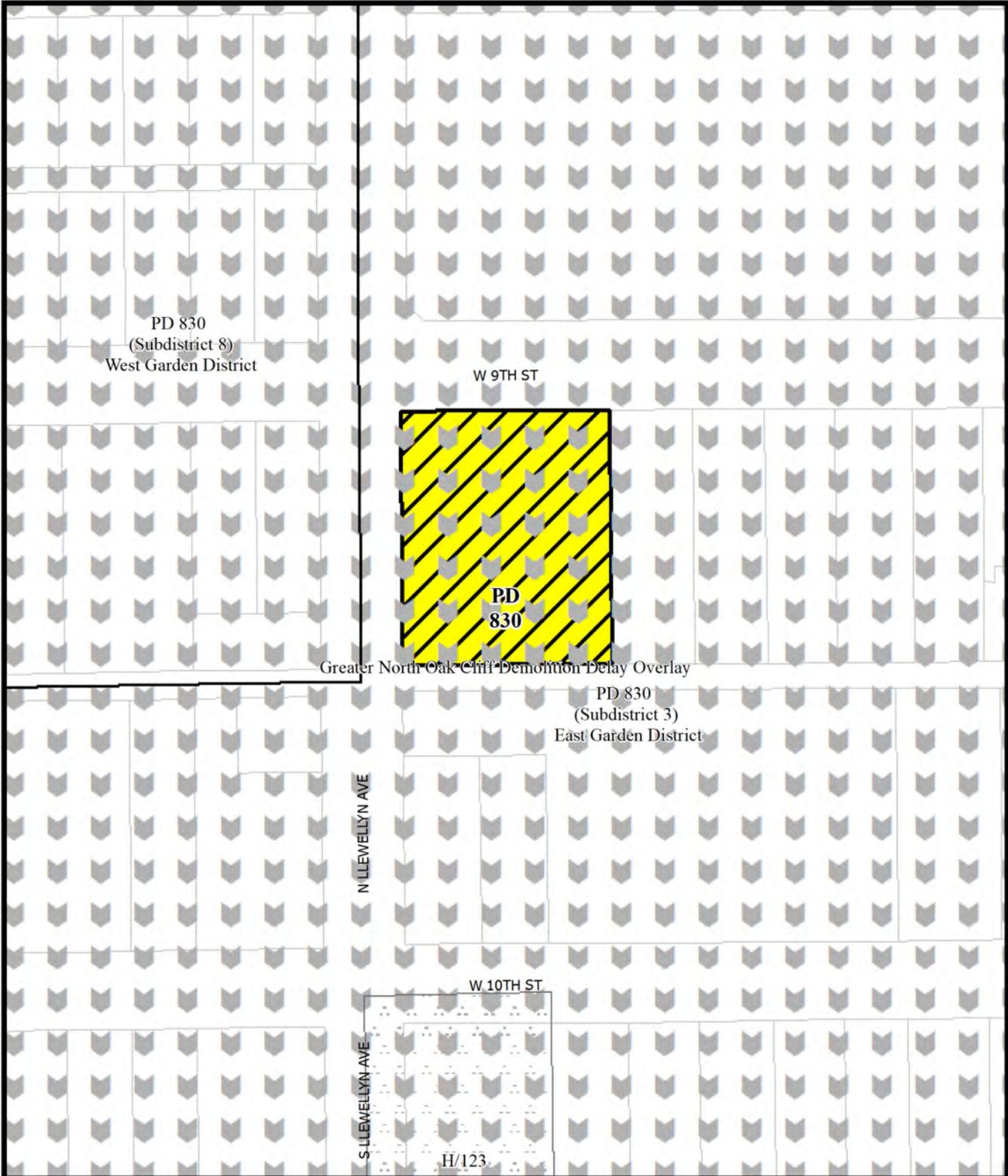
- the criteria/standard that the board will use in their decision to approve or deny the request; and
- the Board of Adjustment Working Rules of Procedure pertaining to documentary evidence.

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.

March 3, 2022:

The Sustainable Development and Construction Chief Arborist submitted a report detailing the recommendation (**Attachment A**) based on a revised landscape plan.

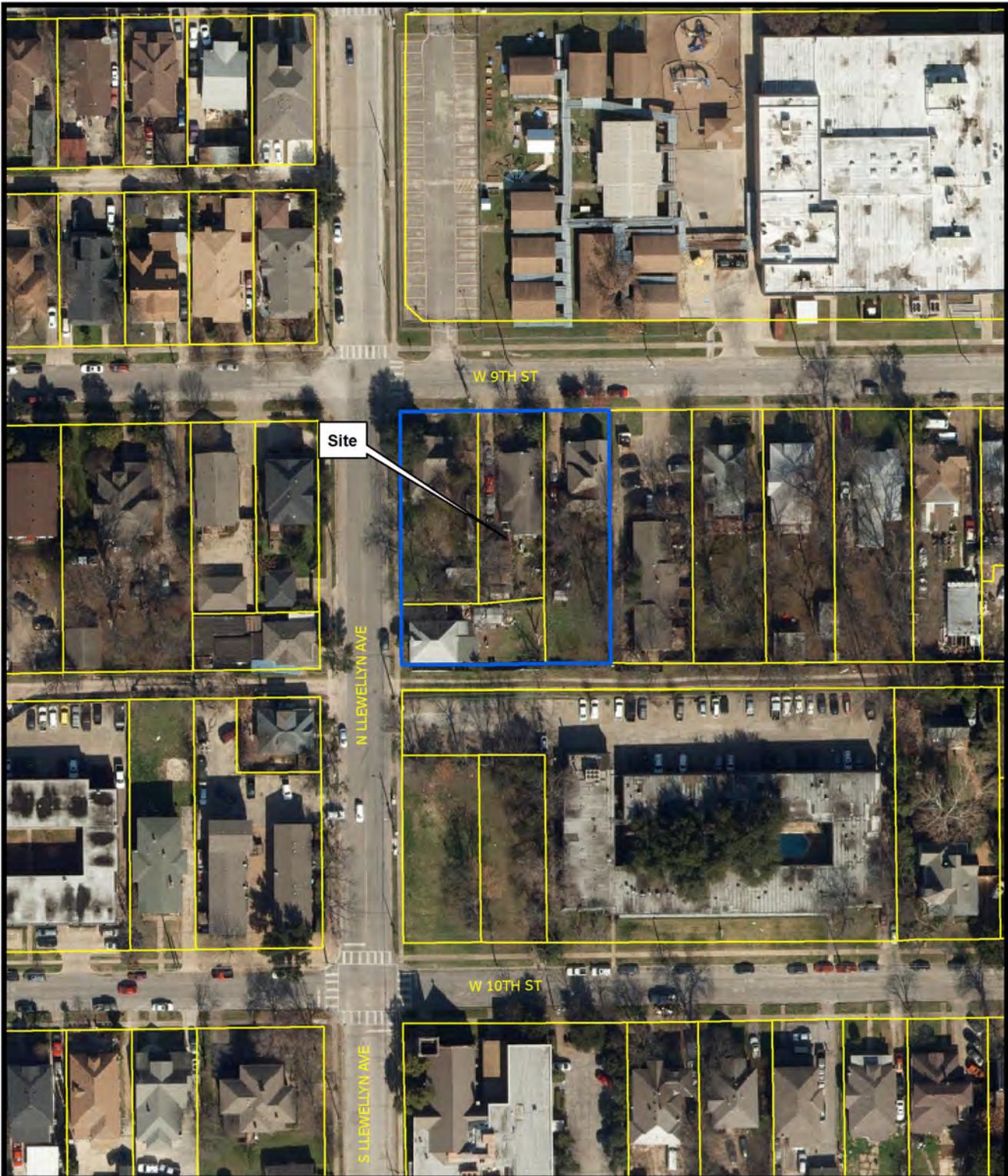


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ZONING MAP

Case no: BDA212-019

Date: 2/1/2022

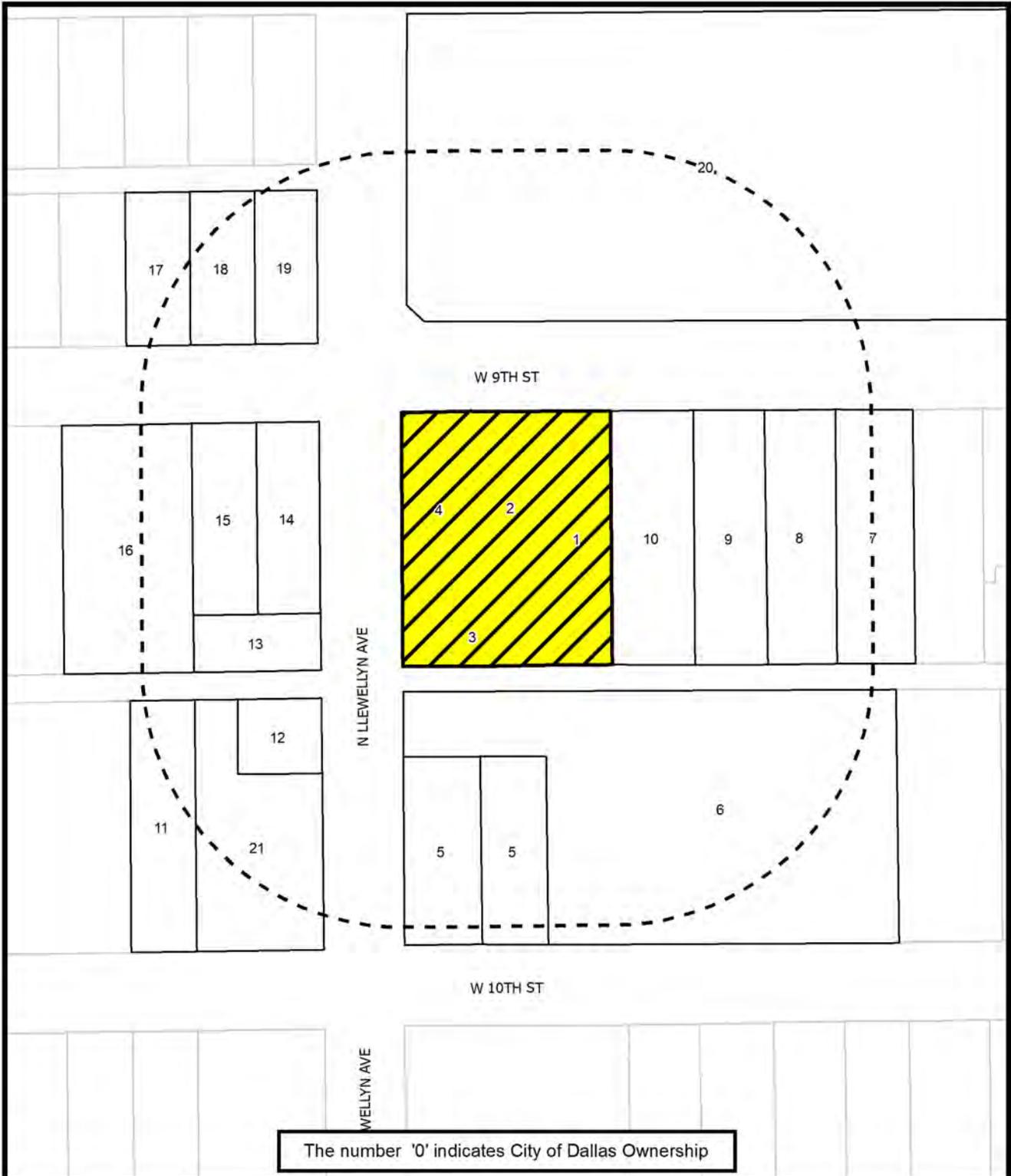


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AERIAL MAP

Case no: BDA212-019

Date: 2/1/2022



1:1,200

NOTIFICATION

200' AREA OF NOTIFICATION
21 NUMBER OF PROPERTY OWNERS NOTIFIED

Case no: **BDA212-019**
 Date: **2/1/2022**

02/01/2022

Notification List of Property Owners

BDA212-019

21 Property Owners Notified

<i>Label #</i>	<i>Address</i>	<i>Owner</i>
1	528 W 9TH ST	BISHOP DEV 2 LLC
2	532 W 9TH ST	CARDENAS GERONIMO GARZA
3	114 N LLEWELLYN AVE	BISHOP DEV 2 LLC
4	536 W 9TH ST	RUSH CAROL L
5	539 W 10TH ST	VALERO JESSE III & DIANE
6	515 W 10TH ST	KENSINGTON RIVERFALL LLC
7	514 W 9TH ST	LAM RICARDO
8	516 W 9TH ST	WILLIAMS OLA JUANITA
9	520 W 9TH ST	BOWLES LAURA
10	522 W 9TH ST	NORTH OAK CLIFF COMMUNITY
11	611 W 10TH ST	TORRES PABLO A
12	109 N LLEWELLYN AVE	FOUR SHELBY INC
13	113 N LLEWELLYN AVE	SALAS JOSE & IGNACIA
14	600 W 9TH ST	LAKE MILLINGTON INDUSTRIES LLC
15	604 W 9TH ST	READ JOHN H II &
16	610 W 9TH ST	MEDINA BILLY &
17	609 W 9TH ST	NUNO SALVADOR & MARIA D
18	607 W 9TH ST	HERNANDEZ JOSE A
19	603 W 9TH ST	PADILLA LUZ
20	201 N ADAMS AVE	Dallas ISD
21	601 W 10TH ST	FLORES GUSTAVO & ROSA E



City of Dallas

APPLICATION/APPEAL TO THE BOARD OF ADJUSTMENT

Case No.: BDA 212-019

Data Relative to Subject Property:

Date: 01/10/2022 1-6-22 cot

Location address: 536 W. 9th Street

Zoning District: PD830 (Subdistrict 3) E

PT of LT 18, 19, 20

Lot No.: Block No.: 35/3155 Acreage: .725 AC

Census Tract: 47.00

Street Frontage (in Feet): 1) 169 LF 2) 208 LF 3) 4) 5)

To the Honorable Board of Adjustment :

Owner of Property (per Warranty Deed): The Shelter Companies

Applicant: Mr. Mark Drumm Telephone: 214-766-5522

Mailing Address: 10939 Yorkspring Drive Dallas TX Zip Code: 75218

E-mail Address: drumm@sheltercompaniesllc.com

Represented by: KFM Engineering and Design Nate Parrott, PLA Telephone: 260-413-6577

Mailing Address: 3501 Olympus Blvd. Suite 100 Dallas, TX Zip Code: 75019

E-mail Address: nparrott@kfm-llc.com

Affirm that an appeal has been made for a Variance , or Special Exception , of
Site and Landscape requirements

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:

Landscape plan- Site cannot meet required landscape requirements because of site visibility, conflict with utilities and site constraints

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

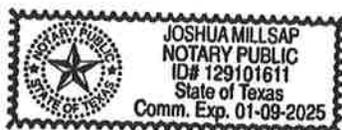
Before me the undersigned on this day personally appeared MARK E DRUMM
(Affiant/Applicant's name printed)

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: [Signature]
(Affiant/Applicant's signature)

Subscribed and sworn to before me this 10th day of JANUARY, 2022

(Rev. 08-01-11)



[Signature]
Notary Public in and for Dallas County, Texas

MEMORANDUM OF
ACTION TAKEN BY THE
BOARD OF ADJUSTMENT

Date of Hearing _____

Appeal was--Granted OR Denied

Remarks

Chairman

Building Official's Report

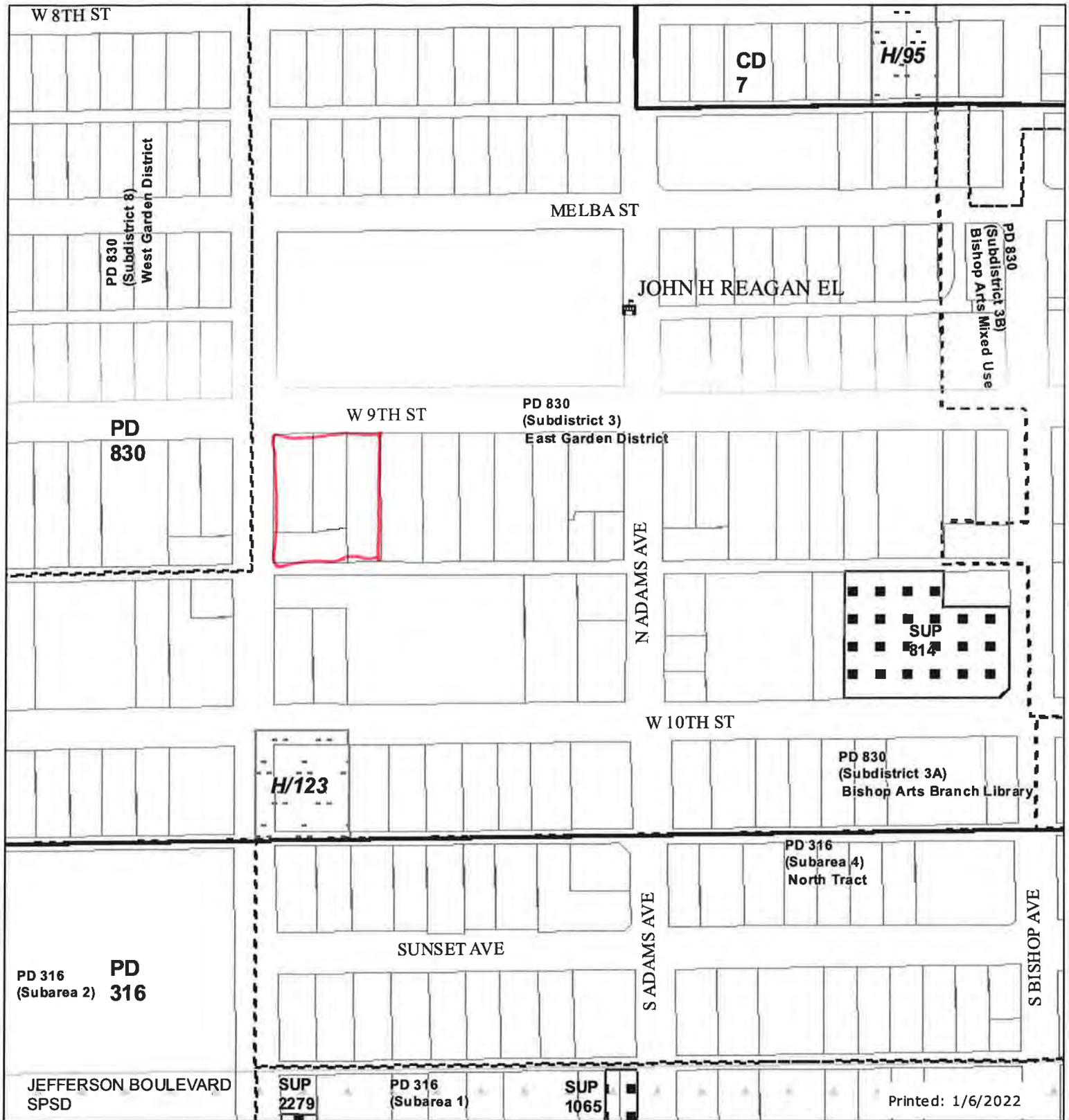
I hereby certify that Mark Drumm
represented by KFM Engineering and Design
did submit a request for a special exception to the landscaping regulations
at 536 W 9th Street

BDA212-019. Application of Mark Drumm represented by KFM Engineering and Design for a special exception to the landscaping regulations at 536 W 9TH ST. This property is more fully described as Pt of Lots 18, 19, 20, Block 35/3155, and is zoned PD-830 (subdistrict 3) E, which requires mandatory landscaping. The applicant proposes to construct a multi-family structure and provide an alternate landscape plan, which will require a special exception to the landscape regulations.

