

**BOARD OF ADJUSTMENT, PANEL B
PUBLIC HEARING MINUTES
DALLAS CITY HALL, L1FN CONFERENCE CENTER AUDITORIUM
WEDNESDAY, NOVEMBER 17, 2010**

MEMBERS PRESENT AT BRIEFING: Darlene Reynolds, Vice Chair, Sam Gillespie, Panel Vice Chair, Christian Chernock, regular member, David Wilson, regular member and Robert Agnich, alternate member

MEMBERS ABSENT FROM BRIEFING: No one

MEMBERS PRESENT AT HEARING: Darlene Reynolds, Vice Chair, Sam Gillespie, Panel Vice Chair, Christian Chernock, regular member, David Wilson, regular member and Robert Agnich, alternate member

MEMBERS ABSENT FROM HEARING: No one

STAFF PRESENT AT BRIEFING: Steve Long, Board Administrator, Bert Vandenberg, Asst. City Attorney, Todd Duerksen, Development Code Specialist, Donnie Moore, Chief Planner, Phil Erwin, Chief Arborist and Trena Law, Board Secretary

STAFF PRESENT AT HEARING: Steve Long, Board Administrator, Bert Vandenberg, Asst. City Attorney, Todd Duerksen, Development Code Specialist, Donnie Moore, Chief Planner, Chief Planner, Phil Erwin, and Trena Law, Board Secretary

11:10 A.M. The Board of Adjustment staff conducted a briefing on the Board of Adjustment's **November 17, 2010 docket.**

1:05 P.M.

The Chairperson stated that no action of the Board of Adjustment shall set a precedent. Each case must be decided upon its own merits and circumstances, unless otherwise indicated, each use is presumed to be a legal use. Each appeal must necessarily stand upon the facts and testimony presented before the Board of Adjustment at this public hearing, as well as the Board's inspection of the property.

MISCELLANEOUS ITEM NO. 1

To approve the Board of Adjustment Panel B October 20, 2010 public hearing minutes.

BOARD OF ADJUSTMENT ACTION: NOVEMBER 17, 2010

MOTION: Wilson

I move approval of the **Wednesday, October 20, 2010** Board of Adjustment Public Hearing minutes.

SECONDED: Chernock

AYES: 5– Reynolds, Gillespie, Chernock, Wilson, Agnich

NAYS: 0 –

MOTION PASSED 5 – 0 (unanimously)

MISCELLANEOUS ITEM NO. 2

Adoption of Panel B's 2011 Public Hearing Schedule.

MOTION: Wilson

I move to adopt Panel B's 2011 Public Hearing Schedule.

SECONDED: Chernock

AYES: 5– Reynolds, Gillespie, Chernock, Wilson, Agnich

NAYS: 0 –

MOTION PASSED 5 – 0 (unanimously)

FILE NUMBER: BDA 090-107

BUILDING OFFICIAL'S REPORT:

Application of Rick Sulton for a special exception to the sign regulations at 7718-7751 Forest Lane. This property is more fully described as Lot 1A in City Block A/7741 and is zoned MU-1 which allows one detached sign for every 450 feet, or fraction thereof, of frontage on a public street. The applicant proposes to construct and maintain one additional detached premise sign which will require a special exception.

LOCATION: 7718-7751 Forest Lane

APPLICANT: Rick Sulton

REQUEST:

- A special exception to the sign regulations is requested in conjunction with erecting and maintaining a detached ‘double-face pylon’ sign along the site’s Forest Lane street frontage on a site limited to one sign per frontage – a site currently with one detached sign (a billboard) along its street frontage. The subject site is developed with a retail strip center.

STAFF RECOMMENDATION:

Approval, subject to the following condition:

- Compliance with the submitted site plan and elevation is required.

Rationale:

- Staff has concluded that the existing billboard on this site creates inequity precluding the applicant/owner from having a detached premise sign identifying businesses within the existing center – a type of sign that is typically found along the street frontages on other lots/other properties.

STANDARD FOR A SPECIAL EXCEPTION TO THE SIGN REGULATIONS FOR AN ADDITIONAL DETACHED SIGN:

The Board of Adjustment may, in specific cases and subject to appropriate conditions, authorize one additional detached sign on a premise in excess of the number permitted by the sign regulations as a special exception to these regulations when the board has made a special finding from the evidence presented that strict compliance with the requirement of the sign regulations will result in substantial financial hardship or inequity to the applicant without sufficient corresponding benefit to the city and its citizens in accomplishing the objectives of the sign regulations.

GENERAL FACTS:

- The Dallas Development Code states that only one detached sign is allowed per street frontage other than expressways, and that one expressway sign is allowed for every 450 feet of frontage or fraction thereof on an expressway. (The subject site’s frontage is not adjacent to an expressway).
The applicant submitted a site plan which indicates the location of the existing billboard sign and the proposed additional “pylon” sign. There is an approximate 270 feet of distance separating the existing billboard sign and the proposed “double-face pylon” sign.
The applicant has also submitted a sign elevation which denotes that the proposed sign at 35’ in height with a sign board that is 14’ 7’ high and 12’ 8” wide. (The actual sign board is located atop a base that is 20’ 5” in height).

- On November 1, 2010, the applicant submitted additional information to staff regarding the request beyond what was submitted with the original application (see Attachment A).

BACKGROUND INFORMATION:

Zoning:

Site: MU-1 (Mixed use)
North: MU-3 (Mixed use)
South: R-16(A) (Single family district 16,000 square feet)
East: MU-1 (Mixed use)
West: MU-1 (Mixed use)

Land Use:

The site is currently developed with a retail strip. The area to the north is developed with office uses; the area to the east is developed with retail uses; and the areas to the south and west are developed with the White Rock Trail Greenbelt.

Zoning/BDA History:

1. BDA 012-242, Property located at 7718 Forest Lane (the subject site)

On October 8, 2002, the Board of Adjustment Panel B granted a request for a special exception to the parking regulations of 18 spaces (or a 21 percent reduction from the 86 spaces required), and imposed the following conditions: The special exception of 18 spaces automatically and immediately terminates if and when the restaurant use of the site increases above 5,360 square feet; and compliance with the submitted site plan (Exhibit P) is required. The case report states that the request was made in conjunction with obtaining a CO that would be required to fill an existing vacant retail space within the existing retail strip with a 1,000 square foot “coffee” restaurant use; and remedy the remaining portion of the existing retail strip center that is “underparked” by 13 spaces.

Timeline:

Sept. 22, 2010: The applicant submitted an “Application/Appeal to the Board of Adjustment” and related documents which have been included as part of this case report.

October 21, 2010: The Board of Adjustment Secretary assigned this case to Board of Adjustment Panel B.

October 21, 2010: The Board Administrator emailed the applicant the following information:

- an attachment that provided the public hearing date and panel that will consider the application; the November 1st deadline to submit additional evidence for staff to factor into their analysis; and the November 5th 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.

November 1, 2010: The applicant submitted additional information to the Board Administrator beyond what was submitted in the original application (see Attachment A).

November 2, 2010: The Board of Adjustment staff review team meeting was held regarding this request and the others scheduled for November public hearings. Review team members in attendance included: the Board Administrator, the Building Inspection Senior Plans Examiner/Development Code Specialist, the Sustainable Development and Construction Department Project Engineer, the Chief Arborist, and the Assistant City Attorney to the Board.