Sincerely,


David Session, Building Official





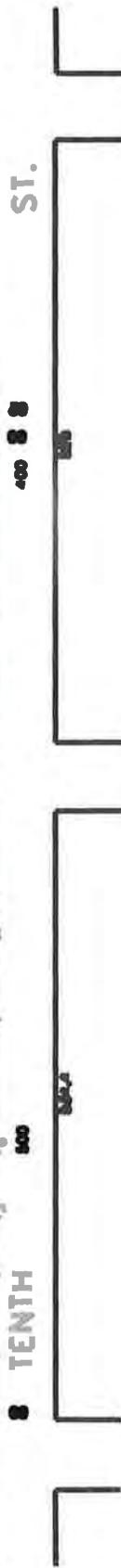
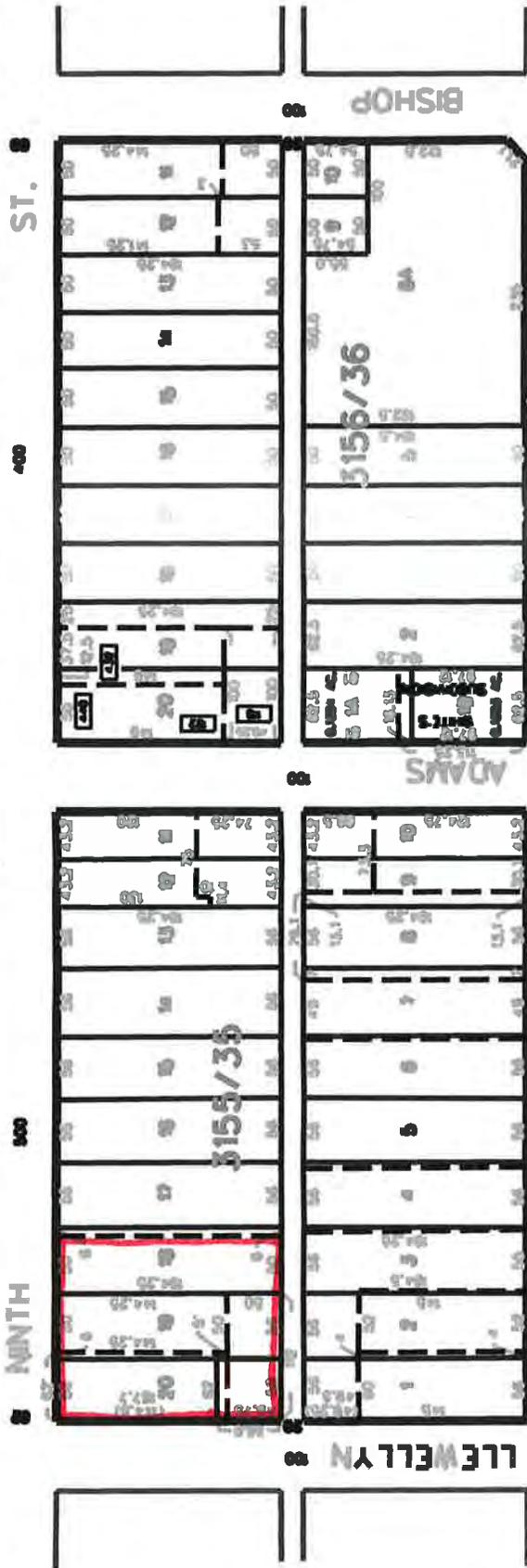
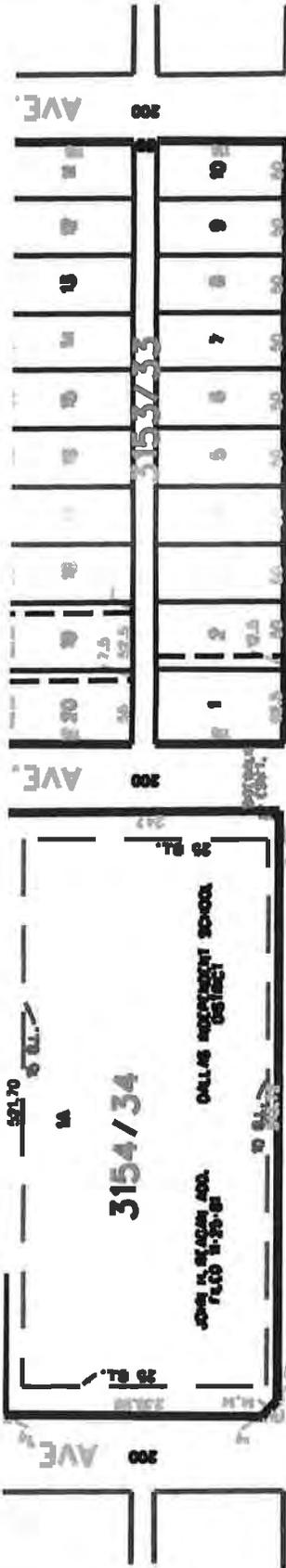
Printed: 1/6/2022

Legend

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





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Owner:
The Shelter Companies, LLC
1772 Reuth Street, Suite 800
Dallas, Texas 75201
214.766.5522

General Contractor:
RWA Construction
1772 Reuth Street, Suite 300
Addicks, Texas 75001
214.978.0177

Civil Engineer:
KFM Engineering & Design
3501 Olympus Boulevard, Suite 100
Frisco, Texas 75034
817.418.4536

Architect:
KFM Engineering & Design
12225 Greenville Ave., #980
Dallas, TX 75243
972.535.5585

Structural Engineer:
Strand Systems Engineering, Inc.
1003 Technology Boulevard West
Frisco, Texas 75034
972.620.8204

MEP Engineer:
Sutton Edge Engineering, LLC
5600 Terrymon Parkway, Suite 250
Frisco, Texas 75024
214.767.7300

Interior Designer:
WORKSHOP | studio
1772 Reuth Street, Suite 206
Dallas, Texas 75208
214.215.8680

Landscape Architect:
KFM Engineering & Design
3501 Olympus Boulevard, Suite 100
Frisco, Texas 75034
817.418.4536

PLANT KEY - GROUND LEVEL

ORNAMENTAL TREES



COMMON NAME

CRIMSON QUEEN MAPLE
OKLAHOMA TEXAS REDBUD

SHRUBS



COMMON NAME

WINTER GEM BOXWOOD
WINTERGREEN BOXWOOD, GLOBE SHAPE
HOLLY FERN
HELENE VON STEIN LAMB'S EAR

LARGE EVERGREEN SHRUBS



COMMON NAME

MAKI PODOCARPUS

GROUND COVERS



COMMON NAME

STANDARD LIRIOPE

**City of Dallas Landscape Requirements - Article X
Avid Living Bishop Arts District**

Street Buffer Zones

Required: One 3" Caliper large or medium tree per 40' of street frontage, except when existing conditions allow two small trees to substitute for each required tree. All street trees must be provided along the entire length of the lot.
Provided: (6) 8' Ht. Min. Ornamental trees along Llewellyn Ave and (8) 8' Ht. Min along 9th Street

Urban Streetscape:

Required: If approved must have a 6' width planting area of open soil and covered soil conditions.
Provided: 6' width planting area of open soil and covered soil conditions.

Interior Zone:

Required: All required large and medium trees must be a minimum of 3" caliper. Minimum landscape area is 160 sf with a minimum soil width of 8'. The center of the trunk must be a minimum of 4' from pavement
Provided: BOA (Board of Adjustments Application)

Site Trees

Required: Must have (1) 2" Caliper Tree per 4,000 sf of Lot Area
Provided: BOA (Board of Adjustments Application)

Screening of off-street loading spaces:

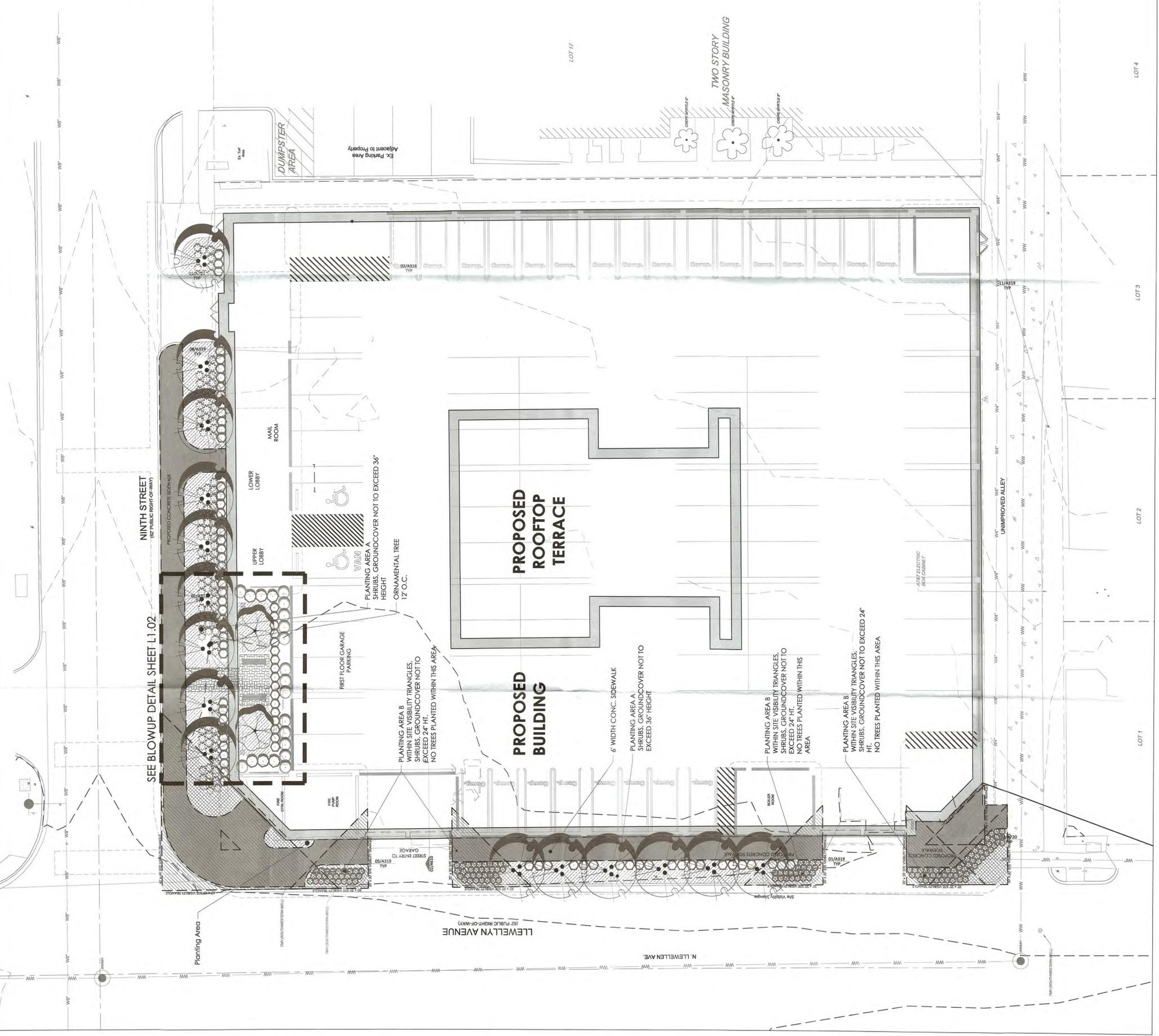
Required: Must be screened from residential adjacency. Must also be screened from all public streets.
Provided: NA

Pedestrian uses - 25 points maximum

Provide private or publicly accessible pedestrian facilities for at least 5% of the building site
Options: Urban streetscape (minimum of 2 amenity types)
x Benches, _x_ Lamps, _x_ Enhanced Pavement

Pavements - 15 points maximum

Provide enhanced or special pavement to a minimum of 25% of all outdoor vehicular pavement or 5% pedestrian use pavement
Options: _x_ Enhanced vehicular pavement. Texture 3pts and Color 3 pts
x Permeable vehicular pavement - 5pts
x Enhanced pedestrian walkways. Texture 3pts and Color 3pts



1" = 10'
0 30 60 90 feet

BDA212-019_ATTACHMENT_A

Memorandum



CITY OF DALLAS

Date March 3, 2022

To Pamela Daniel, Sr. Planner
Jennifer Munoz, Board Administrator

Subject BDA #212-019 536 W 9th Street Arborist report

Request

The applicant is seeking a special exception to the landscaping requirements of Article X. The property is in the PD 830 Subdistrict 3 which contains additional requirements for street trees.

Provision

The proposed landscape plan provides a narrow strip of landscaping on the property at the edge of the building foundation on both street fronts and two enclosed areas facing 9th Street.

- Street buffer zone: Meets Article X urban streetscape (street buffer zone) requirements on 9th Street, but not on Llewellyn Street.
- Street trees are provided with two small trees for a required one large tree, as allowed by PD 830. All street trees are small trees.
- The requirement for site trees is met on the parkway, as allowed by PD 830.

Deficiency

- The plan does not provide for the Article X urban streetscape conditions along Llewellyn Street. Requirements include a minimum six-foot wide planting area and one design option.
- The property requires 15 landscape design option points (Sec. 10.126) but are not provided for, or listed, on the landscape plan. Partial points may have been provided but are not stated.

Recommendation

The chief arborist recommends approval of the proposed revised alternate landscape plan. The landscape plan has several deficiencies based primarily on building proximity to the street right-of-way and the amount of lot coverage relative to open space, all allowed by city zoning regulations. The conditions of PD 830 made supportive conditions to allow 1) site trees to be planted in the right-of-way, and 2) for street trees to be minimized to small trees due to reduced planting spaces as well as the location of public utilities. I believe that strict compliance with the landscaping regulations in Article X unreasonably burdens this use of this property under this design.

Philip Erwin
Chief Arborist
Building Inspection

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.

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 (first & second requests):

Denial:

Rationale:

Staff concluded that the subject site is not unique and different from most lots in Subarea 1 within Conservation District No. 13 considering the evidence (**Attachment A**) neither meets the variance standard by comparing the parcels of land nor proved how the subject land is 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. While the evidence (**Attachment A**) reflected a comparative analysis of twelve properties, the analysis focused on year built, floor area of structures, floor area of variances submitted, average percentage of these variances, average floor area allowed by these variances, and the floor area of existing quarters for five of the comparative properties. Additionally, the evidence (**Attachment A**) provides an overview of how the regulations for the zoning district restrict development on the subject site yet fails to address that the same twelve properties contain the same zoning and regulations that are not prohibitive. All things considered; the evidence (**Attachment A**) does not provide a substantive comparative analysis of the land(s) to meet the variance standard and reflect how the site cannot be developed in a commensurate manner. Subsequently, a cost analysis reflecting how compliance of CD No. 13 regulations would exceed 50 percent of the appraised value of the structure as shown on the most recent appraisal roll certified to the assessor would have received a more favorable recommendation.

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-3-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-a half times greater than the minimum lot size.

The applicant has submitted a document comparing the lot sizes and improvements of the subject site with 12 adjacent properties in the same zoning district. However, information contained within the evidence did not provide a comparative analysis of lot area, shape, or slope. Thus, staff cannot determine whether the subject property is restrictive in a manner to prevent commensurate development.

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 March 11, 2022, staff has received no letters in opposition of and no letters in support of 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:

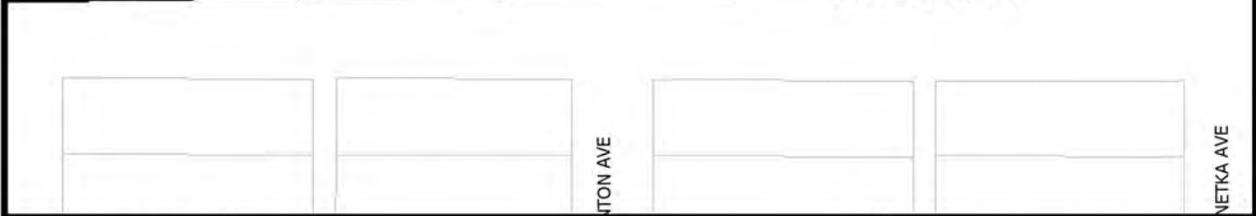
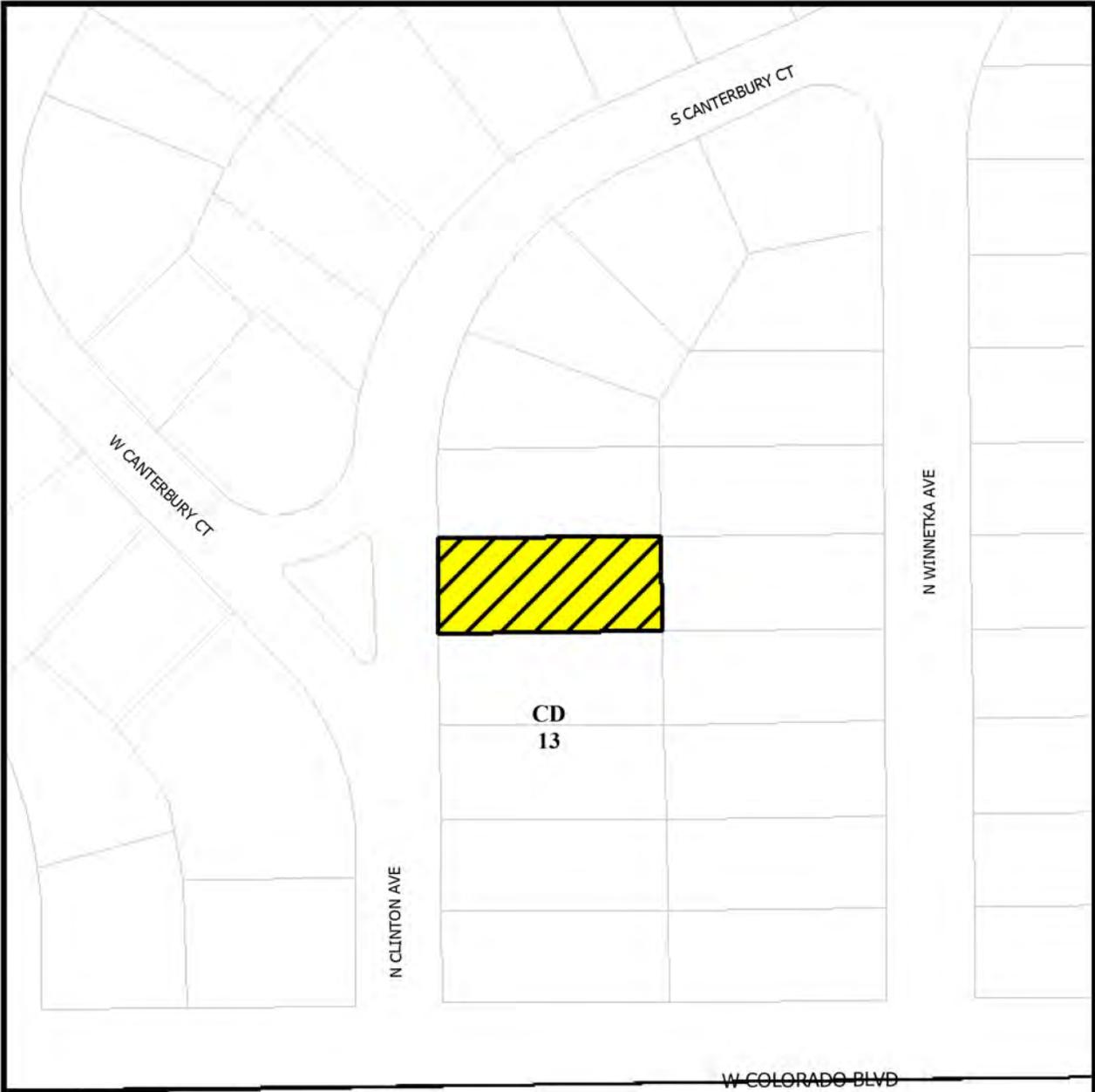
- January 7, 2022: The applicant submitted an “Application/Appeal to the Board of Adjustment” and related documents which have been included as part of this case report. Additionally, the applicant submitted evidence (**Attachment A**) with the application.
- March 1, 2022: The Board of Adjustment Secretary 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.