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

STAFF ANALYSIS:

- The request focuses on erecting and maintaining a detached 'double-face pylon' sign along the site's Forest Lane street frontage on a site limited to one sign per frontage – a site currently with one detached sign (a billboard) along its street frontage. The subject site is developed with a retail strip center.
- The applicant submitted a site plan which indicates the location of the existing billboard sign and the proposed additional "pylon" sign. There is an approximate 270 feet of distance separating the existing billboard sign and the proposed "double-face pylon" sign.
- The applicant has also submitted a sign elevation which denotes that the proposed sign at 35' in height with a sign board that is 14' 7" high and 12' 8" wide. (The actual sign board is located atop a base that is 20' 5" in height).
- The applicant has the burden of proof in establishing the following:
 - That strict compliance with the requirement of the sign regulations (where in this case, the site would be limited to having only one sign along the street frontage) will result in substantial financial hardship or inequity to the applicant without

sufficient corresponding benefit to the city and its citizens in accomplishing the objectives of the sign regulations.

- Granting this special exception would allow a 2nd sign on the site – in this case a sign that could serve to identify the businesses within the existing retail strip center. If the Board were to impose the submitted elevation and site plan as a condition to the request, the additional sign would be limited to the specific location and characteristics as shown of these documents.

BOARD OF ADJUSTMENT ACTION: NOVEMBER 17, 2010

APPEARING IN FAVOR: Rick Sulton, 1110 Squires Lane, Aubry, TX
Doug Howell, 7514 Westbend Drive, Dallas, TX

APPEARING IN OPPOSITION: No one

MOTION: **Wilson**

I move that the Board of Adjustment, in Appeal No. **BDA 090-107** on application of Rick Sulton, **grant** the special exception to allow an additional detached premise sign, because our evaluation of the property, the testimony presented to us, and the facts that we have determined show that strict compliance with the provisions of Article VII of the Dallas Development Code will result in substantial financial hardship or inequity to the applicant without sufficient corresponding benefit to the City of Dallas and its citizens in accomplishing the objectives of that article. I further move that the following condition be imposed to further the purpose and intent of Article VII of the Dallas Development Code:

- Strict compliance with the submitted elevation and site plan is required.

SECONDED: **Chernock**

AYES: 5 -Reynolds, Gillespie, Chernock, Wilson, Agnich

NAYS: 0 –

MOTION PASSED 5 – 0 (unanimously)

FILE NUMBER: BDA 090-063

BUILDING OFFICIAL’S REPORT:

Application of Julio Hernandez to appeal the nonconforming use compliance date set by the City Council on April 27, 2005 at 3400 Ross Avenue. This property is more fully described as a 4,750 square foot tract in City Block 0512 and is zoned PD-298 (Subarea 1) which required that those uses that became nonconforming as a result of City Council action on April 27, 2005, must be brought to conformance no later than April 26, 2010. The applicant requests a later conformance date for the nonconforming vehicle or engine repair or maintenance use.

LOCATION: 3400 Ross Avenue

APPLICANT: Julio Hernandez

November 17, 2010 Public Hearing Notes:

- Additional written documentation was submitted to the board at the public hearing from the Assistant City Attorney assisting with the application and from a citizen in opposition to the application.

REQUEST:

- An application is made for the Board of Adjustment to appeal a City Council ordinance-imposed compliance date of April 26, 2010 for a nonconforming vehicle or engine repair or maintenance use (EZ Auto Repair/EZ Auto Service) on the subject site.

COMPLIANCE REGULATIONS FOR NONCONFORMING USES:

Determination of amortization period.

- (i) If the board determines that continued operation of the nonconforming use will have an adverse effect on nearby properties, it shall, in accordance with the law, provide a compliance date for the nonconforming use under a plan whereby the owner's actual investment in the use before the time that the use became nonconforming can be amortized within a definite time period.
 - (ii) The following factors must be considered by the board in determining a reasonable amortization period:
 - (aa) The owner's capital investment in structures, fixed equipment, and other assets (excluding inventory and other assets that may be feasibly transferred to another site) on the property before the time the use became nonconforming.
 - (bb) Any costs that are directly attributable to the establishment of a compliance date, including demolition expenses, relocation expenses, termination of leases, and discharge of mortgages.
 - (cc) Any return on investment since inception of the use, including net income and depreciation.
 - (dd) The anticipated annual recovery of investment, including net income and depreciation.
- (E) Compliance requirement. If the board establishes a compliance date for a nonconforming use, the use must cease operations on that date and it may not operate thereafter unless it becomes a conforming use.
- (F) For purposes of this paragraph, "owner" means the owner of the nonconforming use at the time of the board's determination of a compliance date for the nonconforming use.

UPDATED GENERAL FACTS (November 2010):

- The Board of Adjustment Panel B conducted a public hearing on this application on October 20, 2010, and delayed action until November 17th in response to additional written documentation that was circulated to the Board at their briefing (see Attachment B). This documentation was a memo to the Board Administrator from the Assistant City Attorney assisting with this application stating that "the City requests

that the hearing in the above-referenced matter by rescheduled to next month. The City has conferred with the applicant and he has no objection to the postponement. The City requests the continuation because the additional time will benefit both parties to allow evidence submitted to be properly reviewed and allow parties to attempt to negotiate an agreed period of time.”

- On November 5, 2010, the Assistant City Attorney assisting with this application provided a document entitled “City of Dallas Pre-Hearing Submission” (see Attachment C). This document stated among other things that “the City intends to offer opinion testimony at the hearing regarding the appropriate extension. However, the report is not complete at this time.”

UPDATED GENERAL FACTS (October 2010):

- The Board of Adjustment Panel B conducted a public hearing on this application on August 18, 2010, and delayed action until October 20th to allow the applicant an opportunity to provide answers to a subpoena duces tecum and interrogatories sent to him by the City in June of 2010.
- On September 8, 2010, the applicant provided answers to the interrogatories and copies of the requested documents. (Attachment A is a copy of the applicant’s answers).

ORIGINAL GENERAL FACTS (August 2010):

- City records indicate that a Certificate of Occupancy (CO # 0310081026) was issued on October 23, 2003, and that the vehicle or engine repair or maintenance use on the subject site became nonconforming on April 27, 2005.
- The Dallas Development Code states that “nonconforming use” means “a use that does not conform to the use regulations of this chapter, but was lawfully established under the regulations in force at the beginning of operation and has been in regular use since that time.”
- The subject site is zoned PD No. 298 (Subarea 1) where the ordinance includes a provision specifically related to nonconforming uses (Section 51P-298.108). This ordinance (Ordinance No. 25960 which was established on April 27, 2005) states that all nonconforming uses must be brought to conformance no later than April 26, 2008, except those uses that became nonconforming as a result of city council action on April 27, 2005, must be brought into conformance no later than April 26, 2010. The ordinance states that the owner of a nonconforming use in Subarea 1 may appeal to the board of adjustment for a later compliance date at any time up to the conformance date set forth in this subsection if the owner will not be able to recover his investment in the use (up to the date of nonconformance) by the conformance date set forth in this subsection.
- The owner of use on the site could transition the use to any use that is permitted by right in the site’s PD 298 (Subarea 1) zoning classification.
- On June 7, 2010, a subpoena duces tecum and interrogatories was personally delivered to the applicant/owner of the nonconforming use on the site.
- As of August 9, 2010, the applicant/owner of the nonconforming use on the site had not submitted a response to the subpoena duces tecum and interrogatories.

BACKGROUND INFORMATION:

Zoning:

Site: PD No. 298 (Subarea 1) (Planned Development)
North: PD No. 298 (Subarea 1) (Planned Development)
South: PD No. 298 (Subarea 1) (Planned Development)
East: PD No. 298 (Subarea 6) (Planned Development)
West: PD No. 298 (Subarea 1) (Planned Development)

Land Use:

The site is currently developed with nonconforming vehicle or engine repair or maintenance use (EZ Auto Repair/EZ Auto Service). The area to the north appears to be vacant commercial use; the areas to the east, south and west appear to be developed with commercial uses.

Zoning/BDA History:

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

Timeline:

- April 25, 2010: The applicant submitted an "Application/Appeal to the Board of Adjustment" and related documents which have been included as part of this case report.
- May 11, 2010: The Board of Adjustment Secretary randomly assigned this case to Board of Adjustment Panel B.
- June 7, 2010: A subpoena duces tecum and interrogatories was personally delivered to the applicant/owner of the nonconforming use on the site.
- August 3, 2010: The Board of Adjustment staff review team meeting was held regarding this request and the others scheduled for August public hearings. Review team members in attendance included: the Board of Adjustment Chief Planner, the Board Administrator, the Building Inspection Senior Plans Examiner/Development Code Specialist, the Sustainable Development and Construction Department Project Engineer, and the Assistant City Attorney to the Board.

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

August 18, 2010: The Board of Adjustment Panel B conducted a public hearing on this request and delayed action until their October 20th public hearing.

September 8, 2010: The applicant submitted additional information beyond what was submitted with the original application (see Attachment A).

October 5, 2010: The Board of Adjustment staff review team meeting was held regarding this request and the others scheduled for November public hearings. Review team members in attendance included: the Board of Adjustment Chief Planner, the Board Administrator, the Assistant Building Official, the Building Inspection Chief Planner, the Sustainable Development and Construction Department Project Engineer, the Chief Arborist, and the Assistant City Attorney to the Board.

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

October 20, 2010: The Board of Adjustment Panel B conducted a public hearing on this request and delayed action until their November 17th public hearing in response to additional written documentation that was circulated to the Board at their briefing (see Attachment B). This documentation was a memo to the Board Administrator from the Assistant City Attorney assisting with this application stating that “the City requests that the hearing in the above-referenced matter be rescheduled to next month. The City has conferred with the applicant and he has no objection to the postponement. The City requests the continuation because the additional time will benefit both parties to allow evidence submitted to be properly reviewed and allow parties to attempt to negotiate an agreed period of time.”

November 2, 2010: The Board of Adjustment staff review team meeting was held regarding this request and the others scheduled for November public hearings. Review team members in attendance included: the Board Administrator, the Building Inspection Senior Plans Examiner/Development Code Specialist, the Sustainable Development and Construction Department Project Engineer, the Chief Arborist, and the Assistant City Attorney to the Board.

November 5, 2010: The Assistant City Attorney assisting with this application provided a document entitled “City of Dallas Pre-Hearing Submission” (see Attachment C).

STAFF ANALYSIS:

- The vehicle or engine repair or maintenance use on the subject site is a nonconforming use. City records indicate that a Certificate of Occupancy (CO # 0310081026) was issued on October 23, 2003, and that the vehicle or engine repair or maintenance use on the subject site became nonconforming on April 27, 2005.

- The Dallas Development Code states that it is the declared purpose of this subsection (Sec. 51A-4.704. Nonconforming Uses and Structures) that nonconforming uses be eliminated and be required to comply with the regulations of the Dallas Development Code, having due regard for the property rights of the persons affected, the public welfare, and the character of the surrounding area.
- The subject site is zoned PD No. 298 (Subarea 1) where the ordinance includes a provision specifically related to nonconforming uses (Section 51P-298.108). This ordinance (Ordinance No. 25960 which was established on April 27, 2005) states that all nonconforming uses must be brought to conformance no later than April 26, 2008, except those uses that became nonconforming as a result of city council action on April 27, 2005 must be brought into conformance no later than April 26, 2010. The ordinance states that the owner of a nonconforming use in Subarea 1 may appeal to the board of adjustment for a later compliance date at any time up to the conformance date set forth in this subsection if the owner will not be able to recover his investment in the use (up to the date of nonconformance) by the conformance date set forth in this subsection.
- The Dallas Development Code states the following factors must be considered by the board in determining a reasonable amortization period:
 - The owner's capital investment in structures, fixed equipment, and other assets (excluding inventory and other assets that may be feasibly transferred to another site) on the property before the time the use became nonconforming.
 - Any costs that are directly attributable to the establishment of a compliance date, including demolition expenses, relocation expenses, termination of leases, and discharge of mortgages.
 - Any return on investment since inception of the use, including net income and depreciation.
 - The anticipated annual recovery of investment, including net income and depreciation.
- The purpose of the public hearing is to determine if additional time is needed to recover his investment in the use (up to the date of nonconformance) by the conformance date set by this subsection of the ordinance which in this case is April 26, 2010.
- The Dallas Development Code additionally states that if the board establishes a compliance date for a nonconforming use, the use must cease operations on that date and it may not operate thereafter unless it becomes a conforming use.
- As is the case with any nonconforming use, the owner of the use could transition the nonconforming vehicle or engine repair or maintenance use on the site to any use that is permitted by right in the site's PD No. 298 (Subarea 1) zoning classification.
- On September 8, 2010, the applicant/owner of the nonconforming use on the site submitted a response to the subpoena duces tecum and interrogatories (see Attachment A) whereby the applicant/owner (Julio Hernandez) has stated that "Mr. Julio believes that it will require at least four years to recoup the remaining \$50,000. dollars that was invested."
- On November 5, 2010, the Assistant City Attorney assisting with this application provided a document entitled "City of Dallas Pre-Hearing Submission" (see Attachment C). This document stated among other things that "the City intends to offer opinion testimony at the hearing regarding the appropriate extension. However, the report is not complete at this time."

1:47 P.M.: Executive Session Begins
2:03 P.M.: Executive Session Ends

BOARD OF ADJUSTMENT ACTION: AUGUST 18, 2010

APPEARING IN FAVOR: Julio Hernandez, 3400 Ross Ave., Dallas, TX

APPEARING IN OPPOSITION: Eric Williamson, 3507 Bryan St., Dallas, TX

APPEARING FOR THE CITY: Charles Estee, 1500 Marilla St., Dallas, TX

MOTION: **Chernock**

I move that the Board of Adjustment, in Appeal No. **BDA 090-063**, hold this matter under advisement until **October 20, 2010**.

SECONDED: **Wilson**

AYES: 5– Reynolds, Gillespie, Chernock, Wilson, Stefan

NAYS: 0 –

MOTION PASSED 5 – 0(unanimously)

BOARD OF ADJUSTMENT ACTION: OCTOBER 20, 2010

APPEARING IN FAVOR: Julio Hernandez, 3400 Ross Ave., Dallas, TX

APPEARING IN OPPOSITION: No one

APPEARING FOR THE CITY: Charles Estee, 1500 Marilla St., Dallas, TX

MOTION: **Gillespie**

I move that the Board of Adjustment, in Appeal No. **BDA 090-063**, hold this matter under advisement until **November 17, 2010**.

SECONDED: **Wilson**

AYES: 5– Reynolds, Gillespie, Chernock, Wilson, Agnich

NAYS: 0 –

MOTION PASSED 5 – 0(unanimously)

BOARD OF ADJUSTMENT ACTION: NOVEMBER 17, 2010

APPEARING IN FAVOR: Julio Hernandez, 3400 Ross Ave., Dallas, TX

APPEARING IN OPPOSITION: Eric Williamson, 3507 Bryan Street, Dallas, TX

APPEARING FOR THE CITY: Charles Estee, 1500 Marilla St., Dallas, TX

MOTION #1: Agnich

I move that the Board of Adjustment in Appeal No. **BDA 090-063**, suspend the rules and accept the evidence that is being presented to us today.

SECONDED: Wilson

AYES: 5– Reynolds, Gillespie, Chernock, Wilson, Agnich

NAYS: 0 –

MOTION PASSED 5 – 0(unanimously)

MOTION #2: Gillespie

I move that the Board of Adjustment, in Appeal No. **BDA 090-063**, on application of Julio Hernandez, provide a compliance date of **April 26, 2014** for the nonconforming vehicle or engine repair or maintenance use currently being operated on the property located at 3400 Ross Avenue, because the facts and testimony show that the owner will not be able to recover his investment in the use, by April 26, 2010, the date established in the ordinance. I further move that the owner’s certificate of occupancy for the nonconforming vehicle or engine repair or maintenance use be revoked on **April 26, 2014**, unless the vehicle or engine repair or maintenance use becomes a conforming use.