1:1,200

ZONING MAP

Case no: BDA212-020

Date: 2/1/2022

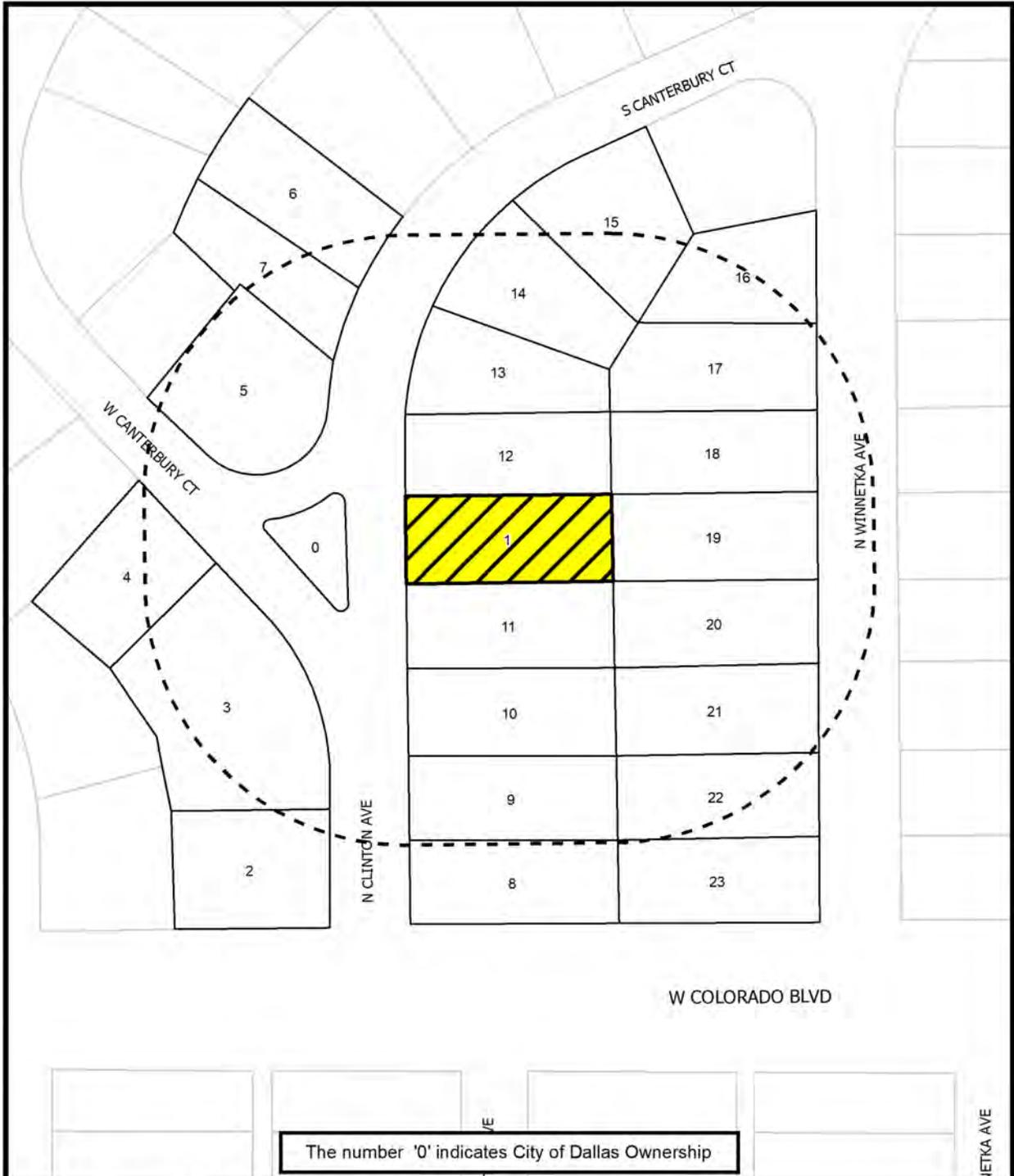


1:1,200

AERIAL MAP

Case no: **BDA212-020**

Date: **2/1/2022**



The number '0' indicates City of Dallas Ownership

 1:1,200	<h2 style="text-align: center;">NOTIFICATION</h2> <table border="0"> <tr> <td style="border: 1px solid black; padding: 2px;">200'</td> <td>AREA OF NOTIFICATION</td> </tr> <tr> <td style="border: 1px solid black; padding: 2px;">23</td> <td>NUMBER OF PROPERTY OWNERS NOTIFIED</td> </tr> </table>	200'	AREA OF NOTIFICATION	23	NUMBER OF PROPERTY OWNERS NOTIFIED	Case no: BDA212-020 Date: 2/1/2022
200'	AREA OF NOTIFICATION					
23	NUMBER OF PROPERTY OWNERS NOTIFIED					

02/01/2022

Notification List of Property Owners

BDA212-020

23 Property Owners Notified

<i>Label #</i>	<i>Address</i>	<i>Owner</i>
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



APPLICATION/APPEAL TO THE BOARD OF ADJUSTMENT

Case No.: BDA 212-020

Data Relative to Subject Property:

Date: ~~01-06-22~~ 1-7-22 col

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

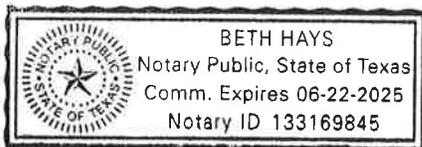
Before me the undersigned on this day personally appeared STEPHEN MARLEY
(Affiant/Applicant's name printed)

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: [Signature]
(Affiant/Applicant's signature)

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

(Rev. 08-01-11)



[Signature]
Notary Public in and for Dallas County, Texas



Legend

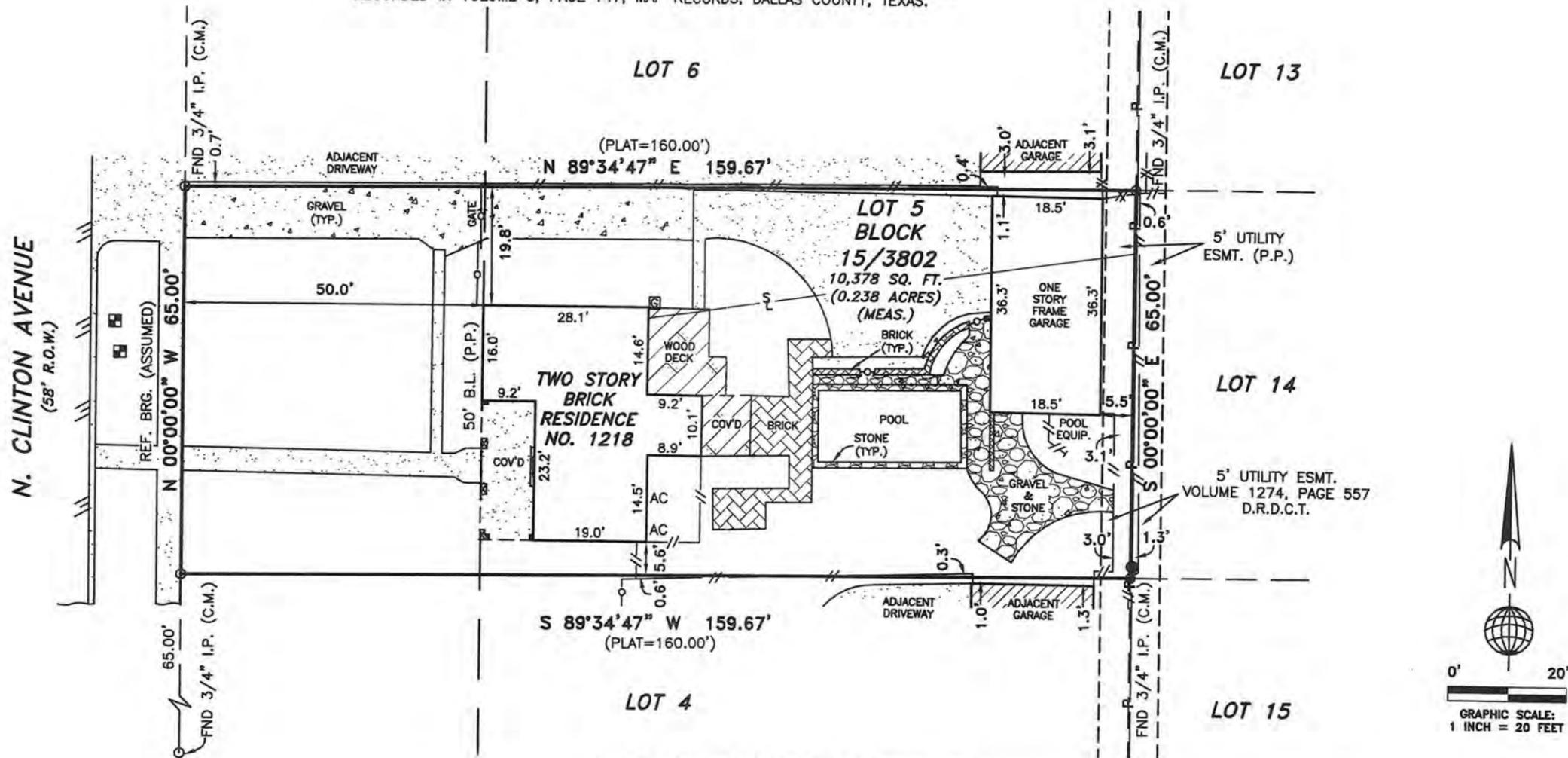
- | | | | |
|----------------------|--------------------------------|-----------------------|----------------------------|
| City Limits | Railroad | Dry Overlay | CD Subdistricts |
| School | Certified Parcels | D | PD Subdistricts |
| Floodplain | Base Zoning | D-1 | PDS Subdistricts |
| 100 Year Flood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



"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.



TEZANTO
817.602.8161
fred@tezanto.com

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

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

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

SYMBOL	LEGEND
---	WOOD FENCE
-x-	CHAIN LINK FENCE
-x-	WIRE FENCE
o	WROUGHT IRON FENCE
□	COLUMN
●	POWER POLE
⊗	WATER METER
—	POWERLINE
—	OVER-HEAD SERVICE LINE
⊕	TRANSFORMER AND PAD
⊕	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 OF 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.

Jason L. Morgan
JASON L. MORGAN TXRPLS 5587



Global Land Surveying, Inc.
SERVING COLLIN, DALLAS AND DENTON COUNTIES SINCE 2002

GLOBAL LAND SURVEYING, INC.
P.O. BOX 280369
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.

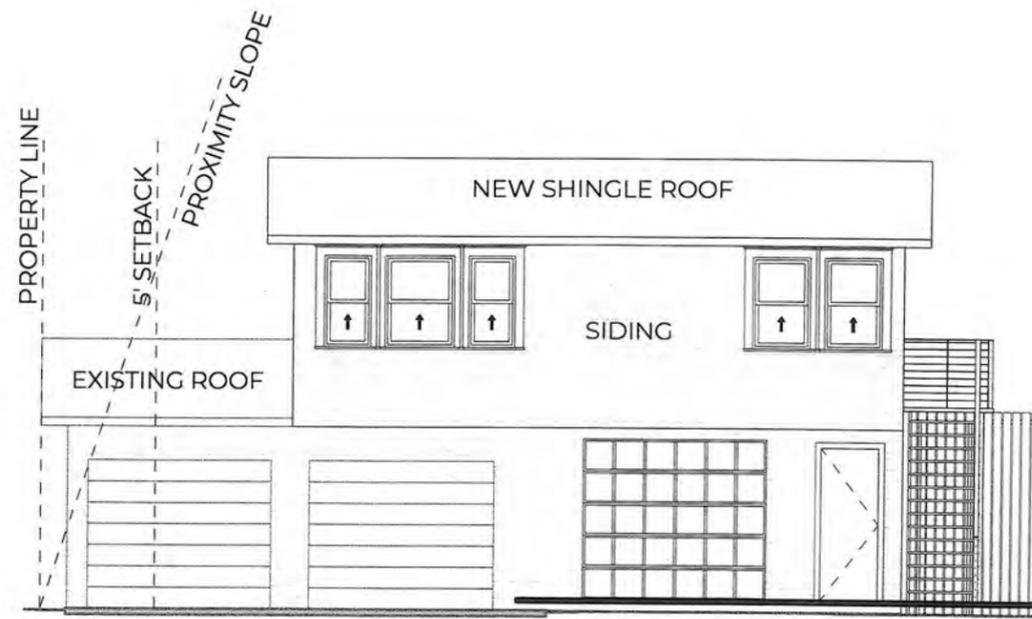
**SURVEY - FOR
REFERENCE**

212-020

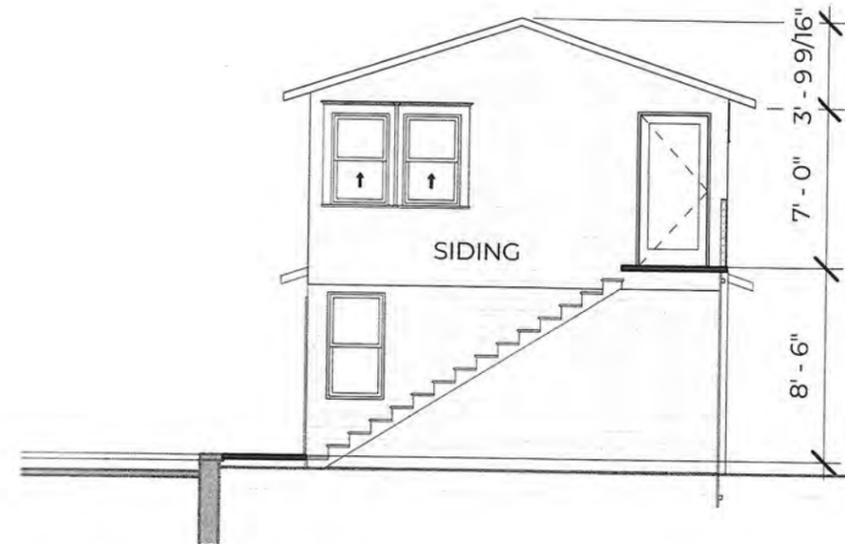
Project number: 21.06-01
Date: 01-07-22

A-02

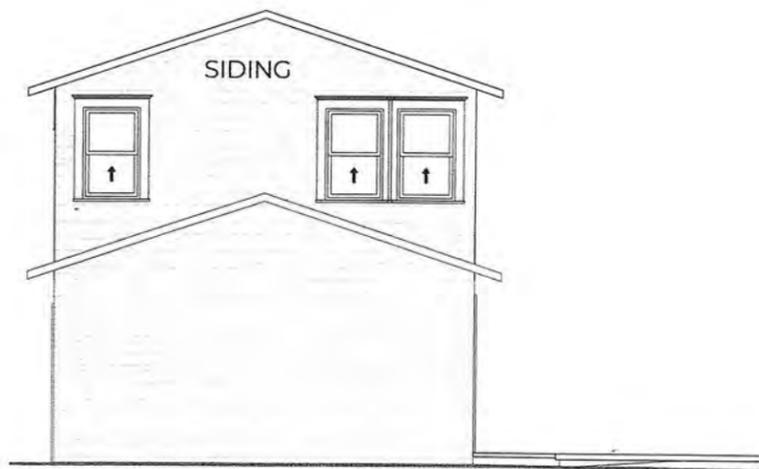
1/7/2022 9:03:54 AM



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

817.602.8161

fred@tezanto.com



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

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 STRUCTURE: 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



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STEPHEN MARLEY**
1218 N CLINTON
DALLAS, TX 75208