SECONDED: Wilson

AYES: 5– Reynolds, Gillespie, Chernock, Wilson, Agnich

NAYS: 0 –

MOTION PASSED 5 – 0(unanimously)

FILE NUMBER: BDA 090-064

BUILDING OFFICIAL’S REPORT:

Application of Roxan Staff, represented by Roxan and Randy Staff, to require compliance of a nonconforming use at 2802 W. Northwest Highway, AKA: 2728 Community Drive. This property is more fully described as Lots 13, 14 and part of 15 in City Block A/5780 and is zoned CR which limits the legal uses in a zoning district. The applicant proposes to request that the board establish a compliance date for a nonconforming alcoholic beverage establishment use.

LOCATION: 2802 W. Northwest Highway, AKA: 2728 Community Drive

APPLICANT: Roxan Staff
Represented by Roxan and Randy Staff

November 17, 2010 Public Hearing Notes:

- Additional written documentation was submitted to the board at the public hearing from the Assistant City Attorney assisting with the application.

REQUEST:

- A request is made for the Board of Adjustment to establish a compliance date for a nonconforming “alcoholic beverage establishments” use (El Bom Boom) on the subject site.

COMPLIANCE REGULATIONS FOR NONCONFORMING USES: SEC. 51A-4.704. NONCONFORMING USES AND STRUCTURES of the Dallas Development Code provides the following provisions:

(a) Compliance regulations for nonconforming uses. It is the declared purpose of this subsection that nonconforming uses be eliminated and be required to comply with the regulations of the Dallas Development Code, having due regard for the property rights of the persons affected, the public welfare, and the character of the surrounding area.

(1) Amortization of nonconforming uses.

(A) Request to establish compliance date. The city council may request that the board of adjustment consider establishing a compliance date for a nonconforming use. In addition, any person who resides or owns real property in the city may request that the board consider establishing a compliance date for a nonconforming use. Upon receiving such a request, the board shall hold a public hearing to determine whether continued operation of the nonconforming use will have an adverse effect on nearby properties. If, based on the evidence presented at the public hearing, the board determines that continued operation of the use will have an adverse effect on nearby properties, it shall proceed to establish a compliance date for the nonconforming use; otherwise, it shall not.

(B) Factors to be considered. The board shall consider the following factors when determining whether continued operation of the nonconforming use will have an adverse effect on nearby properties:

- (i) The character of the surrounding neighborhood.
- (ii) The degree of incompatibility of the use with the zoning district in which it is located.
- (iii) The manner in which the use is being conducted.
- (iv) The hours of operation of the use.
- (v) The extent to which continued operation of the use may threaten public health or safety.
- (vi) The environmental impacts of the use's operation, including but not limited to the impacts of noise, glare, dust, and odor.
- (vii) The extent to which public disturbances may be created or perpetuated by continued operation of the use.
- (viii) The extent to which traffic or parking problems may be created or perpetuated by continued operation of the use.
- (ix) Any other factors relevant to the issue of whether continued operation of the use will adversely affect nearby properties.

- (C) Finality of decision. A decision by the board to grant a request to establish a compliance date is not a final decision and cannot be immediately appealed. A decision by the board to deny a request to establish a compliance date is final unless appealed to state court within 10 days in accordance with Chapter 211 of the Local Government Code.
- (D) Determination of amortization period.
- (iii) If the board determines that continued operation of the nonconforming use will have an adverse effect on nearby properties, it shall, in accordance with the law, provide a compliance date for the nonconforming use under a plan whereby the owner's actual investment in the use before the time that the use became nonconforming can be amortized within a definite time period.
- (iv) The following factors must be considered by the board in determining a reasonable amortization period:
- (aa) The owner's capital investment in structures, fixed equipment, and other assets (excluding inventory and other assets that may be feasibly transferred to another site) on the property before the time the use became nonconforming.
- (bb) Any costs that are directly attributable to the establishment of a compliance date, including demolition expenses, relocation expenses, termination of leases, and discharge of mortgages.
- (cc) Any return on investment since inception of the use, including net income and depreciation.
- (dd) The anticipated annual recovery of investment, including net income and depreciation.
- (E) Compliance requirement. If the board establishes a compliance date for a nonconforming use, the use must cease operations on that date and it may not operate thereafter unless it becomes a conforming use.
- (F) For purposes of this paragraph, "owner" means the owner of the nonconforming use at the time of the board's determination of a compliance date for the nonconforming use.

GENERAL FACTS:

- City records indicate the following:
 - On August 17, 1992, a certificate of occupancy (C.O. #9208171037) for a conforming alcoholic beverage establishment use was issued on property zoned CR (Community Retail).
 - On June 23 1993, Ordinance No. 21735 was passed which required an SUP for alcoholic beverage establishment use in CR zoning.
 - On August 16, 1994, a certificate of occupancy (C.O. #9408161023) for a nonconforming alcoholic beverage establishment use was issued on property zoned CR (Community Retail).
 - On August 27, 1997, a certificate of occupancy (C.O. #9708271025) for a nonconforming alcoholic beverage establishment use was issued on property zoned CR (Community Retail).

- On January 5, 2001, a certificate of occupancy (C.O. #0101051043) for a nonconforming alcoholic beverage establishment use was issued on property zoned CR (Community Retail).
- The Dallas Development Code states that “nonconforming use” means “a use that does not conform to the use regulations of this chapter, but was lawfully established under the regulations in force at the beginning of operation and has been in regular use since that time.”
- The subject site is zoned CR (Community Retail) that permits an “alcoholic beverage establishments” use by SUP (Specific Use Permit) only.
- The Dallas Development Code establishes the following provisions for “alcoholic beverage establishments” use in Section 51A-4.210 (4):
 - “Alcoholic beverage establishments.”
 - (A) Definition:
 - (i) Bar, lounge or tavern means an establishment principally for the sale and consumption of alcoholic beverages on the premises that derives 75 percent or more of its gross revenue on a quarterly (three-month) basis from the sale or service of alcoholic beverages, as defined in the Texas Alcoholic Beverage Code, for on-premise consumption.
 - (ii) Private-club bar means an establishment holding a private club permit under Chapter 32 or 33 of the Texas Alcoholic Beverage Code that derives 35 percent or more of its gross revenue from the sale or service of alcoholic beverages, as defined in the Texas Alcoholic Beverage Code, for on-premise consumption and that is located within a dry area as defined in Title 6 (Local Options Elections) of the Texas Alcoholic Beverage Code.
 - (B) Districts permitted: By SUP only is GO(A)*, CR, RR, CS, industrial, central area, mixed use, multiple commercial, MF-4(A), LO(A), MO(A), UC-2, and UC-3 districts. *Note: This use is subject to restrictions in the GO(A) district.
- The owner of the site could eliminate the nonconforming use status of the existing alcoholic beverage establishments use by obtaining an SUP (Specific Use Permit) from City Council.
- The owner of the site could transition the use of the site from “alcoholic beverage establishments” use to any use that is permitted by right in the site’s existing CR (Community Retail) zoning classification. Uses permitted by right in this zoning district include a number of commercial and business service uses; institutional and community service uses; office uses; recreation uses; retail and personal service uses; transportation uses; and utility and public service uses.
- On June 4, 2010, the applicant submitted information to the Board Administrator on this application (Attachment A). This information included a table of contents that listed the following three categories of information:
 - Application;
 - Zoning Map;
 - Adverse Effects;
 - Letters; and
 - Conclusion.
- The board determined at their August 18, 2010 hearing, that based on the evidence and testimony presented to them, that continued operation of the nonconforming “alcoholic beverage establishments” use would have an adverse effect on nearby

properties, and set a hearing date November 17, 2010 for the purpose of establishing a compliance date for this nonconforming use.