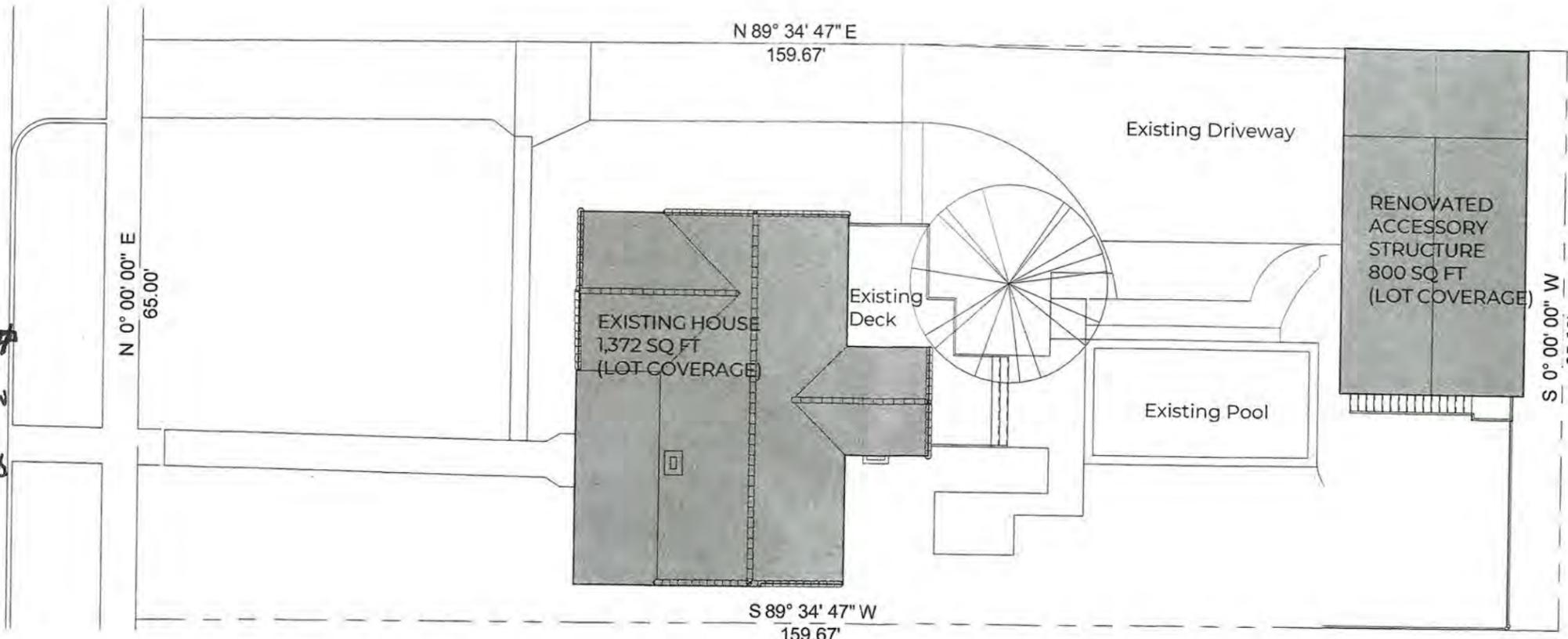
SITE PLAN

212-020

Project number: 21.06-01
Date: 01-07-22

A-01

main Structure per
Dead 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

817.602.8161

fred@tezanto.com



Alfredo Peña
01-07-22

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

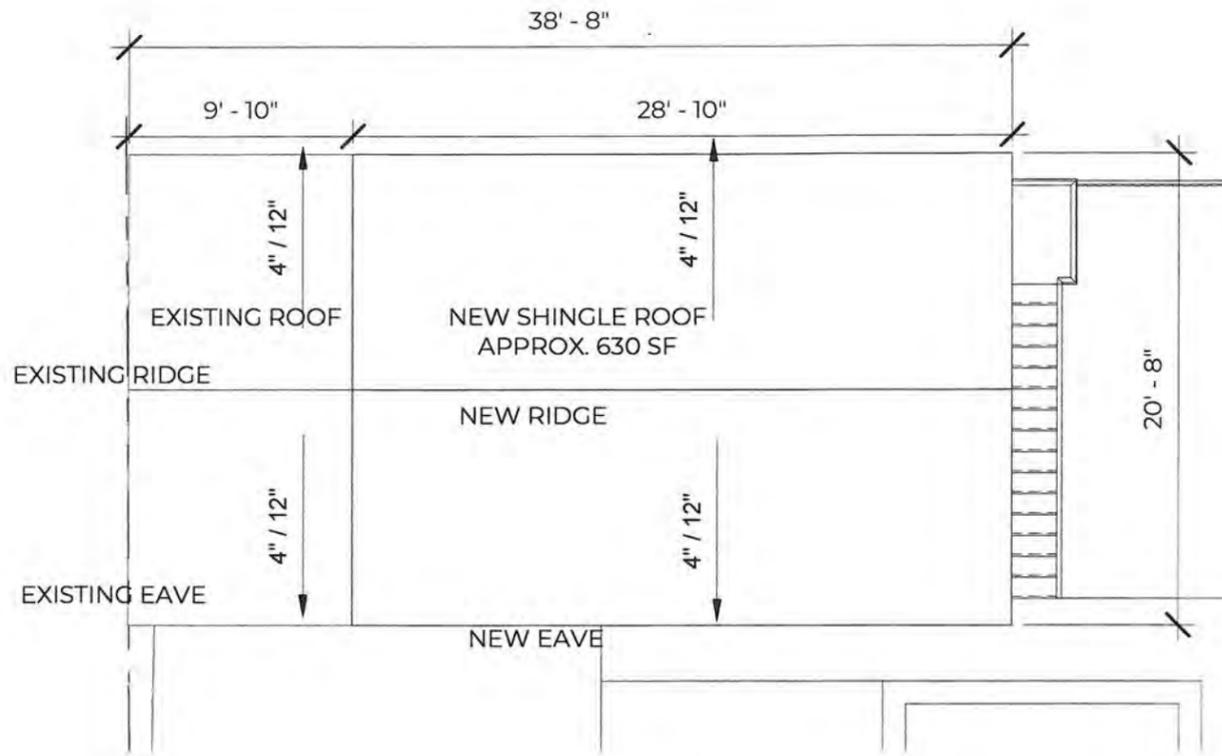
FLOOR PLANS

212-020

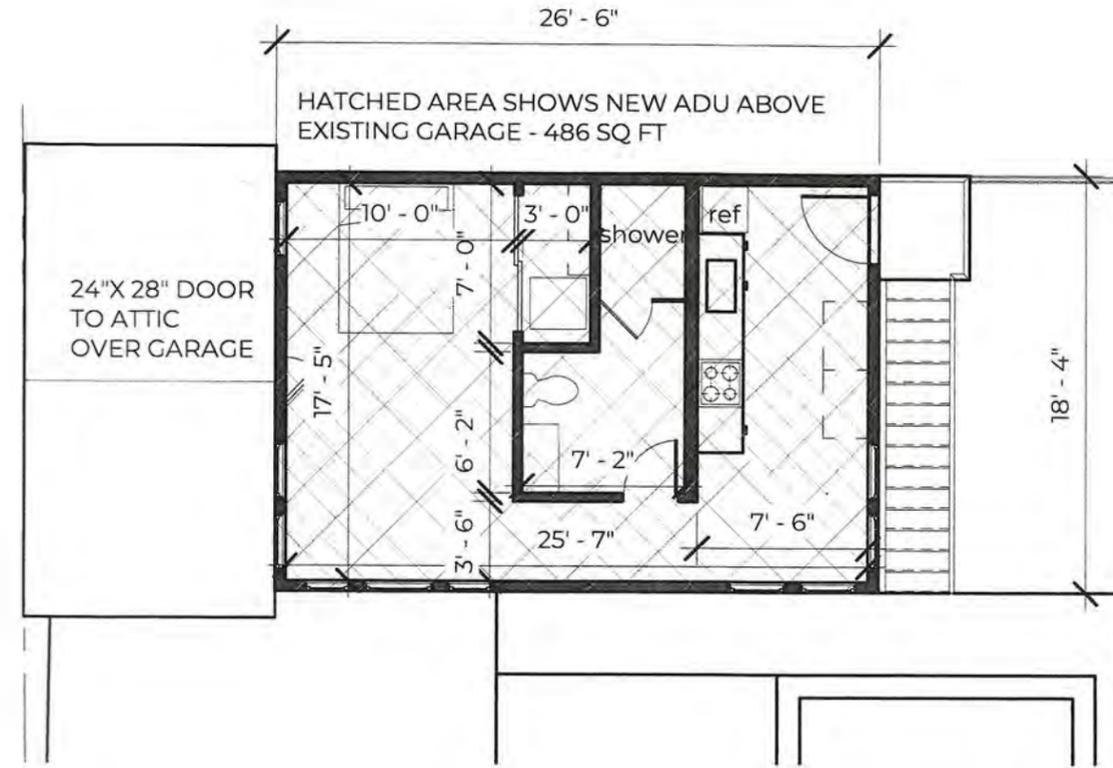
Project number: 21.06-01

Date: 01-07-22

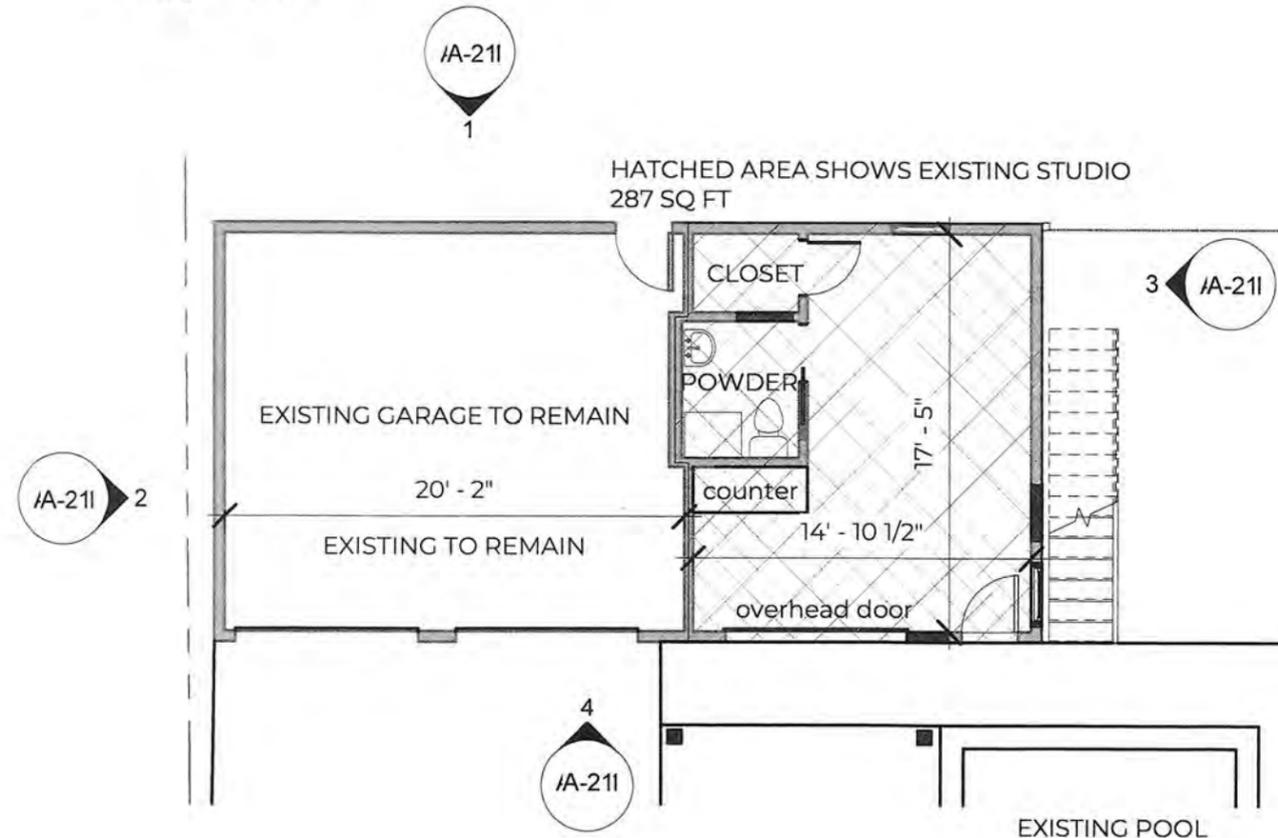
A-12



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



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



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

Board of Adjustment Appeal

1218 N Clinton Ave, Dallas, TX

BOA Case No: BDA212-020

Purpose

The purpose of this appeal is to seek a variance to CD-13, Subarea 1 code requirements applicable to 1218 N Clinton Ave, Dallas, TX 75208, specifically:

1. An accessory structure (“ADU”) may not exceed 25% of the floor area of the main structure; and
2. A side yard setback of 5 feet.

Key structure and measurements include:

Main Structure sq ft: 2,018 SF (living area per DCAD); 2,201 SF (including covered porches)

Allowable sq ft: 505 SF (per DCAD SF); 550 SF (including covered porches SF)

Proposed sq ft: 798 SF accessory structure comprised of 298 SF existing and a 500 SF addition (rounded up to account for small measurement variances), representing 40% of existing main structure, or 15% over existing requirement

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:

- Disparity in main structure square footage (SF) to comparative properties; and
- Limitations in extending the main structure of the house.

BOA212-020_ATTACHMENT_A

Project Summary

The proposed plan is to take the existing accessory structure, or ADU, on the property and extend it upwards, while abiding by all rules pertaining to the property's conservation district.

Floor Area Ratio Variance: Due to constraints of the property, extending the current size of the main structure is limited, so this project looks to solve this through adding onto the existing accessory structure while avoiding an increase of its current footprint. The variance appeal requests a specific increase to 40% of the main structure, or ~15% above the existing 25% floor to area ratio limit, in order to allow the property to be developed in a commensurate manner to other properties.

Setback Variance: The existing accessory structure is a complying structure as it was constructed prior to the establishment of the 5 foot setback ordinance. However, to improve the structure, it must be brought into current compliance. To improve the existing structure, it can no longer stay at its current location without a setback variance. The goal of this setback variance appeal is to simply maintain what is already existing, not to place a larger footprint onto the setback. The existing structure is shown below in **Figure 1.**

Figure 1. Existing Structure

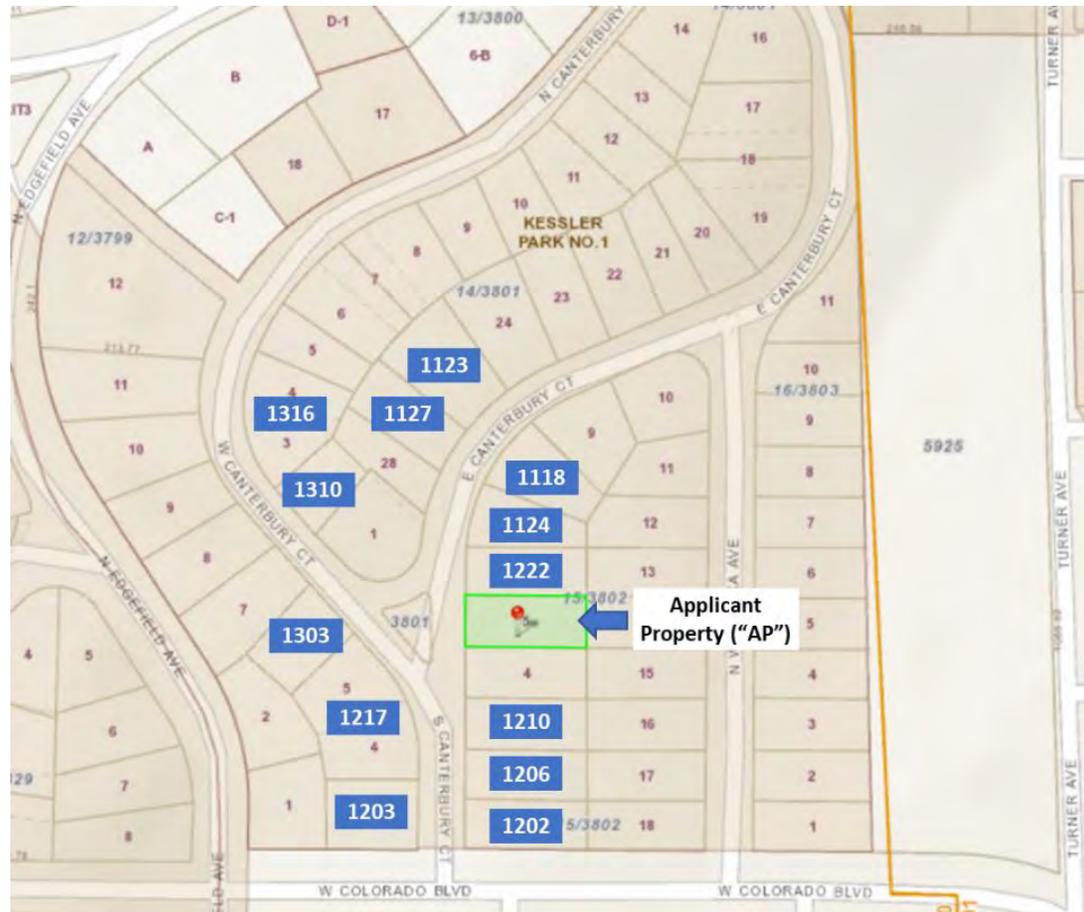


Comparative Property Data & Main Structure Disparity

The properties shown in **Figure 2** have been used for comparison. The properties are directly adjacent or within very close proximity to the subject property and thus are an indicative sample.

Figure 2. Comparative Properties

- 1202 N Clinton Ave
- 1203 N Clinton Ave
- 1206 N Clinton Ave
- 1210 N Clinton Ave
- 1217 N Clinton Ave
- 1222 N Clinton Ave
- 1123 Canterbury Ct
- 1124 Canterbury Ct
- 1118 Canterbury Ct
- 1303 W Canterbury Ct
- 1310 W Canterbury Ct
- 1316 W Canterbury Ct



As shown in the analysis in **Figure 3**, the Applicant Property (“AP”) is roughly 64%, or 1,289 SF, smaller than comparative properties in the immediate vicinity. If the square footage of the AP’s main structure was commensurate with the immediate neighbors, the allowable ADU would be 827 SF, or 29 SF less than the combined requested 798 SF. Additionally, if the SF of the main structure was improved to meet the 25% threshold of the ADU at the proposed 798 SF, the main house would need to be 3,192 SF, or 115 SF less than the average comparable properties in the neighborhood.

Figure 3. Property Comparison

St No.	St Name	Year Built	SF Var			Qtrs SF Allowable	Existing Qtrs	Proposed Addtl Qtrs **	Total Qtrs	% of Main	% Overage		
			SF *	From AP	% Var						Qtrs SF Overage	From 25% Code	
1202	N Clinton Ave	1937	4,073	2,055	102%	1,018							
1203	N Clinton Ave	1934	3,022	1,004	50%	756							
1206	N Clinton Ave	1924	2,629	611	30%	657							
1210	N Clinton Ave	2001	3,254	1,236	61%	814	529		529				
1217	N Clinton Ave	1933	4,012	1,994	99%	1,003							
1218	N Clinton Ave	1924	2,018	0	0%	505	298	500	798	40%	294	15%	Applicant Property (AP)
1222	N Clinton Ave	1936	3,010	992	49%	753							
1123	Canterbury Ct	1922	4,266	2,248	111%	1,067	714		714				
1124	Canterbury Ct	1924	3,158	1,140	56%	790	374		374				
1118	Canterbury Ct	1936	2,937	919	46%	734							
1303	W Canterbury Ct	1949	2,701	683	34%	675							
1310	W Canterbury Ct	1929	2,802	784	39%	701							
1316	W Canterbury Ct	1935	3,814	1,796	89%	954	200		200				
Avg. excluding Applicant Property			3,307	1,289	64%	827	<-- Avg. is 29 SF greater than requested at Applicant Property						
Adj. AP SF required to maintain ADU within 25% code			3,192										
Adj. AP SF Variance to Avg SF			(115)										

* Main Structure (SF) based on Dallas CAD Records and does not take into account covered areas
 ** Proposed Additional Quarters SF rounded up to account for potential small measurement variations and avoid resubmission to BOA

Development of Main Structure

Options were initially looked at to extend the main structure instead of the current proposed plans for an accessible structure given this can be approved without variances; however, limitations were identified in the feasibility phase that limited the expansion of the main structure to achieve the required SF to meet the 25% requirement:

- Conservation District ordinances, setback rules and aesthetics make extending to the front impossible.
- The main structure sits at two stories and Conservation District ordinances will not allow further upward extension
- Conservation District ordinances, setback rules, anti-looming rules and design requirements of contributing houses make expanding the southern part of the house prohibitive – see **Figure 4**
- Expansion backwards 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 maintain the tree) – see **Figure 5**.

Figure 4. Anti-looming Setback Prohibiting Expansion On Southern Part of Main Structure

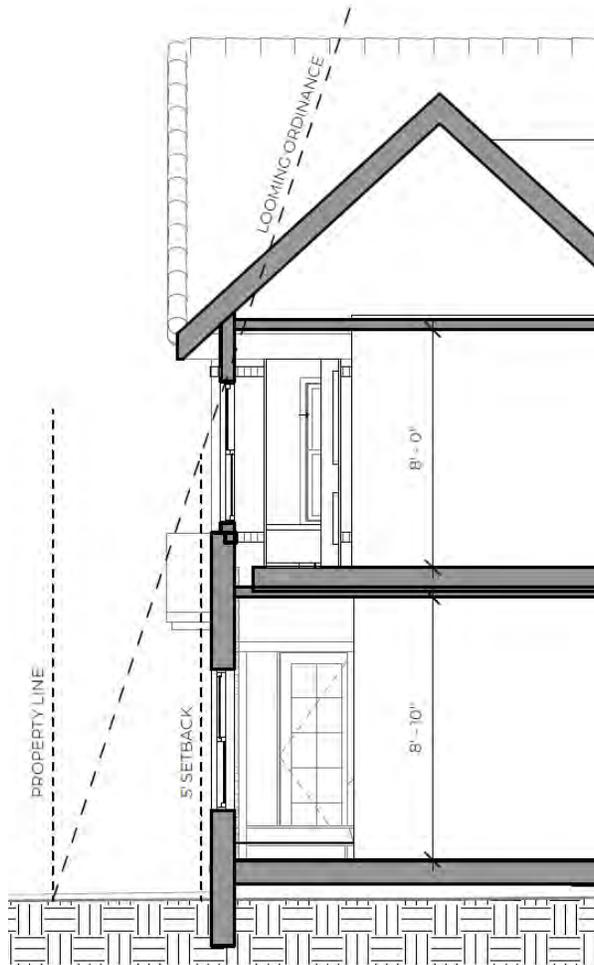


Figure 5. Significant Eastern Redcedar (*Juniperus Virginia*) in backyard (est. 100+ yrs old)



Conclusion

The board of adjustment appeal can grant variances provided that:

- **The Variance is not Contrary to the Public Interest:** providing the variances requested in this appeal will NOT go against the public interest, as the proposed plans:
 - Are in keeping with the main structure contingent upon this variance.
 - Aid in the preservation of a tree whose removal would cause a significant impact to the Applicant Property, all adjacent properties, and the surrounding neighborhood.
- **The Variance is Necessary to Develop the Property in a Commensurate Fashion:** as evidenced above, the current parcel of land is different from all comparison properties in:
 - Main Accessory Sq Footage.
- **The variances are not being requested to relieve a self-created or personal hardship or for financial reasons**
- **The existing accessory structure footprint is NOT increasing.**

FILE NUMBER: BDA212-021(PD)

BUILDING OFFICIAL'S REPORT: Application of Dimitri Morris for a variance to the off-street parking regulations at 5531 Anita Street. This property is more fully described as Lot 3 in City Block J/2901 and is zoned a D(A) Duplex District, which requires a parking space to be at least 20 feet from the right-of-way line adjacent to a street or alley if the space is located in an enclosed structure and if the space faces upon or can be entered directly from the street or alley. The applicant proposes to construct and maintain an addition to the existing single-family dwelling unit with a setback of five-feet one-inch which will require a variance of 14-feet 11-inches to the off-street parking regulations.

LOCATION: 5531 Anita Street

APPLICANT: Dimitri Morris

REQUEST:

A request for a variance to the off-street parking regulations of 14-feet 11-inches is made to construct and maintain addition to the existing single-family dwelling unit (garage with second story) with a setback of five-feet one-inch in lieu of the 20-foot setback requirement.

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:

- 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;
- 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
- 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 and an automatic garage door must be installed and maintained in working order at all times.

Rationale:

Staff concluded that the subject site is unique and different from most lots in the D(A) Duplex District considering its restrictive lot area of 7,923 square feet. The applicant submitted documents (**Attachment A**) comparing the minimum lot size and total floor area ratio for all structures, to six properties within the same zoning district. Per the comparative analysis, the average lot area is 8,768 square feet and the average floor area for structures is 3,666 square feet while the subject site is reported as containing an existing floor area of approximately 2,079 square feet with the proposed addition providing 1,071 square feet for a total of 3,150 square feet for the single-family dwelling. Thus, 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 Transportation Development Services Department Senior Engineer reviewed the information provided for review and has a recommendation of denial to the request. (**Attachment B**). The recommendation cites maneuvering into proposed garage access would encroach onto private property (across the alley).

BACKGROUND INFORMATION:

Zoning:

<u>Site:</u>	D(A) Duplex District
<u>North:</u>	D(A) Duplex District
<u>East:</u>	D(A) Duplex District
<u>South:</u>	D(A) Duplex District
<u>West:</u>	D(A) Duplex District

Land Use:

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

Zoning/BDA History:

There have not been any related board or zoning cases in the immediate vicinity within the last five years.

GENERAL FACTS/STAFF ANALYSIS:

This request for a variance to the off-street parking regulations focuses on constructing and maintaining a two-story addition containing a two-car garage (an enclosed area) that would be located five-feet one-inch from the property line adjacent to the improved alley, into the required 20-foot distance requirement on a property developed with a one-story single-family dwelling unit.

Section 51(A)-4.301(a)(9) of the Dallas Development Code states that a parking space must be at least 20 feet from the right-of-way line adjacent to a street or alley if the space is located in an enclosed structure and if the space faces upon or can be entered directly from a street or alley.

According to DCAD records, the “main improvements” consist of an approximately 2,079-square-foot one-story dwelling unit and “additional improvements” consist of an approximately 100-square-foot structure titled “storage building” which has been removed or demolished.

The subject site is flat, rectangular in shape and, according to the submitted application, 7,923 square feet in lot area whereas the minimum lot area for an D(A) Single Family District is 6,000 square feet.

The applicant provided evidence (**Attachment A**) representing a comparative analysis of six properties within the same zoning district. The analysis compared the total floor area ratios of the main structures and all structures on these properties. The analysis proved that the site provides a delta of 1,333 square feet total floor area for the main structure and a delta of 1,587 square feet overall for all structures on the six comparative lots.

The Transportation Development Services Department Senior Engineer reviewed the information provided and has a recommendation of denial to the request. (**Attachment B**).

- The applicant has the burden of proof in establishing the following:
- That granting the variance to the off-street parking 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 D(A) zoning classification.
- 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 D(A) zoning classification.

The board may also consider the new criteria for unnecessary hardship and how they relate to the proposed structure and/or existing main structure constraints.

As of March 11, 2022, staff has received one letter in opposition and no letters in support of the request.

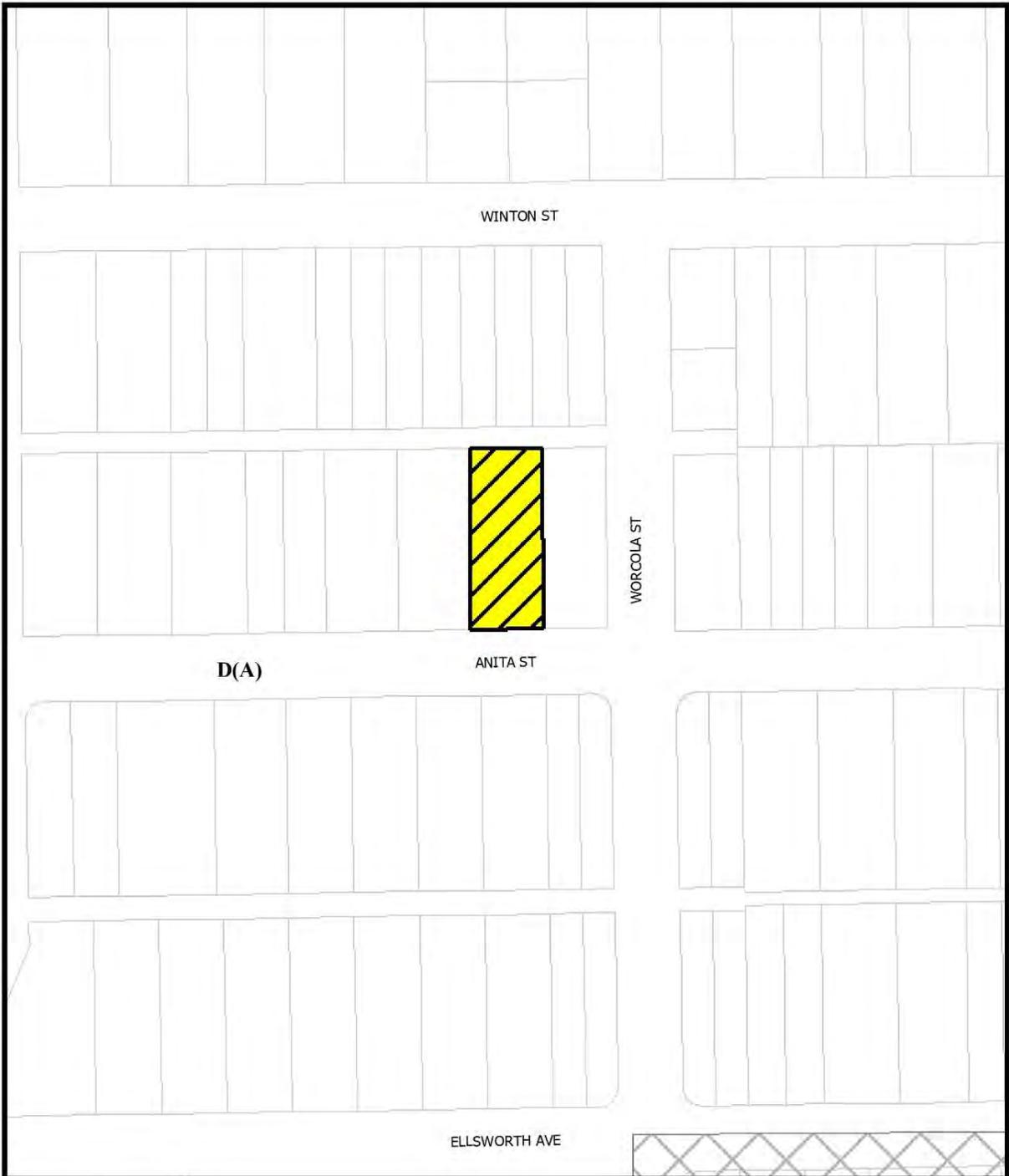
If the board were to grant the request for a variance for an enclosed garage to be located five-feet one-inch from the right-of-way line adjacent to a street or alley into the required 20-foot setback, staff recommends imposing the following conditions:

1. Compliance with the submitted site plan is required.
2. An automatic garage door must be installed and maintained in working order at all times.

However, granting the variance request will not provide any further relief to the Dallas Development Code regulations (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.
- March 3, 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, 2022 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 hearing. The review team members in attendance included: the Planning and Urban Design Interim Assistant Director, the Board of Adjustment Chief Planner/Board Administrator, the Chief Arborist, the Development Code Specialist, the Senior Sign Inspector, the Transportation Senior Engineer, the Board of Adjustment Senior Planner, and the Assistant City Attorney to the Board.
- March 7, 2022: The applicant submitted evidence to staff. (**Attachment A**).
- March 14, 2022: The Senior Engineer submitted a review comment sheet (**Attachment B**).

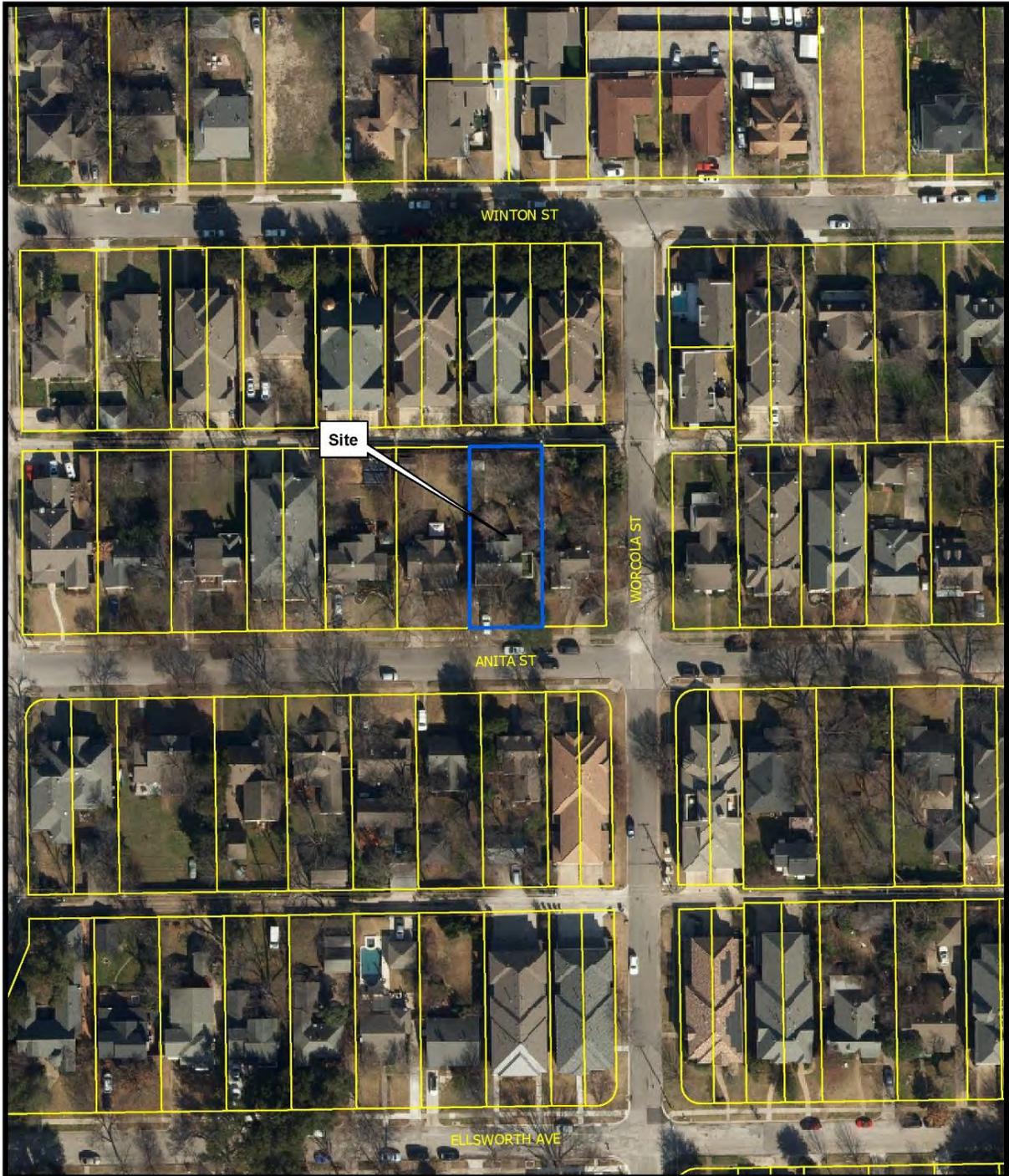


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ZONING MAP

Case no: BDA212-021

Date: 2/1/2022

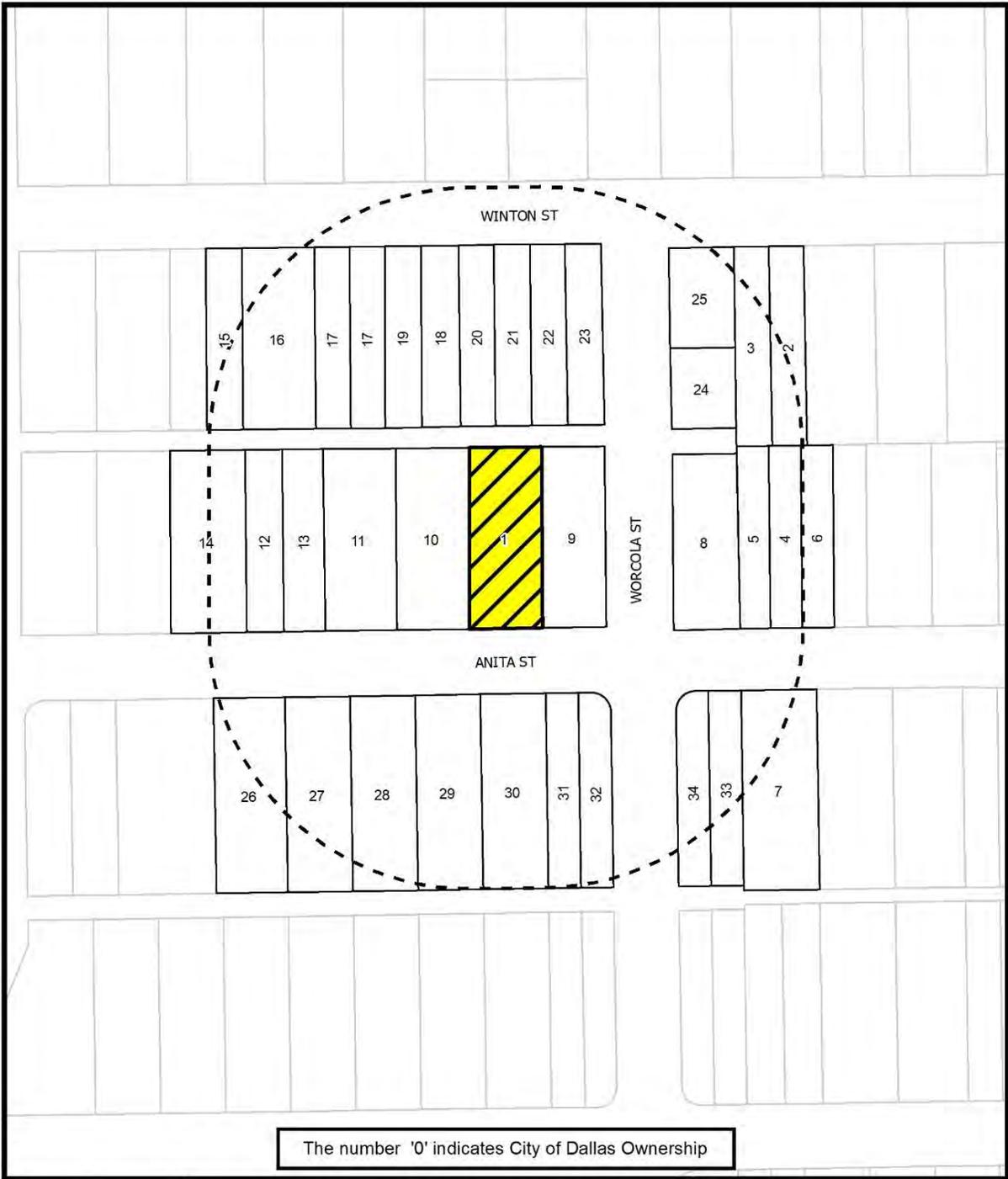


1:1,200

AERIAL MAP

Case no: BDA212-021

Date: 2/1/2022



1:1,200

NOTIFICATION

200' AREA OF NOTIFICATION
34 NUMBER OF PROPERTY OWNERS NOTIFIED

Case no: **BDA212-021**
 Date: **2/1/2022**

02/01/2022

Notification List of Property Owners

BDA212-021

34 Property Owners Notified

<i>Label #</i>	<i>Address</i>	<i>Owner</i>
1	5531 ANITA ST	Taxpayer at
2	5606 WINTON ST	KOHLI RAJAN S
3	5604 WINTON ST	ISAAK ELAINE B & IOANNIS L
4	5609 ANITA ST	HANSON ANDREW &
5	5607 ANITA ST	LEWIS LISA
6	5611 ANITA ST	REID KATHRYN G &
7	5606 ANITA ST	DRANESKIPWORTH CHERYL
8	5603 ANITA ST	TURNER MARY ANN
9	5535 ANITA ST	ONUOHA SUNDAY
10	5525 ANITA ST	MILLER LAURI G
11	5521 ANITA ST	MCBRAYER SAMUEL K & MOLLY B
12	5517 ANITA ST	FEINSTEIN LAUREN
13	5519 ANITA ST	BATTLE MONIQUE
14	5513 ANITA ST	DAVENPORT RICHARD BUCKLEY
15	5510 WINTON ST	EUSTACE CHRISTOPHER SCOTT
16	5512 WINTON ST	OHLAND BILL
17	5516 WINTON ST	HAERTLING INVESTMENTS LP
18	5522 WINTON ST	HARRIS DIANE
19	5520 WINTON ST	HARRIS DIANE
20	5524 WINTON ST	POLAND TYLER J & CYNTHIA
21	5526 WINTON ST	HOHERTZ JARED & KELLY
22	5532 WINTON ST	PARKER BRETT M
23	5534 WINTON ST	OSBORNE ELIZABETH & STEPHEN SR &
24	4070 WORCOLA ST	WOODALL CHASE & LESLIE
25	5600 WINTON ST	GUZMAN GARRETT & KEESHA
26	5514 ANITA ST	PACE CHARLES RYAN &

02/01/2022

<i>Label #</i>	<i>Address</i>	<i>Owner</i>
27	5518 ANITA ST	MORLEY DAVID
28	5522 ANITA ST	KUPER HOLLY
29	5526 ANITA ST	LESLIE BRIAN
30	5530 ANITA ST	ROBINSON STEVEN JON &
31	5534 ANITA ST	POMPA JOHNNY J II &
32	5536 ANITA ST	THOMAS ROBY
33	5602 ANITA ST	RASMUSON SCOTT A & AMY
34	5600 ANITA ST	COLLINS SALLY KATHLEEN



City of Dallas

APPLICATION/APEAL TO THE BOARD OF ADJUSTMENT

Case No.: BDA 212-021

Date: 4/6/22 1-7-22 col

Data Relative to Subject Property:

Location address: 5531 ANITA ST. Zoning District: D(A)
Lot No.: 3 Block No.: J/2901 Acreage: 0.18 Census Tract: 0003.00
Street Frontage (in Feet): 1) 57' 2) 3) 4) 5)

To the Honorable Board of Adjustment :

Owner of Property (per Warranty Deed): GARY KESSLER

Applicant: DIMITRI MORRIS Telephone: 214-803-7172

Mailing Address: 1417 N WASHINGTON AVE. Zip Code: 75204

E-mail Address: dimitri@centurydesignbuild.com

Represented by: Telephone:

Mailing Address: Zip Code:

E-mail Address:

Affirm that an appeal has been made for a Variance [checked], or Special Exception, of SECTION 51A-4.301 OFF-STREET PARKING REGULATIONS (a) GENERAL PROVISIONS (9)

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: EXISTING PERMIT FOR REMODELING AND ADDITION WAS APPROVED 4/26/21 SHOWING GARAGE ATTACHED TO HOUSE AND SETBACK 5'-1" FROM ALLEY, WITH GARAGE DOOR FACING ALLEY. PLEASE PROVIDE A GRANT FOR CONTINUING GARAGE DOOR INSTALLATION, PER APPROVED PLANS. THANK YOU

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 DIMITRI MORRIS (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: Dimitri Morris (Affiant/Applicant's signature)

Subscribed and sworn to before me this 6th day of JANUARY 2022



Notary Public in and for Dallas County, Texas

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 Dimitri Morris

did submit a request for a variance to the off-street parking regulations
at 5531 Anita Street

BDA212-021. Application of Dimitri Morris for a variance to the off-street parking regulations at 5531 ANITA ST. This property is more fully described as Lot 3, Block J/290 and is zoned D(A), which requires a parking space must be at least 20 feet from the right-of-way line adjacent to a street or alley if the space is located in an enclosed structure and if the space faces upon or can be entered directly from the street or alley. The applicant proposes to construct a single family residential garage structure with a setback of 5 feet 1 inch, which will require a variance of 14 feet 11 inch to the off-street parking regulations.