- All information submitted by the applicant (“Attachment A”) related to whether continued operation of the nonconforming “alcoholic beverage establishments” use would have an adverse effect on nearby properties has been retained in the case file and is available for review upon request.
- On September 15, 2010 a subpoena duces tecum and interrogatories was sent to both the owner of the nonconforming “alcoholic beverage establishments” use of the site/property (Asher Dreyfus) and to the record tenant and holder of the certificate of occupancy for the nonconforming alcoholic beverage establishment use on the site (Manuel Hernandez).
- On September 27, 2010, the owner of the nonconforming “alcoholic beverage establishments” use of the site/property (Asher Dreyfus) submitted a response to the subpoena duces tecum and interrogatories (see Attachment B).
- On November 5, 2010, the Assistant City Attorney assisting with this application provided a document entitled “City of Dallas Pre-Hearing Submission” (see Attachment C). This document stated among other things that “the City intends to offer opinion testimony at the hearing regarding the appropriate extension. However, the report is not complete at this time.”

BACKGROUND INFORMATION:

Zoning:

Site: CR (Community Retail)
North: CR (Community Retail)
South: MF-2 (Multifamily)
East: CR (Community Retail)
West: CR (Community Retail)

Land Use:

The site is currently developed as a retail strip with the focus of this application being a suite within this center developed with an “alcoholic beverage establishment” use (El Bom Boom). The areas to the north, east, and west are developed with retail/commercial uses; and the area to the south is developed with multifamily residential uses.

Zoning/BDA History:

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

Timeline:

April 26, 2010: The applicant submitted an “Application/Appeal to the Board of Adjustment” and related documents which have been included as part of this case report.

May 11, 2010: The Board of Adjustment Secretary randomly assigned this case to Board of Adjustment Panel B.

May 14, 2010: The Board Administrator wrote/sent the owner of the site/property (Asher Dreyfus, Sr.) a letter (with a copy to the applicant) that informed him that a Board of Adjustment case had been filed against his property. The letter included following enclosures:

- a copy of the Board of Adjustment application and related materials that had been submitted in conjunction with the application;
- a copy of the section of the Dallas Development Code that described the Board of Adjustment (Section 51A-3.102);
- a copy of the section of the Dallas Development Code that provides the definition of “nonconforming use” (Section 51A-2.102(90));
- a copy of the section of the Dallas Development Code that provides the purpose and main use permitted set forth for “community retail (RR)” districts (Section 51A-4.122 (b));
- a copy of the section of the Dallas Development Code that provides the definition and provisions set forth for “alcoholic beverage establishments” use (Section 51A-4.210(4));
- a copy of the section of the Dallas Development Code that provides provisions for “nonconforming uses and structures” (Section 51A-4.704);
- a copy of the section of the Dallas Development Code that provides provisions regarding the Board of Adjustment hearing procedures (51A-4.703);
- a copy of the City of Dallas Board of Adjustment Working Rules of Procedure; and
- A copy of the hearing procedures for board of adjustment amortization of a nonconforming use.

The letter also informed the owner of the property the date, time, and location of the briefing/public hearing, and provided a deadline of August 6th (corrected from June 4th on May 27th) to submit any information that would be incorporated into the board’s docket.

May 27, 2010: The Board Administrator wrote/sent the record tenant and holder of the certificate of occupancy for the nonconforming alcoholic beverage establishment use on the site (Manuel Hernandez) a letter (with a copy to the applicant) that informed him that a Board of Adjustment case had been filed against his use. The letter included following enclosures:

- a copy of the Board of Adjustment application and related materials that had been submitted in conjunction with the application;
- a copy of the section of the Dallas Development Code that described the Board of Adjustment (Section 51A-3.102);
- a copy of the section of the Dallas Development Code that provides the definition of “nonconforming use” (Section 51A-2.102(90));

- a copy of the section of the Dallas Development Code that provides the purpose and main use permitted set forth for “community retail (RR)” districts (Section 51A-4.122 (b));
- a copy of the section of the Dallas Development Code that provides the definition and provisions set forth for “alcoholic beverage establishments” use (Section 51A-4.210(4));
- a copy of the section of the Dallas Development Code that provides provisions for “nonconforming uses and structures” (Section 51A-4.704);
- a copy of the section of the Dallas Development Code that provides provisions regarding the Board of Adjustment hearing procedures (51A-4.703);
- a copy of the City of Dallas Board of Adjustment Working Rules of Procedure; and
- A copy of the hearing procedures for board of adjustment amortization of a nonconforming use.

The letter also informed the record tenant and holder of the certificate of occupancy for the nonconforming alcoholic beverage establishment use on the site of the date, time, and location of the briefing/public hearing, and provided a deadline of August 6th to submit any information that would be incorporated into the board’s docket.

June 4, 2010 The applicant submitted additional information to the Board Administrator beyond what was submitted with the original application (see Attachment A).

August 3, 2010: The Board of Adjustment staff review team meeting was held regarding this request and the others scheduled for August public hearings. Review team members in attendance included: the Board of Adjustment Chief Planner, the Board Administrator, the Building Inspection Senior Plans Examiner/Development Code Specialist, the Sustainable Development and Construction Department Project Engineer, and the Assistant City Attorney to the Board.

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

August 18, 2010: The Board of Adjustment conducted a public hearing on this application and determined that based on the evidence and testimony presented to them, that continued operation of the nonconforming “alcoholic beverage establishments” use would have an adverse effect on nearby properties, and set a hearing date November 17, 2010 for the purpose of establishing a compliance date for this nonconforming use.

September 15, 2010: A subpoena duces tecum and interrogatories was sent to both the owner of the nonconforming “alcoholic beverage establishments” use of the site/property (Asher Dreyfus) and to the record tenant and holder of the certificate of occupancy for the nonconforming alcoholic beverage establishment use on the site (Manuel Hernandez).

- September 27, 2010: The owner of the nonconforming “alcoholic beverage establishments” use of the site/property (Asher Dreyfus) submitted a response to the subpoena duces tecum and interrogatories (see Attachment B). The owner’s states/answers among other things how he believes the compliance date (the date in which he must end the nonconforming use) should be “September 30, 2011, the end of the current Lease.”
- October 29, 2010: A subpoena duces tecum and interrogatories and other documents related to this application was sent (according to answers provided by the owner of the nonconforming use) to the person who leases the property (Great Fioravanti) to the record tenant and holder of the certificate of occupancy for the nonconforming alcoholic beverage establishment use on the site (Manuel Hernandez).
- October 29, 2010: The Assistant City Attorney assisting with this application sent a letter to the record tenant and holder of the certificate of occupancy for the nonconforming alcoholic beverage establishment use on the site (Manuel Hernandez). The letter tells the record tenant holder that the City has not received a response to the subpoena and interrogatories sent to him on or about September 15th and that were due on or about October 15th. The letter furthers states the requested information is necessary for the board and the City to evaluate how much time, if any, he should be granted in order for him to recover his investment in the nonconforming use; and that if the information is not received, the City may have to request that you be determined to be in contempt. Lastly, the letter tells the record tenant and holder of the certificate of occupancy for the nonconforming alcoholic beverage establishment use on the site that if he does not intend to appear at the hearing or present evidence, to complete an enclosed form and return it to the board – a form that states that he acknowledges that the Owner/Lessee has recovered all of its investment in the nonconforming use.
- November 2, 2010: The Board of Adjustment staff review team meeting was held regarding this request and the others scheduled for November public hearings. Review team members in attendance included: the Board Administrator, the Building Inspection Senior Plans Examiner/Development Code Specialist, the Sustainable Development and Construction Department Project Engineer, the Chief Arborist, and the Assistant City Attorney to the Board.
- November 5, 2010: The Assistant City Attorney assisting with this application provided a document entitled “City of Dallas Pre-Hearing Submission” (see Attachment C).