Sincerely,


David Session, Building Official



CITY OF DALLAS

AFFIDAVIT

Appeal number: BDA 212-021

I, GARY KESSLER, Owner of the subject property
(Owner or "Grantee" of property as it appears on the Warranty Deed)

at: 5531 ANITA ST.
(Address of property as stated on application)

Authorize: DIMITRI MORRIS
(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)
- Other Appeal (specify below)

Specify: GARAGE DOOR FACING THE ALLEY
WITH 5'-1" SETBACK

Gary S. Kessler
Print name of property owner or registered agent

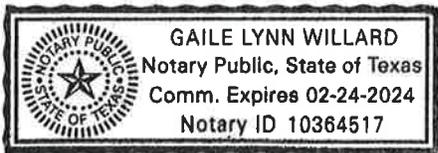
[Signature]
Signature of property owner or registered agent

Date 1/6/22

Before me, the undersigned, on this day personally appeared Gary S. Kessler

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 6 day of January, 2022



Gaile Lynn Willard
Notary Public for Dallas County, Texas

Commission expires on 02-24-2024



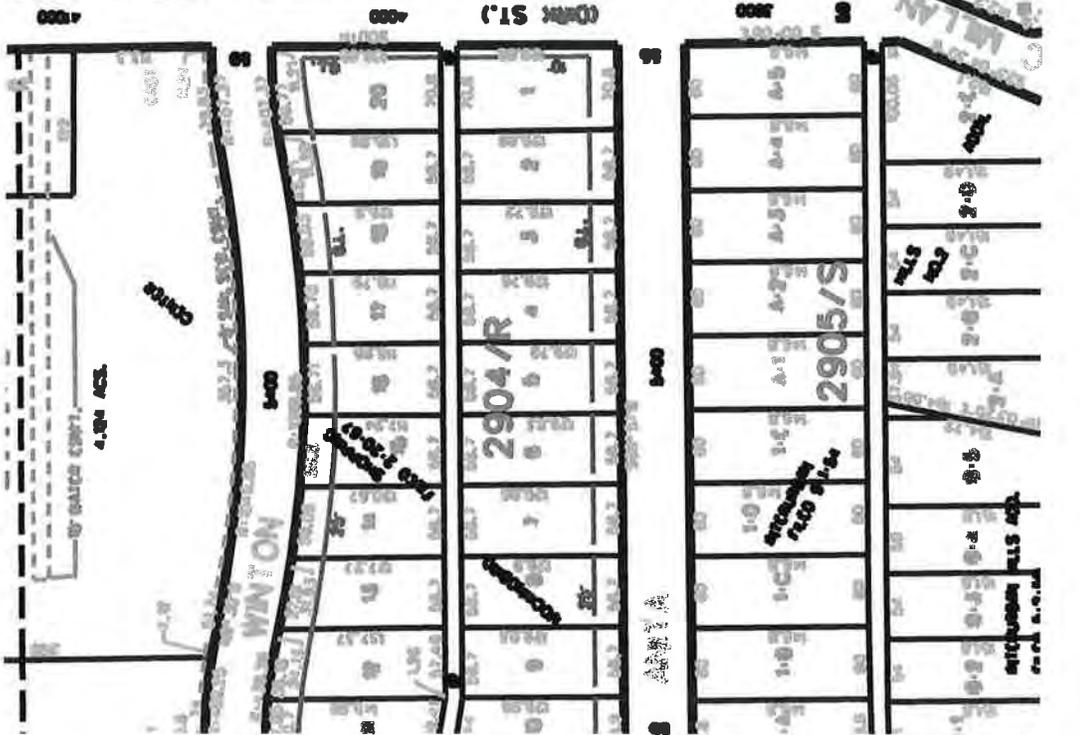
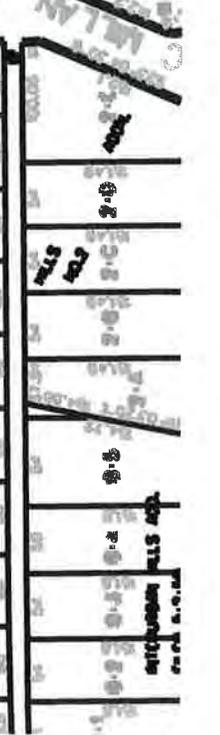
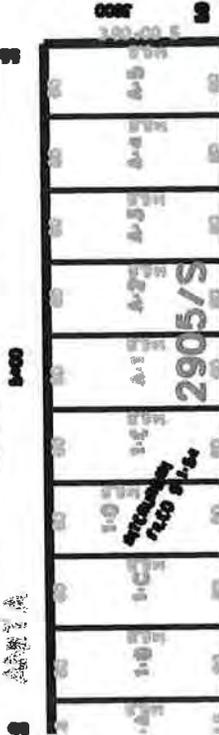
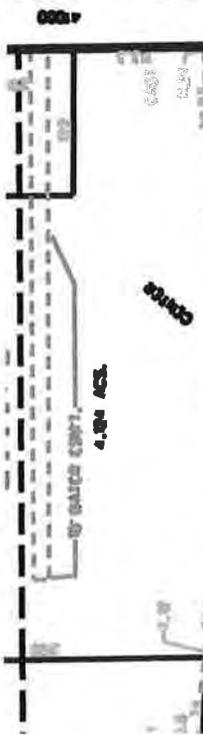
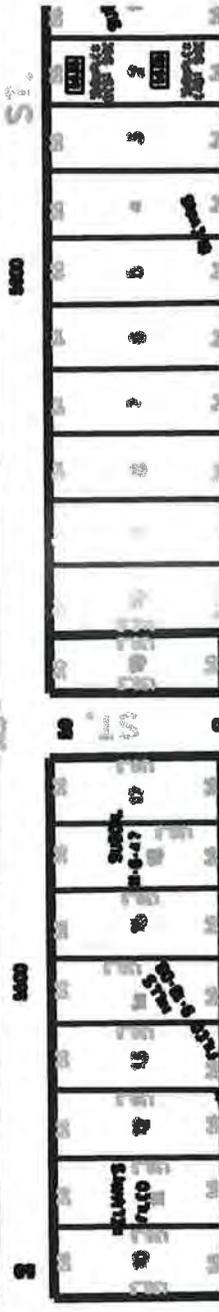
Printed: 1/7/2022

Legend

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





ANITA STREET

(DIRECTIONAL CONTROL)

S 89°57'00" W 57.00' PLAT

1/2" IRS FROM WHICH BEAR 5/8" IPF (S 33°07'53" W 0.87')

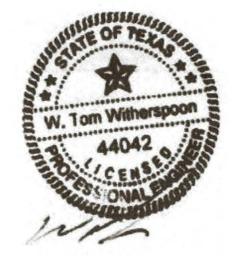
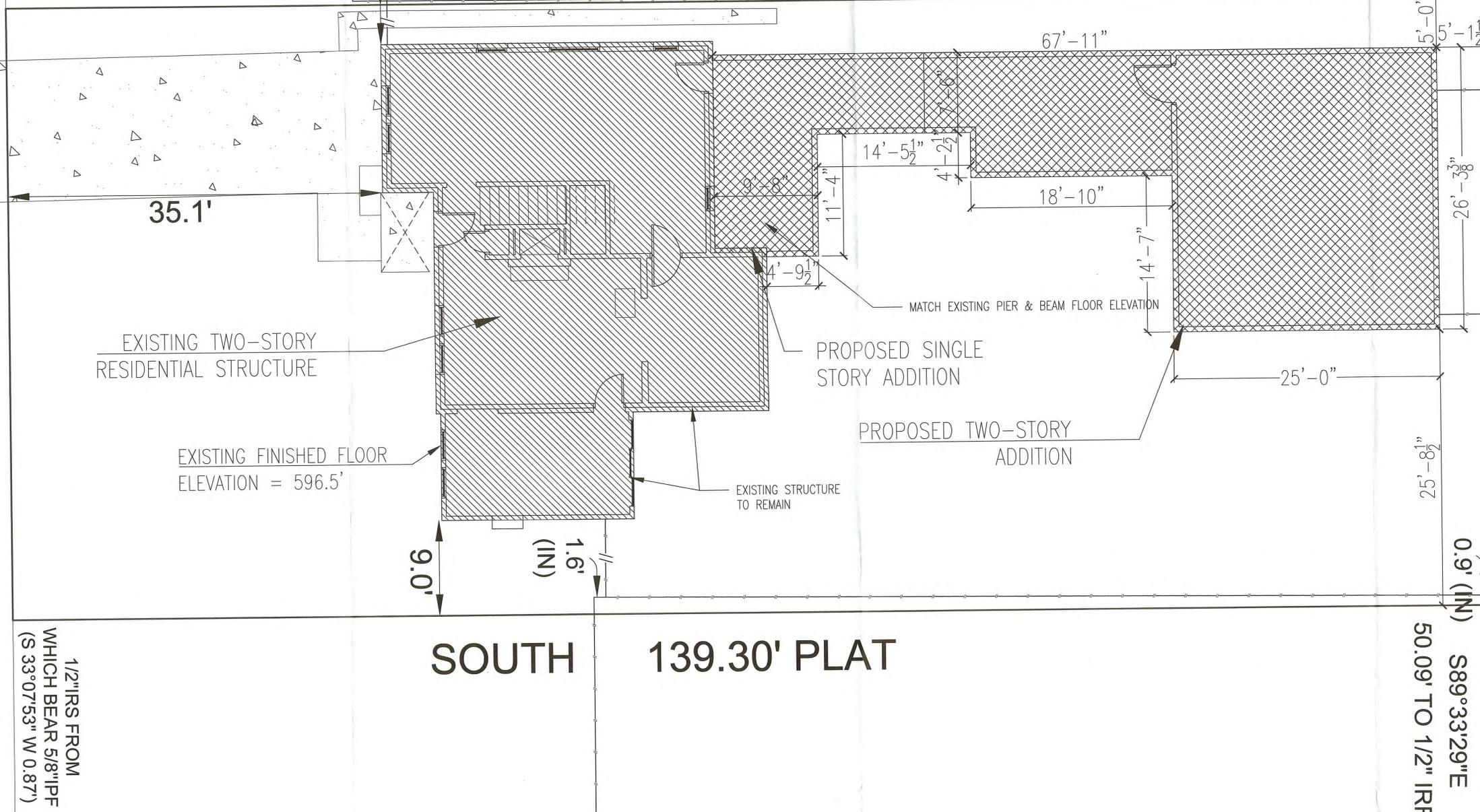
NEAREST STORM DRAIN INLET ELEVATION = 593.0'

NORTH 139.30' PLAT

SOUTH 139.30' PLAT

N 89°57'00" E 57.00' PLAT

MRD S 89°33'29"E 50.09' TO 1/2" IRF



1 SITE PLAN
3/16" = 1'-0"

5531 ANITA ST.
DALLAS, TX 75206

DATE: 4/24/2021 1:25:37 AM
REVISIONS:

SHEET NO.: SITE
S 1.1
212-021

BOA212-021_ATTACHMENT_A

Dear Ms. Daniel,

As a preliminary matter, thank you very much for your phone call today. As additional evidence in support of the requested variance, please note that there are several comparable properties in close proximity (and some in other areas of Dallas) subject to the same zoning ordinance, Duplex(A), which evidence that the applicant/appellant cannot build the proposed structure (or a structure similar to the structures located on comparable lots subject to the same zoning ordinance) because of the relative size of 5531 Anita St. Dallas, TX 75206. Such compelling evidence would suggest that because of the smaller lot size at 5531 Anita St. Dallas, TX 75206, the record home owners meet the standard required for a variance from Section SEC. 51A-4.301(a)(9) of the Code. Please accept as evidence the below lots subject to the same zoning ordinance with similar sized improvements (in square footage) as the proposed addition as evidence to support applicant/appellants requested variance:

The Subject Property

The subject property of this appeal is located at 5531 Anita St. Dallas, TX 75206. The lot is approximately 7,923 square feet and the square footage of the living area with the proposed improvement(s) is approximately 3,150 squarefeet. As additional information, the existing structure at 5531 Anita St. Dallas, TX 75206 has approximately 2,079 square feet of living area.

Comparable Properties Subject to Same Zoning Ordinance Evidencing Need For Appellants Variance (as required to build comparable improvements) *All values are pursuant to current DCAD records*

5504 Ellsworth Ave Dallas, TX 7506—Approximately 11,109 square foot lot with 3,039 square feet of living space.

5501 Winton St. Dallas, TX 75206—Approximately 9,800 square foot lot with approximately 3,897 square feet of living area.

5639 Winton St. Dallas, TX 75206—Approximately 5,270 square foot lot with approximately 2,857 square feet of living area. Notably, and most importantly, this is a duplex and represents only half of the comparable lot size which bolsters support for the requested variance in this case to be able to build the comparable structure.

5451 Ellsworth Ave, Dallas, TX 75206—Approximately 8,154 square foot lot with approximately 2,442 square feet of living area.

5509 Martel Ave Dallas, TX 75206—Approximately 9,118 square foot lot with approximately 6,502 square feet of living area. *(Emphasis added)*

5503 Martel Ave Dallas, TX 75206—Approximately 9,160 square foot lot with approximately 3,263 square feet of living area.

The above referenced properties all reflect similar or larger lot sizes with similar or larger square footage of living area and/or improvements pursuant to current DCAD records. Notably, many of them indicate

that homeowners who are subject to D(A) zoning laws are able to improve their homes in the same manner in which appellant is requesting and are only able to do so because they have a larger lot size. This evidence suggests that the appellant in the above referenced matter would require the requested variance in order to build a like and/or similar sized improvement at 5531 Anita, which is what appellant intends to do pursuant to plans approved by the City of Dallas. Please accept the above referenced properties as evidence in support of the requested variance and recommend such variance to the Board of Adjustment.

Kindly,
Samuel Kessler

From: [Elaine Isaak](#)
To: [Daniel, Pamela](#)
Subject: Re:
Date: Tuesday, March 15, 2022 11:59:02 AM

External Email!

Pamela Daniel, Senior Planner
Board of Adjustment, Planning Department
1500Marilla, Room 5BN, Dallas, TX 75201

Dear Ms. Daniel,

I am writing in reference to the application by Dimitri Morris (BDA212-021(PD) 5531 Anita Street which would allow Mr. Morris to build garage with a setback of only 5 feet 1 inch from the alley. You may or may not be aware, but Mr. Morris has already poured the concrete foundation for this structure.

If this application/ exemption were to be granted, it would set a terrible precedent for the M Streets and Lower Greenville neighborhoods. The alleyways in these neighborhoods are quite narrow and cannot accommodate an adjustment of this magnitude to the current easement restrictions. The garbage trucks barely get through the alley as it is today.

We oppose the application as it has been presented on this plan and must insist that the setbacks be enforced as they currently apply to everyone else. It would appear that Mr. Morris is following the adage of "It's easier to ask for forgiveness than for permission" hoping that because he's already started his project, he'll be allowed to complete it. Our next-door neighbors had completely built a fence in violation of city code, and the city made them remove and replace it with one that complied with code. This is all we are asking. Mr. Morris should comply with the rules like everyone else.

If you have any questions or doubts, we strongly encourage you to come see the site yourself. Should you have any questions or require more from us, please do not hesitate to reach out. Our contact information is listed below.

Regards,

Elaine and Ioannis Isaak

5604 Winton Street

Dallas, 75206

214.773.1593

elaineisaak@gmail.com

CAUTION: This email originated from outside of the organization. Please, do not click links or open attachments unless you recognize the sender and know the content is safe.

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.

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:

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

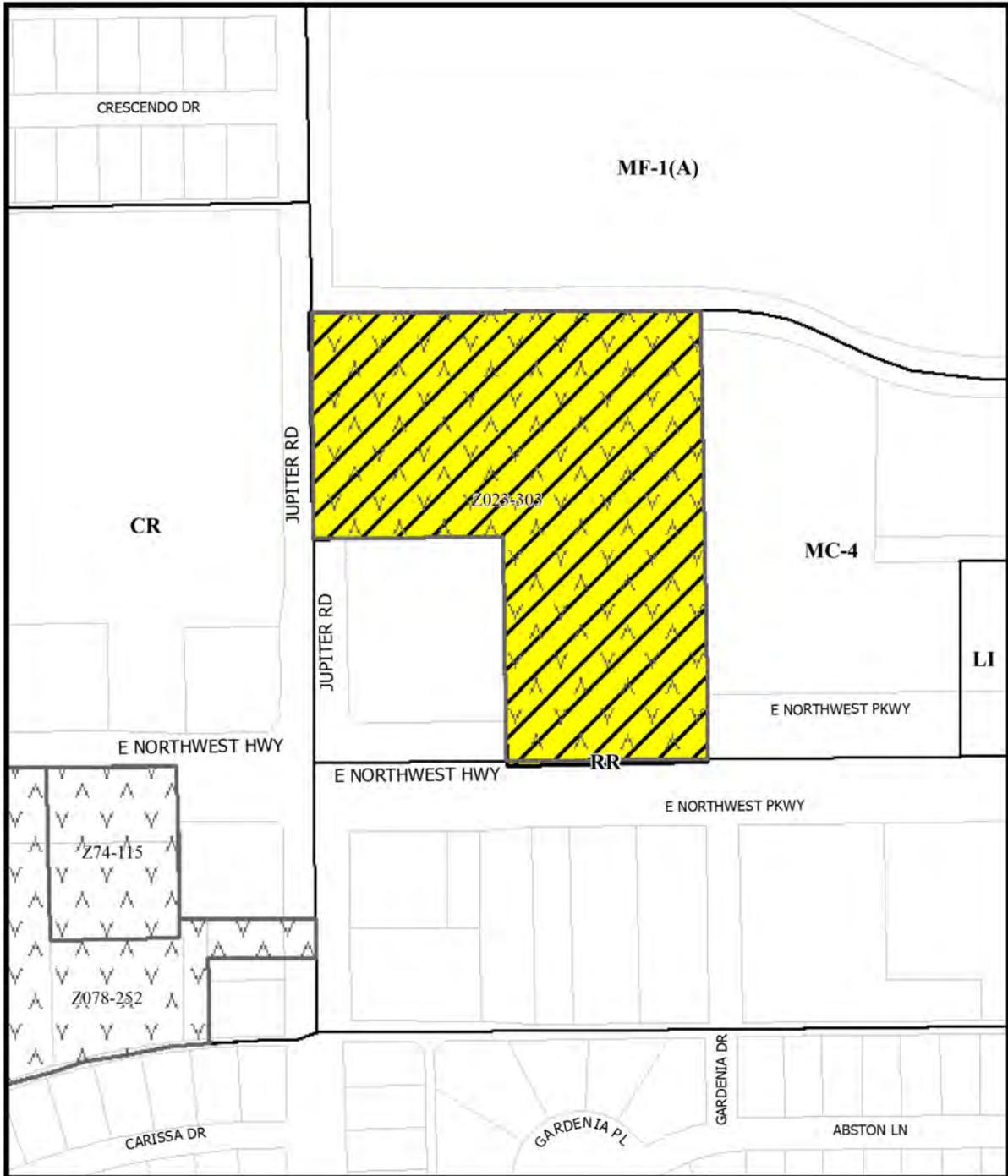
February 15, 2022: The Board of Adjustment Chief Planner emailed the applicant the following information:

- 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**).

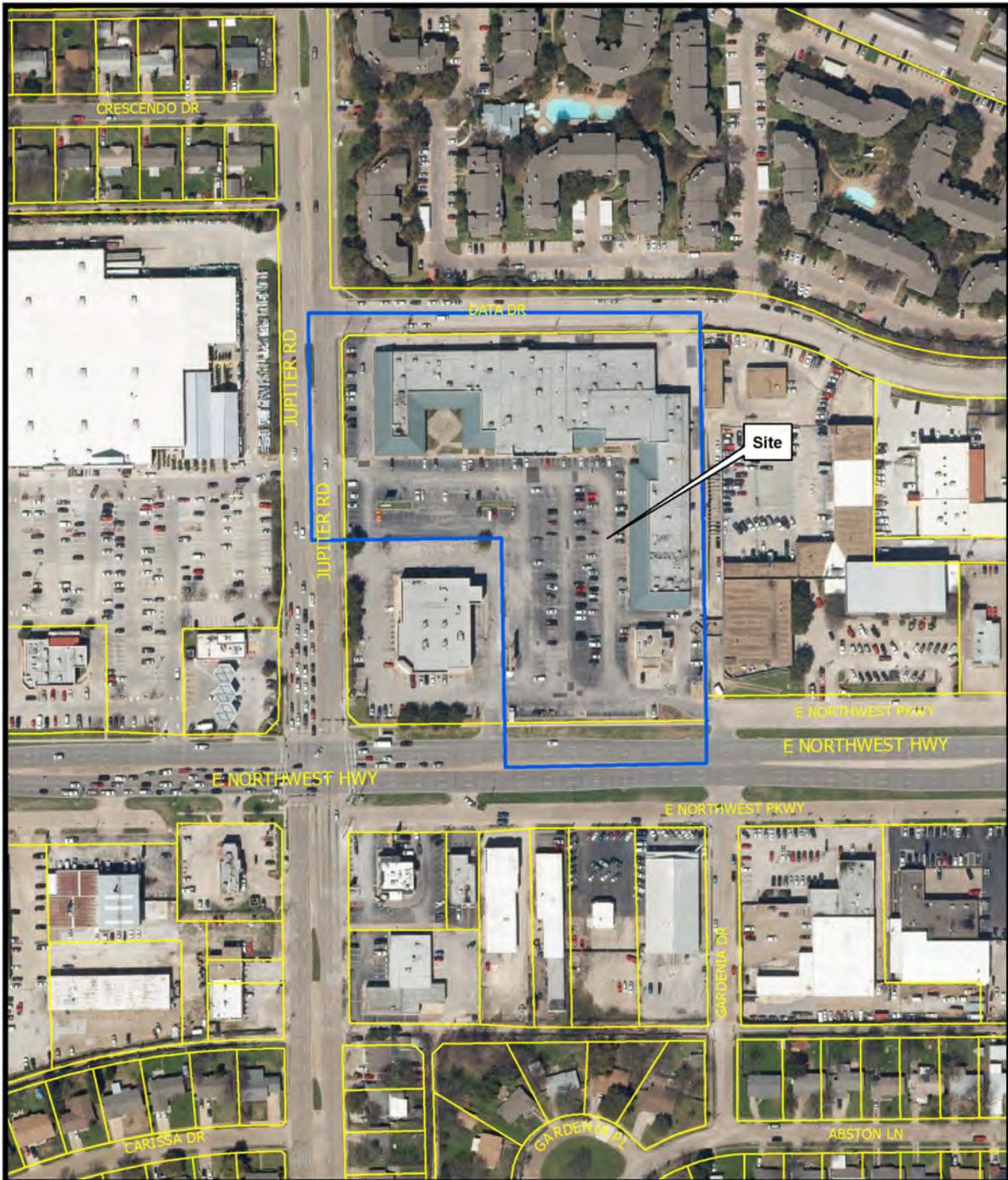


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ZONING MAP

Case no: BDA212-028

Date: 3/2/2022

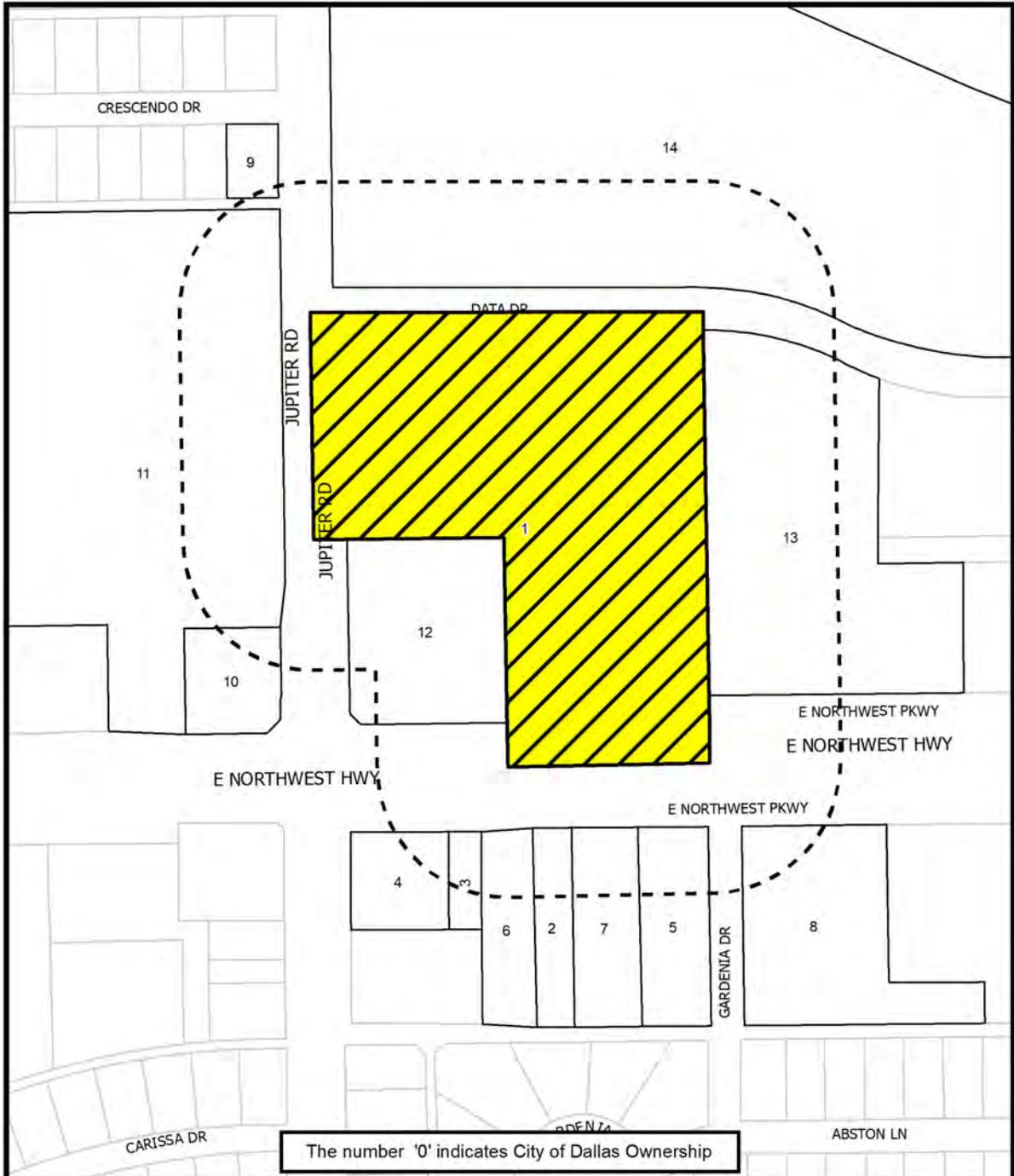


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AERIAL MAP

Case no: BDA212-028

Date: 3/2/2022



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NOTIFICATION

200' AREA OF NOTIFICATION
14 NUMBER OF PROPERTY OWNERS NOTIFIED

Case no: **BDA212-028**
 Date: **3/2/2022**

03/02/2022

Notification List of Property Owners

BDA212-028

14 Property Owners Notified

<i>Label #</i>	<i>Address</i>	<i>Owner</i>
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



APPLICATION/APEAL 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.: 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

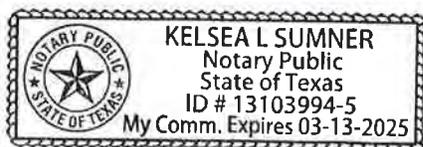
Before me the undersigned on this day personally appeared Matthew Morgan (Affiant/Applicant's name printed)

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: [Signature] (Affiant/Applicant's signature)

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

[Signature] Notary Public in and for Dallas County, Texas





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)
- 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

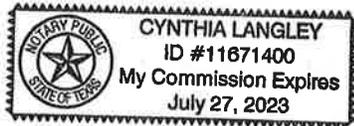
[Signature]
Signature of property owner or registered agent

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



[Signature]
Notary Public for Dallas County, Texas
Commission expires on 7/27/2023



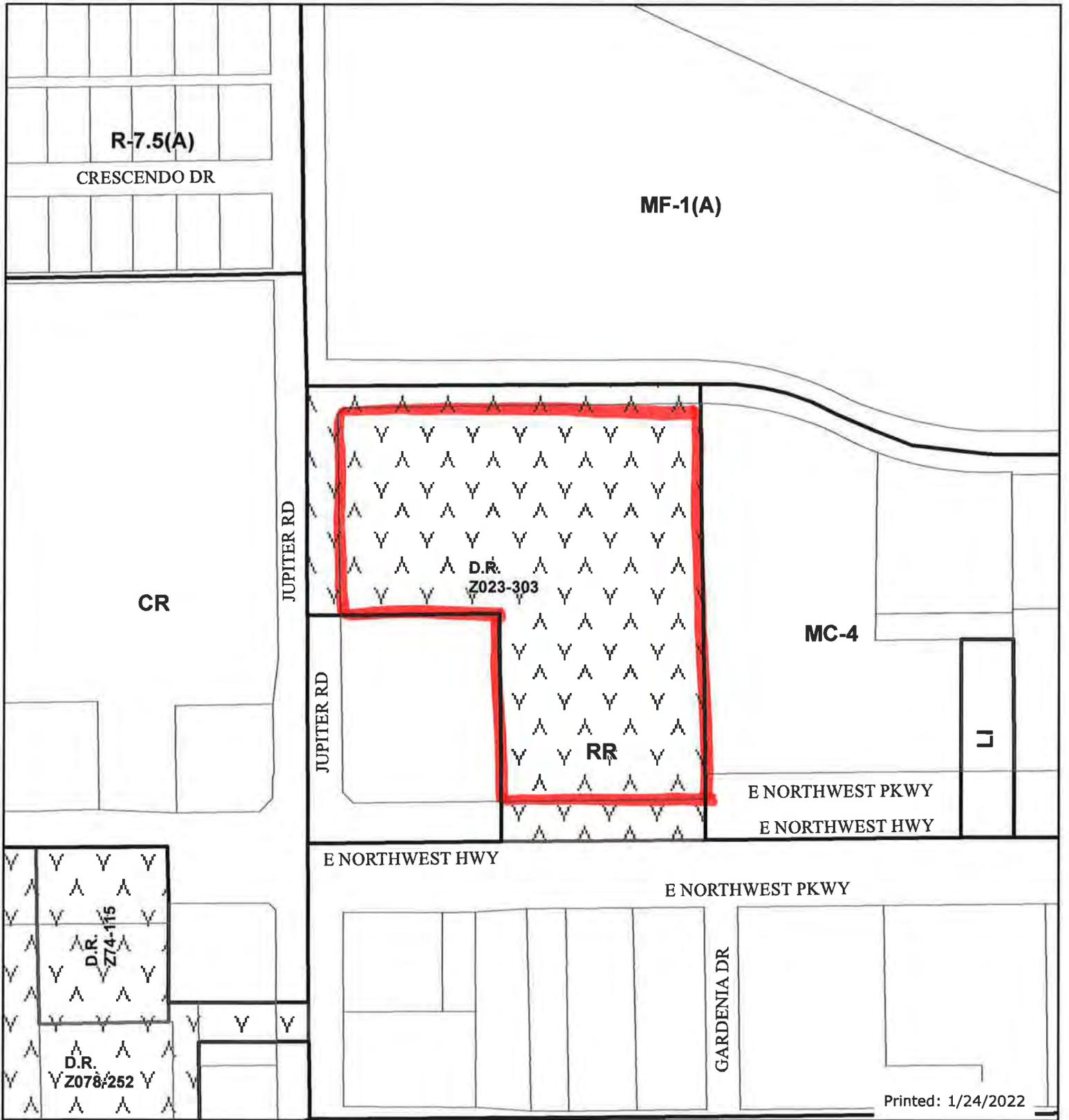
Printed: 1/24/2022

Legend

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





Printed: 1/24/2022

Legend

- | | | | |
|----------------------|--------------------------------|-----------------------|----------------------------|
| City Limits | railroad | Dry Overlay | CD Subdistricts |
| School | Certified Parcels | D | PD Subdistricts |
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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,

A handwritten signature in cursive script, appearing to read 'Megan Wimer'.

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.



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.

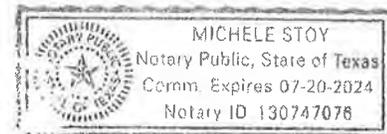
Sincerely,

A handwritten signature in black ink, appearing to read "Matthew Morgan".

Matthew Morgan

Owner, Shuffle 214

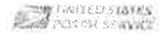
512.423.9881



A handwritten signature in black ink, appearing to read "Michele Stoy", with the date "6/8/2021" written below it.

Help

Product Tracking & Reporting



Home Search Reports Manual Entry Rates/Contributions PTR / SLW USPS Corporate Accounts **Friday, 12/22/2021**

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

City: 75218 State: 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

Certified Mail

Events

Code	Event Code	Event Date	Event Time	Location	Input Method	Signature ID	Signature Name	Scanning Date / Time / Agent	Other Information
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DELIVERED, LEFT WITH INDIVIDUAL	01	12/22/2021	12:29	DALLAS, TX 75218	Scanned	MDD TR D009A05530 (interface type - wireless)	Scanned by route 5218C013	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	Printing Date / Time (Central Time)	Other Information
									View Delivery Signature and Address <small>Geo Location Data Available</small>
OUT FOR DELIVERY	OF	12/22/2021	08:21	DALLAS, TX 75210	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	08:10	DALLAS, TX 75218	Scanned	PASS-001	Destined to route: G013	12/22/2021 08:21:10	OFD Same Day
DEPART USPS FACILITY	EF	12/22/2021	04:52	DALLAS, TX 75260	System Generated			12/22/2021 08:16:06	Dispatch Label ID: DS14.4118.4333.2112.205.5533.000
ENROUTE/PROCESSED	10	12/21/2021	21:23	DALLAS, TX 75260	Scanned	DBCS-066	Destined to route: 75218144130	12/21/2021 21:27:52	
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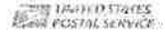
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Select Search Type:

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January 18, 2022

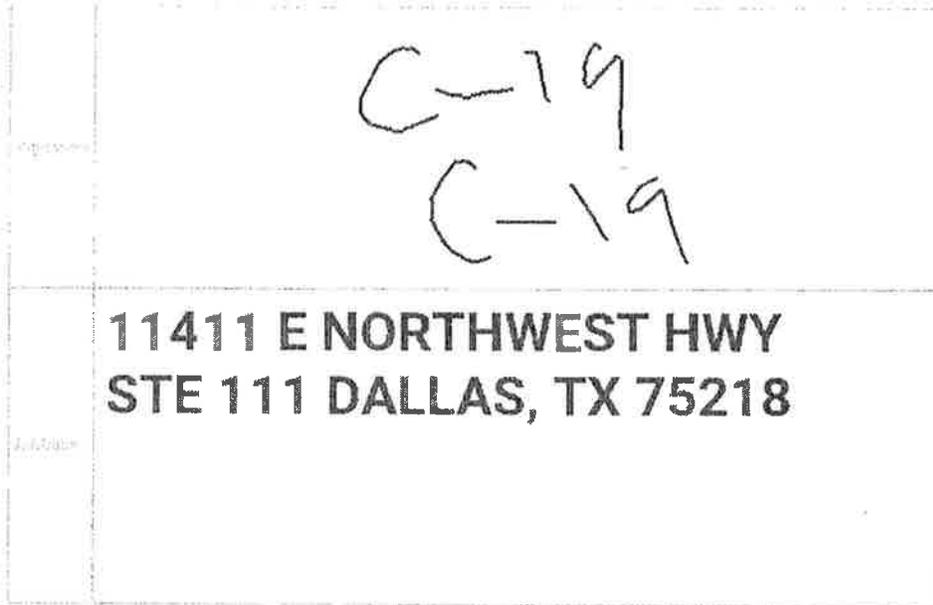
USPS Tracking Intranet

Delivery Signature and Address

Tracking Number: 7020 1290 0000 3631 0129

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

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Search input field with a dropdown menu and a submit button.

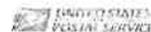
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January 19, 2022

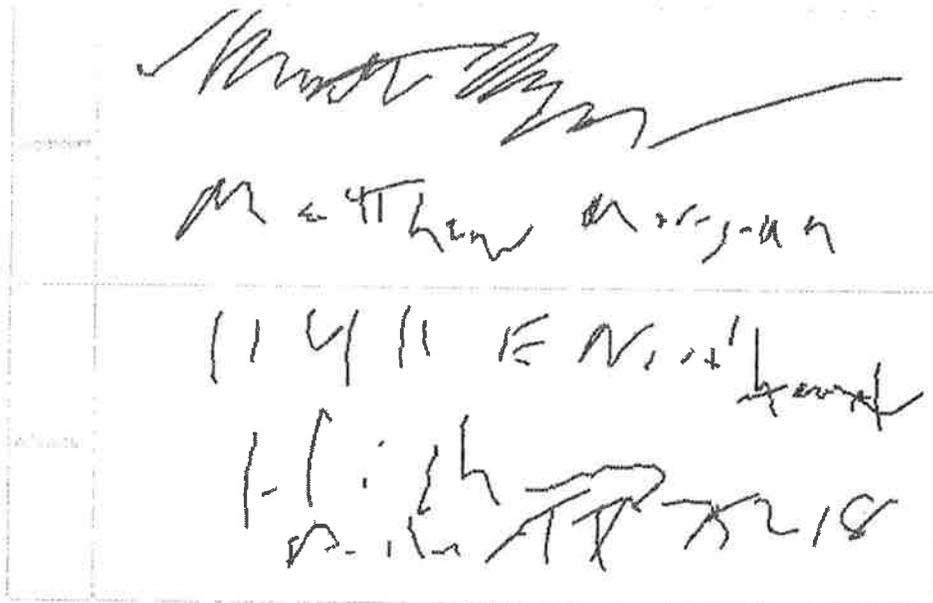
USPS Tracking Intranet

Delivery Signature and Address

Tracking Number: 7020 1290 0000 3631 0129

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

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Enter up to 35 items separated by commas.

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Version 22.2.1.0.18

BDA212-028_ATTACHMENT_A

Law Offices of Roger Albright, LLC

of counsel to:

SHEILS WINNUBST PC

UTAH | ANDREWS

Attorneys and Counselors

1100 ATRIUM II
1701 N. COLLINS BLVD.
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

February 28, 2022

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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 11411 E. Northwest Hwy		SUITE/BLDG/FLOOR NO 111		USE OF PROPERTY Inside Commercial Amusement	
APPLICANT Vickie Rader		ADDRESS 3904 Elm Street, Suite B		CITY Dallas	
DBA (IF APPLICABLE) Shuffle 214		PHONE NO (214) 824-7949		E-MAIL ADDRESS (MAY BE USED FOR OFFICIAL COMMUNICATION) vicki@baldwinplanning.com	
CONTRACTOR-INDIVIDUAL		CONTRACTOR NUMBER 99790		PIN 1111	
CURRENT HOME REPAIR LICENSE ON FILE? <input type="radio"/> YES <input type="radio"/> NO		IF YES, LIST NUMBER		PHONE NO	
PROPERTY OWNER (INDIVIDUAL CONTACT) Matt Morgan		ADDRESS 11411 E. Northwest 111		CITY Dallas	
PROPERTY OWNER (COMPANY NAME) Shuffle 214		PHONE NO (512) 423-9881		E-MAIL ADDRESS (MAY BE USED FOR OFFICIAL COMMUNICATION) 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: **Vicki Rader** Digitally signed by Vicki Rader
 Date: 2020.04.16 17:20:38 -05'00'

DATE OF APPLICATION SUBMISSION



STAFF AREA	
<input type="checkbox"/>	Approved By: _____
<input type="checkbox"/>	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		Review Fee (\$1,000/hour) Based on Square Feet	
Square Footage	Maximum Fee	Square Footage	Maximum Fee
0-10,000	\$500	0-10,000	\$2,000
10,001-50,000	\$750	10,001-50,000	\$12,500
50,001-100,000	\$1,000	50,001-100,000	\$27,500
100,001 and greater	\$1,250	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) Shuffle 211			STREET ADDRESS OF BUSINESS 11411 E. Northwest Hwy			BLDG AND SUITE NUMBER 111		
PROPERTY OWNER Matt Morgan			ADDRESS 11411 E. Northwest			CITY Dallas		
STATE Texas	ZIP CODE	PHONE NO (214) 824-7949	E-MAIL ADDRESS mkmorgan83@gmail.com					
MANAGER/OPERATOR OF USE OR BUSINESS Matt Morgan			ADDRESS 11411 E. Northwest #111			CITY Dallas		
STATE Texas	ZIP CODE 75235	PHONE NO (214) 824-7949	E-MAIL ADDRESS vicki@baldwinplanning.com					
APPLICANT (if different from manager/operator) Vicki Rader			ADDRESS 3904 Elm St., Suite B			CITY Dallas		
STATE Texas	ZIP CODE 75226	PHONE NO (214) 824-7949	E-MAIL ADDRESS 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

<input checked="" type="radio"/> YES <input type="radio"/> NO	Is this a change in use of land, tenant space or building?	See <u>CO Checklist</u> for plan submittal requirements.
<input type="radio"/> YES <input checked="" type="radio"/> 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 <u>Personal Services Affidavit</u> executed by business owner, see <u>CO Checklist</u> for additional requirements.
<input type="radio"/> YES <input checked="" type="radio"/> NO	Will potentially hazardous foods/open foods be sold and/or served?	<u>Food Establishment Permit Application</u> required (only available from City staff)
<input type="radio"/> YES <input checked="" type="radio"/> NO	Will alcohol be sold and/or served?	Provide completed <u>Alcohol Measurement Certification Application Checklist</u> and <u>Alcohol Certification Affidavit Forms</u>
<input type="radio"/> YES <input checked="" type="radio"/> 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.
<input type="radio"/> YES <input checked="" type="radio"/> NO	Is the proposed use a doctor's office, dentist office or other medical office or health care office?	Applicant must execute <u>Ambulatory Health Care Facility</u> form attesting to new or pre-existing conditions & facts pertaining to the health care model for any doctor's, dentist, or other medical offices (except hospitals, emergency rooms & care clinics).
<input type="radio"/> YES <input checked="" type="radio"/> 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