STAFF ANALYSIS:

- The “alcoholic beverage establishments” use (El Bom Boom) on the subject site is a nonconforming use. According to city records, the use became nonconforming on June 23 1993 when the City Council passed Ordinance No. 21735- an ordinance that required an SUP (Specific Use Permit) for an “alcoholic beverage establishments” use on property zoned CR (Community Retail).
- The Dallas Development Code states that it is the declared purpose of this subsection (Sec. 51A-4.704. Nonconforming Uses and Structures) that nonconforming uses be eliminated and be required to comply with the regulations of the Dallas Development Code, having due regard for the property rights of the persons affected, the public welfare, and the character of the surrounding area.
- The owner of the site could eliminate the nonconforming use status of the existing “alcoholic beverage establishments” use by obtaining an SUP from City Council.
- The owner of the site could transition the use of the site from “alcoholic beverage establishments” use to any use that is permitted by right in the site’s existing CR (Community Retail) zoning classification. Uses permitted by right in this zoning district include a number of commercial and business service uses; institutional and community service uses; office uses; recreation uses; retail and personal service uses; transportation uses; and utility and public service uses.
- The board determined at their August 18, 2010 hearing, that based on the evidence and testimony presented to them, that continued operation of the nonconforming “alcoholic beverage establishments” use would have an adverse effect on nearby properties, and set a hearing date November 17, 2010 for the purpose of establishing a compliance date for this nonconforming use.
- The purpose of the Board of Adjustment’s November 17, 2010 public hearing is to establish a compliance date for the nonconforming use under a plan whereby the owner’s actual investment in the use before the time that the use became nonconforming can be amortized within a definite time period. (The Dallas Development Code states that for purposes of this paragraph, “owner” means the owner of the nonconforming use at the time of the board’s determination of a compliance date for the nonconforming use).
- The Dallas Development Code states that following factors must be considered by the board in determining a reasonable amortization period:
 - The owner’s capital investment in structures, fixed equipment, and other assets (excluding inventory and other assets that may be feasibly transferred to another site) on the property before the time the use became nonconforming.
 - Any costs that are directly attributable to the establishment of a compliance date, including demolition expenses, relocation expenses, termination of leases, and discharge of mortgages.
 - Any return on investment since inception of the use, including net income and depreciation.
 - The anticipated annual recovery of investment, including net income and depreciation.
- The Dallas Development Code additionally states that if the board establishes a compliance date for a nonconforming use, the use must cease operations on that date and it may not operate thereafter unless it becomes a conforming use.
- On September 27, 2010, the owner of the nonconforming “alcoholic beverage establishments” use of the site/property (Asher Dreyfus) submitted a response to the subpoena duces tecum and interrogatories (see Attachment B). The owner’s

states/answers among other things how he believes the compliance date (the date in which he must end the nonconforming use) should be "September 30, 2011, the end of the current Lease."

- On November 5, 2010, the Assistant City Attorney assisting with this application provided a document entitled "City of Dallas Pre-Hearing Submission" (see Attachment C). This document stated among other things that "the City intends to offer opinion testimony at the hearing regarding the appropriate extension. However, the report is not complete at this time."

BOARD OF ADJUSTMENT ACTION: AUGUST 18, 2010

APPEARING IN FAVOR: Roxan Staff, 6964 Tokalon Dr., Dallas, TX
APPEARING IN OPPOSITION: No one

MOTION: Gillespie

I move that the Board of Adjustment in Appeal No. **BDA 090-064**, based on the evidence presented at the public hearing, find that continued operation of this nonconforming use will have an adverse effect on nearby properties, based on the following factors:

- The character of the surrounding neighborhood is in better condition than the property in question and there is multifamily about 42 feet away.
- The degree of incompatibility of the use with the zoning district in which it is located in that over 200 apartments are located about a block away and the alley is crowded with cars and cigarette butts.
- The manner in which the use is being conducted - clearly with numerous TABC violations and protests for the TABC in their application for the renewal of their alcohol beverage license
- Visual evidence of used car sales frequently on the site.
- The hours of operation of the use where visual photographic evidence shows that at 8:00 a.m. there is a lot going on at the bar, and the bar does not close until 2:00 am – nearly 24 hours of operation.
- The extent to which continued operation of the use may threaten public health or safety in that we have a reported murder at this property and other crime statistics that are very alarming.
- The environmental impacts of the use's operation, including but not limited to the impacts of noise, glare, dust, and odor.
- The extent to which public disturbances may be created or perpetuated by continued operation of the use with the crime statistics and hours of operation.
- The extent to which traffic or parking problems may be created or perpetuated by continued operation of the use is self explanatory from the visual evidence presented to us.
- Other factors relevant to the issue of whether continued operation of the use will adversely affect nearby properties in that a Dart station will be opening soon which will generate additional traffic and attract some new quality development in the neighborhood in which this bar is clearly incompatible;

And set a hearing date of **November 17, 2010** for the purpose of establishing a compliance date for this nonconforming use.

SECONDED: Wilson

AYES: 5– Reynolds, Gillespie, Chernock, Wilson, Stefan

NAYS: 0 –

MOTION PASSED 5 – 0(unanimously)

BOARD OF ADJUSTMENT ACTION: NOVEMBER 17, 2010

APPEARING IN FAVOR: Roxan Staff, 6964 Tokalon Dr., Dallas, TX
Jose Hernandez, 2548Valewood, Farmers Branch, TX

APPEARING IN OPPOSITION: No one

APPEARING FOR THE CITY: Charles Estee, 1500 Marilla, 7DN, Dallas, TX

MOTION #1: Wilson

I move that the Board of Adjustment in Appeal No. **BDA 090-064**, suspend the rules and accept the evidence that is being presented to us today.

SECONDED: Chernock

AYES: 5– Reynolds, Gillespie, Chernock, Wilson, Agnich

NAYS: 0 –

MOTION PASSED 5 – 0(unanimously)

MOTION #2: Gillespie

I move that the Board of Adjustment, in Appeal No. **BDA 090-064**, provide a compliance date of **March 1, 2011** for the nonconforming alcoholic beverage establishment use currently being operated on the property located at 2802 West Northwest Highway/AKA 2728 Community Drive, because the facts and testimony show that the owner's actual investment in the use, before the time that the use became nonconforming, can be amortized within this time period. I further move that the owner's certificate of occupancy for the alcoholic beverage establishment use be revoked on **March 1, 2011**, unless the alcoholic beverage establishment use becomes a conforming use.

SECONDED: Wilson

AYES: 5– Reynolds, Gillespie, Chernock, Wilson, Stefan

NAYS: 0 –

MOTION PASSED 5 – 0(unanimously)

FILE NUMBER: BDA 090-095

BUILDING OFFICIAL’S REPORT:

Application of Robert Clayton, represented by Roger Albright, for a variance to the front yard setback regulations and for a special exception to the landscape regulations at 4501 Cole Avenue. This property is more fully described as Lot 1 in City Block L/1536 and is zoned PD No. 193 which requires a front yard setback of 10 feet and requires mandatory landscaping. The applicant proposes to construct and maintain a structure and provide a 3-foot 11-inch front yard setback, which will require a 6-foot 1-inch variance to the front yard setback regulations, and to provide an alternate landscape plan which will require a special exception to the landscape regulations.

LOCATION: 4501 Cole Avenue

APPLICANT: Robert Clayton
Represented by Roger Albright

November 17, 2010 Public Hearing Notes:

- Additional written documentation was submitted to the board at the public hearing from the applicant’s representative.