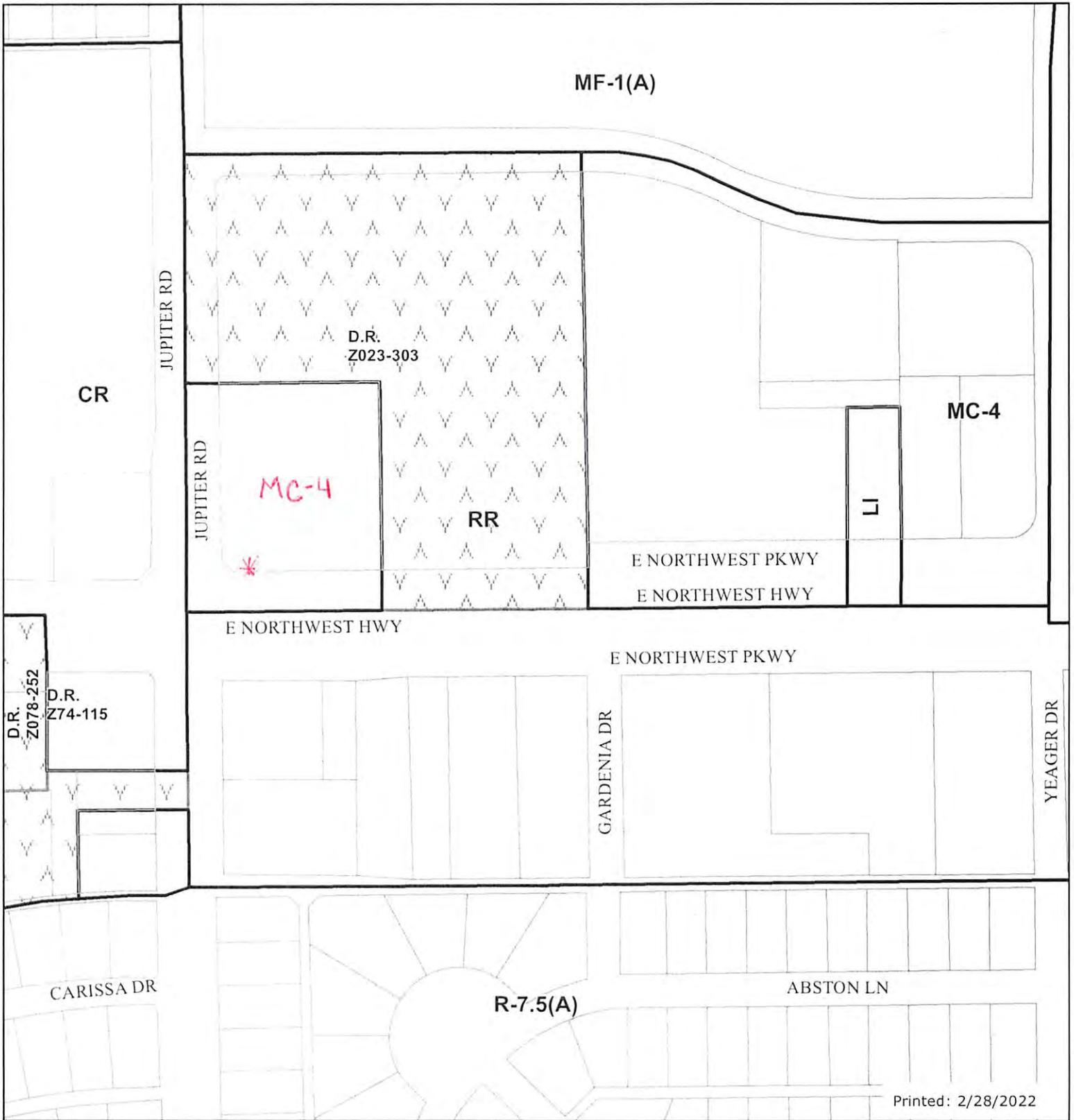
Change in Land Use? YES NO Change in Occupancy? YES NO Is Use Nonconforming? YES NO

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
				\$





Printed: 2/28/2022

Legend

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



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





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.

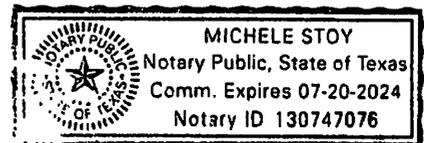
No food or beverages will be prepared or sold on site by our business. We will not be selling or serving alcohol. There will be no live entertainment or dancing on site. Live poker will be the game of skill played in our establishment by our members in a social club atmosphere. There will be no game 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
6/8/2021



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:		Consrv Dist:	61	Pro Park:	61	Req Park:	Park Agrmt: N
Dwlg Units:		Stories:	A3	Occ Code:	260707	Lot Area:	Total Area: 6050
Type Const:	IIA	Sprinkler:		Occ Load:	N	Alcohol:	Dance Floor:N

David Session

David Session, Building Official

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

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



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:

(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.

8. Kelly, Hart & Hallman Analysis.



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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

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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 from 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.

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 gleaned 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”).

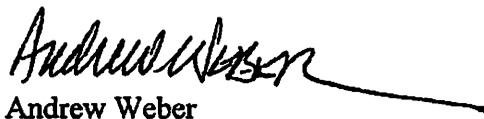
Because Chairman Morrison’s request does not ask the AG to construe these statutes or interpret the statutory definitions of “gambling place,” “bet” or “gambling equipment,” applying Chairman Morrison’s hypothetical to these laws goes far beyond the opinion process—and

The Honorable Ken Paxton
March 29, 2018
Page 11

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,

A handwritten signature in black ink, appearing to read "Andrew Weber", with a long horizontal flourish extending to the right.

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 game¹; (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;*

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 winnings⁷, 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

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

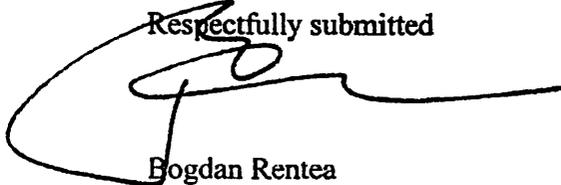
a wager, or bet.

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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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.

STATE GOVERNMENT CODE WITH PERMISSIVE ISSUANCE OF LOCAL PERMITS
**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

(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.



March 11, 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")

Dear Board Members:

This letter and the attached materials are the City's written response to the above-listed Board of Adjustment appeal by the Applicant, set for hearing on Tuesday, March 22, 2022, at 1:00 p.m. This is an appeal from the revocation of Applicant's certificate of occupancy ("CO") originally issued on June 22, 2021. The City urges the Board of Adjustment to affirm the Building Official's decision because, as shown herein, Applicant's use of the Property to operate a commercial gambling business featuring poker betting violates state law – Texas Penal Code §47.04(a) which prohibits keeping a gambling place or operating a business featuring gambling with cards. Additionally, 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 erroneously issued CO.

I. BACKGROUND

A. Revocation of Applicant's certificate of occupancy

Applicant's CO was issued on June 22, 2021. A copy of the CO Application (the "Application") is attached as **Exhibit 1**. A land use statement dated June 7, 2021, (copy attached as **Exhibit 2**) 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 3**. 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 4**. 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 3 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 2**) 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 was the only activity 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 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.

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. In light of the constitution's requirement that the legislature prohibit lotteries." *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 5**) 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 6**) 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 fees and entrance fees. Additionally, according to the commentary on section 47.02(b)—“charges for the privilege of using the facilities”—the fees Applicant charges would not come within the affirmative defense because these fees and charges served as a prerequisite for using 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 2**) 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 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 state 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 7**) 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 3 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 8**) interprets the second “economic benefit” element of the section 47.02(b)(2) affirmative defense available to otherwise illegal gambling operations in Texas. (*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 owner(s), operator(s), 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 here 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), operator(s), or employees of a poker gambling business receive funds generated by the business as compensation for their work or services to the gambling business 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 2**) makes it clear that Applicant intends to collect membership fees or a “fee to enter” from club members. Thus, Applicant plans to collect charges or assessments from persons who come to Applicant’s establishment to play poker. 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, which defeats the affirmative defense and means that Applicant is responsible for “keeping a gambling place.” Furthermore, any employees who are paid or tipped to work at Applicant’s poker business derive an “economic benefit” from their employment, which means that Applicant cannot prove the affirmative defense.

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 concludes that because the transactions would generate an economic benefit to a third party, the defense to prosecution would not apply. As demonstrated by this Opinion, the requirement of the affirmative defense that “no person received any economic benefit” is viewed very broadly, such that if *any* person (either the host of the game(s), or a third party, or even an employee) derives any “economic benefit” from the gambling operation “other than personal winnings” received by the players, the affirmative defense to a gambling offense fails. 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 person(s) will receive an economic benefit other than personal winnings. If a poker game is played in the host’s home (i.e., a “private place”) 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 games 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 Article III, section 47(a) of 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 as declared in Article III, section 47(a) of the Texas Constitution and Chapter 47 of the Texas Penal Code. Atty. Gen. Opinion No. GA-0358 concludes: 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 participate in gambling) 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 (as suggested by Applicant) is not synonymous with a “private place” under the affirmative defense to Texas laws prohibiting gambling. The Board should reject Applicant’s appeal and affirm the Building Official’s correct revocation.

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

March 11, 2022
Bd. of Adjustment Appeal
Page 8

Sincerely,

Gary R. Powell
Senior Assistant City Attorney

Charlotta S. Riley
Senior Assistant City Attorney

GRP
Attachments

DATE: 4/22/2021
 CO NO: (OFFICE USE ONLY)
210503 1098

CERTIFICATE OF OCCUPANCY APPLICATION



NAME OF BUSINESS (DBA) Shuffle 214			STREET ADDRESS OF BUSINESS 11411 E. Northwest Hwy		BLDG AND SUITE NUMBER 111
PROPERTY OWNER Matthew Morgan			ADDRESS 11411 E. Northwest		CITY Dallas
STATE Texas	ZIP CODE 75218	PHONE NO (214) 824-7949	E-MAIL ADDRESS mkmorgan83@gmail.com		
MANAGER/OPERATOR OF USE OR BUSINESS Matt Morgan			ADDRESS 11411 E. Northwest #111		CITY Dallas
STATE Texas	ZIP CODE 75235	PHONE NO (214) 824-7949	E-MAIL ADDRESS vicki@baldwinplanning.com		
APPLICANT (if different from manager/operator) Vicki Rader			ADDRESS 3904 Elm St., Suite B		CITY Dallas
STATE Texas	ZIP CODE 75226	PHONE NO (214) 824-7949	E-MAIL ADDRESS vicki@baldwinplanning.com		

DESCRIBE THE PROPOSED USE OF PROPERTY (attach additional sheets if necessary)
same use as previous use CO # 1812261056 Commercial Amusement Inside

What is the square footage of the tenant space or building? 6,050 square feet

<input type="radio"/> YES <input checked="" type="radio"/> NO	Is this a change in use of land, tenant space or building?	See <u>CO Checklist</u> for plan submittal requirements.
<input type="radio"/> YES <input checked="" type="radio"/> 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 <u>Personal Services Affidavit</u> executed by business owner, see <u>CO Checklist</u> for additional requirements.
<input type="radio"/> YES <input checked="" type="radio"/> NO	Will potentially hazardous foods/open foods be sold and/or served?	<u>Food Establishment Permit Application</u> required (only available from City staff)
<input type="radio"/> YES <input checked="" type="radio"/> NO	Will alcohol be sold and/or served?	Provide completed <u>Alcohol Measurement Certification Application Checklist</u> and <u>Alcohol Certification Affidavit Forms</u>
<input type="radio"/> YES <input checked="" type="radio"/> 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.
<input type="radio"/> YES <input checked="" type="radio"/> NO	Is the proposed use a doctor's office, dentist office or other medical office or health care office?	Applicant must execute <u>Ambulatory Health Care Facility</u> form attesting to new or pre-existing conditions & facts pertaining to the health care model for any doctor's, dentist, or other medical offices (except hospitals, emergency rooms & care clinics)
<input type="radio"/> YES <input checked="" type="radio"/> 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: 1812261056 Related Permit Number: _____ Related Project Number: _____

ZONING				BUILDING		MISCELLANEOUS	
LAND USE	BASE ZONING	PD	SUP	CONSTRUCTION TYPE	OCCUPANCY	ACTIVITY	OWN
<u>7396</u>	<u>RP</u>	REQUIRED PARKING	PROPOSED PARKING	SPRINKLER	OCCUPANT LOAD	<u>B</u>	<u>B</u>
LOT	BLOCK	PARKING AGREEMENT	DELTA CREDITS	STORIES	DWELLING UNITS	FLOOD PLAIN	AIRPORT
LOT AREA	CONSERVATION DIST					BDA	HISTORIC DISTRICT

ROUTE TO	REVIEWED	DATE	COMMENTS	FEE CALCULATIONS (\$)
PREScreen	<u>BR</u>	<u>03/02/21</u>	<u>PROVIDE #1812261056</u>	CO APP FEE <u>215.00</u>
ZONING				CE INSP FEE <u>65.00</u>
BUILDING				HEALTH PERMIT APP FEE
CODE				OTHER FEES
OTHER:				TOTAL FEES <u>\$ 280.00</u>



CERTIFICATE OF OCCUPANCY (CO) CHECKLIST



City of Dallas

APPLICATION CHECKLIST AND REQUIRED DOCUMENTS

By checking each requirement, you are stating that you have supplied correct and complete information. In the event that the required information is not contained in the submitted documents, you will be notified of the deficiency. Failure to supply the additional requested information within five (5) working days after notification may result in your application being delayed and eventually discarded. A new application, the original application, complete plans and a new checklist will be required for re-submittal for plan review. This re-submittal will be treated as a new application and will be processed in the order of receipt. A Certificate of Occupancy **does not authorize construction** of any type.

SAME USE AS PREVIOUS USE - CERTIFICATE OF OCCUPANCY

- 1. Completed *Building Inspection Application*.
- 2. Please see "**ADDITIONAL REQUIREMENTS OR SPECIAL PROVISIONS**" below

CHANGE OF USE - CERTIFICATE OF OCCUPANCY

- 1. Completed *Building Inspection Application*.
- 2. Please see "**ADDITIONAL REQUIREMENTS OR SPECIAL PROVISIONS**" below
- 3. Submit two (2) sets of the following drawing documents drawn to a standard scale and fully dimensioned. All drawing documents submitted for review must have a minimum text size of 3/32" and a minimum drawing sheet size of 11" x 17" and a maximum of 36" x 48", "E" size:
 - Site plan of the entire property showing all property lines and parking spaces. The site plan must show the location of the tenant space and the locations of all other tenant spaces on the property
 - with their suite numbers.
Exception: Building floor key plan does not need to be to scale, but must show the location of the tenant space and all other tenant spaces on that floor. Identify tenant spaces by their suite number.
 - Floor plan of the entire tenant space showing the areas to be occupied with each room identified as to its use.
 - Provide a complete parking analysis for every tenant space on the property. List the type of business and the area in square feet of each tenant space, occupied or vacant, on the site plan.

ADDITIONAL REQUIREMENTS OR SPECIAL PROVISIONS

In addition to the requirements listed above for a CO, the following land uses will require additional information for review. Please schedule an appointment with a consultant for more information. A building permit may be required if there is no record of a permit previously issued to create the tenant space. Ask the property owner to contact this office for more information. A building permit and other trade permits may also be required as a result of the Certificate of Occupancy review.

- 1. Personal services (Examples include: barber/beauty shop, shoe repair, a tailor, an instructional arts studio, a photography studio, a laundry/cleaning pickup/ receiving station, a handcrafted art work studio, etc.).
 - Floor plan of the entire tenant space showing the areas to be occupied with each room identified as
 - to its use. Show furniture on the same plan or you can provide a furniture plan on a separate floor plan sheet.
 - Signed and notarized Affidavit for Certificate of Occupancy from the business owner.
 - If applicable, a copy of a state license from each employee providing the personal service.

CERTIFICATE OF OCCUPANCY (CO) CHECKLIST (Page 2)

ADDITIONAL REQUIREMENTS OR SPECIAL PROVISIONS (CONTINUED)

2. The display or sale of 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) requires an *SUP*. Additionally, you must register a 'paraphernalia shop' in accordance with Chapter 12B of the Dallas City Code.
3. Places of religious worship, theaters, dance halls, labor halls, commercial amusement uses, restaurants with a total area of 750 sq. ft. or greater and other assembly occupancies (Occupancy Groups A) as defined in the Dallas Building Code.
- Floor plan of the entire tenant space showing the areas in square feet of each different floor area to be occupied and its proposed occupant load factor in accordance with Chapter 10 of the building code. Identify seating and dance areas, type of seating, standing room areas for lines and business or circulation areas.
 - Identify all exits and list type of door hardware and panic hardware used at each exit.
4. Warehouses, storage facilities and other storage occupancies (Occupancy Groups S) as defined in the Dallas Building Code.
- Floor plan of the entire tenant space showing the areas in square feet of each different floor area designated for storage and other uses.
 - High-pile storage (storage over 12 ft.) will require engineered plans.
Provide a complete inventory and MSDS sheets for each different material, especially HAZMAT, being stored as required in the Dallas Building Code or Dallas Fire Code. Any material being stored above the quantity limits allowed by code may require a building permit for fire-rated construction and hazardous occupancy (Occupancy Groups H).
 - Provide a complete inventory and MSDS sheets for each different material, especially HAZMAT, being stored as required in the Dallas Building Code or Dallas Fire Code. Any material being stored above the quantity limits allowed by code may require a building permit for fire-rated construction and hazardous occupancy (Occupancy Groups H).
5. Manufacturing facilities and other factory occupancies (Occupancy Groups F) as defined in the Dallas Building Code.
- Floor plan of the entire tenant space showing the areas in square feet of each different floor area designated for manufacturing, storage of raw materials and other uses.
 - Storage of commodities over 12 feet high is considered *High Piled Storage*. *Racking systems* (shelving) may only be installed with a building permit and required engineered plans.
Provide a complete inventory and MSDS sheets for each different raw material, especially HAZMAT, being stored and used as required in the Dallas Building Code or Dallas Fire Code. Any material being stored above the quantity limits allowed by code may require a building permit for fire-rated construction and hazardous occupancy (Occupancy Groups H).
6. Any land use requiring alcohol certification. Refer to *Alcohol Measurement Certification Application Checklist*.
7. If the new use includes areas where food/ice or beverages are manufactured, packaged, stored, distributed, sold or prepared excluding vending machines, then provide:
- Two (2) sets of scaled floor plans showing equipment and plumbing fixtures layout including floor drains.
 - Two (2) sets of scaled plans showing finish schedules for floors, walls and ceilings.
 - Two (2) sets of menus and cut sheets of equipment being installed, if available.

NOTE: Additional information required by the Building Official may be necessary for the issuance of the permit (Ordinance no. 26029).

I, Vicki Rader have read the above information and acknowledge that all required documents have been provided.

Signature V Rader

Date 4-28-2021

Please note that staff cannot accept incomplete applications or illegible plan review documents.



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







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,

A handwritten signature in cursive script, appearing to read 'Megan Wimer'.

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.



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.

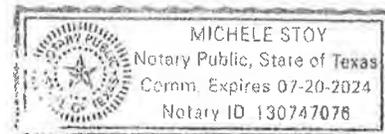
No food or beverages will be prepared or sold on site by our business. We will not be selling or serving alcohol. There will be no live entertainment or dancing on site. Live poker will be the game of skill played in our establishment by our members in a social club atmosphere. There will be no game 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
6/8/2021



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;



 KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

Vernon's Texas Statutes and Codes Annotated

Penal Code (Refs & Annos)

Title 10. Offenses Against Public Health, Safety, and Morals (Refs & Annos)

Chapter 47. Gambling (Refs & Annos)

V.T.C.A., Penal Code § 47.04

§ 47.04. Keeping a Gambling Place

Currentness

(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.

Credits

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

Notes of Decisions (68)

V. T. C. A., Penal Code § 47.04, TX PENAL § 47.04

Current through the end of the 2021 Regular Session and Chapters 1 to 6 of the Second Called Session of the 87th

 KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

Vernon's Texas Statutes and Codes Annotated

Penal Code (Refs & Annos)

Title 10. Offenses Against Public Health, Safety, and Morals (Refs & Annos)

Chapter 47. Gambling (Refs & Annos)

V.T.C.A., Penal Code § 47.02

§ 47.02. Gambling

Effective: January 1, 2016

Currentness

(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;

1994 WL 67733

Only the Westlaw citation is currently available.

NOTICE: NOT DESIGNATED FOR PUBLICATION.
UNDER TX R RAP RULE 47.7, UNPUBLISHED
OPINIONS HAVE NO PRECEDENTIAL VALUE
BUT MAY BE CITED WITH THE NOTATION “(not
designated for publication).”

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,



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

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 misdemeanor¹ 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 defense² 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 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.

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 of 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 evidence³ 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.