REQUESTS:

- The following appeals have been made in this application on a site that is currently developed with two structures, one of which is a restaurant use (Taverna) with an approximately 2,100 square foot building footprint and is not part of this application; the other of which once housed a restaurant use (Chip’s Hamburgers) with an approximately 1,600 square foot building footprint and is to be added to and become a new restaurant use (La Fiorentina) and is the focus of the following requests:
 1. A variance to the front yard setback regulations of 6’ 1” is requested in conjunction with constructing and maintaining an approximately 380 square foot “pergola” structure, part of which is to be located in the site’s 10’ front yard setback along Armstrong Avenue; and
 2. A special exception to the landscape regulations is requested in conjunction with the construction and maintenance of the proposed “pergola” structure mentioned above that requires a variance to the front yard setback regulations, and other dining area expansions of one of the structures on the site shown on the submitted site plan that do not require variances.

Note that no additional information has been submitted on this application since the October 20th public hearing.

STAFF RECOMMENDATION (variance):

Denial

Rationale:

- Staff concludes that there is no property hardship to the site that warrants a front yard variance which in this case is requested to construct and maintain a pergola structure that would attach to one of two existing commercial structures on the subject site that are represented as meeting setbacks. The site is relatively flat, rectangular in shape, and 13,500 square feet in area, and currently developed with two commercial structures (one as a restaurant, the other that had been and is proposed to be a restaurant.) The physical features of the site/lot do not create hardship or preclude its development in a manner commensurate with other developments found in the same PD No. 193 (LC) zoning district. Even though the site has two 10' front yard setbacks, this feature is typical of any corner lot that has a street frontage and is not zoned single family, duplex, or agricultural.
- The applicant has not substantiated how either the restrictive area, shape, or slope of the site/lot preclude it from being developed in a manner commensurate with development found on other PD No. 193 (LC Subdistrict) zoned lots.

STAFF RECOMMENDATION (landscape special exception):

Approval, subject to the following conditions:

1. Compliance with the submitted site/landscape plan is required.
2. The existing sidewalk must be fully clear of obstructions at all times. Vegetation along the façade of the rear structure must be pruned back to eliminate any obstacles to clear pedestrian movement.
3. If either of the large mature canopy trees should die, or be removed, it must be replaced with a large canopy tree, approved by the Building Official, at a minimum of 4 caliper inches and in the approximate location of the original tree.
4. The landscape conditions of PD No. 193 will be required on this property for any change from the current use or redevelopment of the property.

Rationale:

- The City's Chief Arborist recommends approval of this request whereby, if the conditions mentioned above are imposed, the special exception would not compromise the spirit and intent of the landscaping requirements of PD No. 193.
- In addition, in this particular case, the landscape materials that are proposed on the site appear to be justified (the site complies with the general planting and special planting area requirements of the ordinance) particularly given the existing site constraints (existing sidewalks, existing utility lines, public transit seating areas) that preclude the applicant from fully complying with the landscape requirements.

STANDARD FOR A VARIANCE:

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, 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:

- (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.

STANDARD FOR A SPECIAL EXCEPTION TO THE LANDSCAPE REQUIREMENTS IN OAK LAWN:

Section 26(a)(4) of Ordinance No. 21859, which establishes PD No. 193, specifies that the board may grant a special exception to the landscaping requirements of this section if, in the opinion of the Board, the special exception will not compromise the spirit and intent of this section. When feasible, the Board shall require that the applicant submit and that the property comply with a landscape plan as a condition to granting the special exception.

UPDATED GENERAL FACTS (November 2010):

- The Board of Adjustment Panel B conducted a public hearing on this application on October 20, 2010. The applicant's representative submitted additional written documentation related to this request to the Board at the public hearing (see Attachment B). The Board delayed action until November 17th to allow the applicant's representative an opportunity to meet with an opposing neighborhood/business group.
- As of November 8, 2010, no additional information had been submitted to staff.

GENERAL FACTS (variance):

- The minimum front yard setback on a PD No. 193 (LC) zoned lot is 10 feet. The applicant has a site plan indicating that the structure that is the focus of this application is located 3' 11" from the site's front property line along Armstrong Avenue or 6' 1" into the required 10' front yard setback. (Note that an "existing patio" shown as part of the other structure on the subject site that may be a structure in the required setback is not part of this application per revisions denoted on the site plan by the applicant's representative on September 24th. Additionally note that while the site has two 10' front yard setbacks, no part of this application is to vary any structure that encroaches into the site's required 10' front yard setback along Cole Avenue).
- According to calculations taken by the Board Administrator from the submitted site plan, the area of the proposed "pergola" structure that is to be located in the site's Armstrong Avenue 10' front yard setback is approximately 190 square feet (or approximately 1/2) of the approximately 380 square foot building footprint.

- The site is relatively flat, rectangular in shape (180' x 75'), and 13,500 square feet in area. The site is zoned PD No. 193 (LC). The site has two 10' front yard setbacks which is typical of any corner lot that has a street frontage and is not zoned single family, duplex, or agricultural.
- DCAD records indicate that the site is developed with the following:
 - a "restaurant" with 2,770 square feet built in 1920;
 - a "free standing retail store" with 2,160 square feet built in 1910.

GENERAL FACTS (landscape special exception):

- PD No. 193 states that the landscape, streetscape, screening, and fencing standards shall become applicable to uses (other than to single family and duplex uses in detached structures) on an individual lot when work is performed on the lot that increases the existing building height, floor area ratio, or nonpermeable coverage of the lot unless the work is to restore a building that has been damaged or destroyed by fire, explosion, flood, tornado, riot, act of the public enemy, or accident of any kind.

The applicant has submitted a site plan (in this case, alternate landscape plan that, according to the City of Dallas Chief Arborist, is seeking relief from the landscaping requirements of PD No. 193, specifically the established "sidewalks" and "trees" requirements of the ordinance.

- On October 12, 2010, the City of Dallas Chief Arborist submitted a memo to the Board Administrator and the Board of Adjustment Chief Planner pertaining to the landscape special exception request (see Attachment A). The memo stated the following:
 - The special exception request is triggered by new construction and renovation.
 - Deficiencies:
 1. Sidewalks – Required: 6' wide between 5' – 12' from back of curb. (The sidewalks on both streets are 4' wide, and the sidewalk on Cole extends beyond 12').
 2. Trees – Required: One tree per 25' of street frontage to be planted in the tree planting zone between 2.5' – 5' from back of curb. (In this case, 3 of the required 10 trees are provided in the tree planting zone. Tree grates are not provided).
 - Factors:
 - Existing site is conducting renovations and expansion of seating areas. The site complies with the general planting and special planting area requirements.
 - Overhead power lines exist along the Cole Avenue tree planting zone. Staff supports restricting trees from under overhead utility lines. The Armstrong tree planting zone is narrower than the PD No. 193 minimum requirement based on the placement of the existing sidewalk. Due to the goal of tree longevity, it is recommended to not plant trees in parkway area narrower than 5' wide.
 - One large mature canopy tree exists in the front yard of the property adjacent to Cole Avenue. On large mature canopy tree exists in the side yard near the rear of the front structure. One existing live oak is in the northeast corner in an inappropriate location near a driveway and under overhead utilities.

- An alternate plan provides for additional plantings on the north side of the property. Additional plantings would be provided near the pergola.
- Screening shrubs are proposed for the parking lot along Armstrong.
- The existing sidewalk alignment along Cole Avenue is the same as adjacent lots. The sidewalk alignment along Armstrong varies from the adjacent lot to the west that was constructed under a Council-approved landscape plan in PD No. 196. Sidewalk placement along Armstrong could be adjusted without problems of continuity, however, the topography of the site and location of buildings may restrict sidewalk expansion as required per PD No. 193.

BACKGROUND INFORMATION:

Zoning:

<u>Site:</u>	PD No. 193 (LC) (Planned Development District, Light commercial)
<u>North:</u>	PD No. 193 (LC) (Planned Development District, Light commercial)
<u>South:</u>	PD No. 193 (MF-2) (Planned Development District, Multifamily)
<u>East:</u>	PD No. 193 (LC) (Planned Development District, Light commercial)
<u>West:</u>	PD No. 196 (Planned Development District)

Land Use:

The subject site is developed with two structures, one of which is a restaurant use (Taverna) and not part of this application; the other of which once housed a restaurant use (Chip's Hamburgers) and is to be added to and to become a new restaurant use (La Fiorentina) and is the focus of the requests made in this application. The areas to the north, east, and west are developed with office and retail uses; and the area to the south is developed with residential uses.

Zoning/BDA History:

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

Timeline:

August 19, 2010: The applicant submitted an "Application/Appeal to the Board of Adjustment" and related documents which have been included as part of this case report.

September 16, 2010: The Board of Adjustment Secretary randomly assigned this case to Board of Adjustment Panel B.

September 16, 2010: The Board Administrator emailed the applicant's representative the following information:

- an attachment that provided the public hearing date and panel that will consider the application; the October 4th deadline to submit additional evidence for staff to factor into their analysis;

and the October 8th 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.

September 27, 2010: The Building Inspection Senior Plans Examiner/Development Code Specialist submitted a review comment sheet marked "Recommends that this be denied" commenting "Property is not restrictive in its area, shape, or slope as to prevent development commensurate with other properties of similar zoning. In fact, the property is currently well-developed."

October 5, 2010: The Board of Adjustment staff review team meeting was held regarding this request and the others scheduled for November public hearings. Review team members in attendance included: the Board of Adjustment Chief Planner, the Board Administrator, the Assistant Building Official, the Building Inspection Chief Planner, the Sustainable Development and Construction Department Project Engineer, the Chief Arborist, and the Assistant City Attorney to the Board.

October 12, 2010 The City of Dallas Chief Arborist submitted a memo that provided his comments regarding the request (see Attachment A).

October 20, 2010: The Board of Adjustment Panel B conducted a public hearing on this application on October 20, 2010. The applicant's representative submitted additional written documentation related to this request to the Board at the public hearing (see Attachment B). The Board delayed action until November 17th to allow the applicant's representative an opportunity to meet with an opposing neighborhood/business group.

October 28, 2010: The Board Administrator sent a letter to the applicant's representative informing him of the public hearing date and the November 5th deadline to submit additional evidence to be incorporated into the Board's docket materials.

November 2, 2010: The Board of Adjustment staff review team meeting was held regarding this request and the others scheduled for November public hearings. Review team members in attendance included: the Board Administrator, the Building Inspection Senior Plans Examiner/Development Code Specialist, the Sustainable Development and Construction Department Project Engineer, the Chief Arborist, and the Assistant City Attorney to the Board.

STAFF ANALYSIS (variance):

- No additional information has been submitted on this request since the October 20th public hearing. The focus of this request is to construct and maintain an approximately 380 square foot "pergola" structure to be attached to one of two

existing structures on the site, and to be located 3' 11" from the Armstrong Avenue front property line or 6' 11" into the site's 10' front yard setback along Armstrong Avenue.

- The applicant's representative has noted on the submitted site plan that the focus of this request is limited to the proposed pergola structure that would attach to the easternmost structure on the site. Additionally note that while the site has two 10' front yard setbacks, the applicant's representative has stated that no part of this application is to vary any structure that encroaches into the site's required 10' front yard setback along Cole Avenue.
- According to calculations taken by the Board Administrator from the submitted site plan, the area of the proposed "pergola" structure that is to be located in the site's Armstrong Avenue 10' front yard setback is approximately 190 square feet (or approximately 1/2) of the approximately 380 square foot building footprint.
- The site is relatively flat, rectangular in shape (180' x 75'), and 13,500 square feet in area. The site is zoned PD No. 193 (LC). The site has two 10' front yard setbacks which is typical of any corner lot that has a street frontage and is not zoned single family, duplex, or agricultural. The site is (according to DCAD records) developed with a "restaurant" with 2,770 square feet built in 1920; and a "free standing retail store" with 2,160 square feet built in 1910.
- The applicant has the burden of proof in establishing the following:
 - That granting the variance to the front yard setback regulations requested in conjunction with constructing and maintaining an approximately 380 square foot "pergola" structure that would attach to an existing commercial structure on the site 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 (a site that is developed with two structures that are both with over 2,000 square feet in area, that is relatively flat, rectangular in shape (180' x 75'), and 13,500 square feet in area) 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 PD No. 193 (LC) 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 PD No. 193 (LC) zoning classification.
- If the Board were to grant the front yard variance request, imposing a condition whereby the applicant must comply with the submitted site plan, the structure in the front yard setback would be limited to what is shown on this plan – which in this case is pergola structure that would attach to the easternmost structure on the site located 3' 11" from the site's Armstrong Avenue front property line (or 6' 1" into this 10' front yard setback). (Note that because the submitted site plan document also includes a section drawing of the proposed pergola, a granted variance with this document imposed as a condition would limit the pergola structure to an open structure that is about 8.5' high, about 34' long, and about 12' wide).
- Note that if the board were to grant this request and impose the submitted site plan as a condition, but deny the request for the special exception to the landscape

regulations, notations would be made of such action on the submitted site plan that the required landscape materials for the site were not “excepted.”

STAFF ANALYSIS (related to the landscape special exception) :

- No additional information has been submitted on this request since the October 20th public hearing. This landscape special exception request is triggered with the construction and maintenance of the proposed “pergola” structure that would attach to one of two existing structures on the site.
- The applicant seeks exception from the landscape requirements in the following ways: 1) providing 4’ wide sidewalks one of which is beyond 12’ from the back of curb when 6’ wide sidewalks between 5’ – 12’ from back of curb are required; and 2) providing only 3 of the required 10 trees in their required tree planting zone between 2.5’ – 5’ from back of curb.
- The City of Dallas Chief Arborist supports the request with the imposition of 3 specific conditions that are detailed in his October 12th memo to staff (see Attachment A).
- The applicant has the burden of proof in establishing the following:
 - The special exception (where an alternate landscape plan has been submitted that is deficient in meeting the “sidewalks” and “trees” provisions of the PD No. 193 landscape regulations) will not compromise the spirit and intent of the section of the ordinance (Section 26: Landscape, streetscape, screening, and fencing standards).
- If the Board were to grant this request and impose the conditions suggested by staff/the Chief Arborist, the site would be clearly “excepted” from compliance to the “sidewalks” and “trees” requirements of the Oak Lawn PD landscape ordinance.
- Note that if the board were to grant this request and impose the submitted site/landscape plan as a condition, but deny the request for the variance to the front yard setback regulations, notations would be made of such action on the submitted site/landscape plan stating that the required front yard setback on Armstrong Avenue was not “varied.”

BOARD OF ADJUSTMENT ACTION: OCTOBER 20, 2010

APPEARING IN FAVOR: Roger Albright, 3301 Elm St., Dallas, TX

APPEARING IN OPPOSITION: Frank Stich, 4224 N. Hall, Dallas, TX

1:42 P.M.: Break

1:48 P.M.: Resumed

MOTION: **Chernock**

I move that the Board of Adjustment, in Appeal No. **BDA 090-095**, hold this matter under advisement until **November 17, 2010**.

SECONDED: **Gillespie**

AYES: 5– Reynolds, Gillespie, Chernock, Wilson, Agnich

NAYS: 0 –
MOTION PASSED 5 – 0(unanimously)

BOARD OF ADJUSTMENT ACTION: NOVEMBER 17, 2010

APPEARING IN FAVOR: Roger Albright, 3301 Elm St., Dallas, TX
Frank Stich, 4224 N. Hall, Dallas, TX

APPEARING IN OPPOSITION: No one

MOTION #1: Agnich

I move that the Board of Adjustment, in Appeal No. **BDA 090-095**, on application of Robert Clayton represented by Roger Albright, **grant** the request of this applicant for a special exception to the landscaping requirements contained in PD 193, because our evaluation of the property, the testimony presented to us, and the facts that we have determined show that this special exception will not compromise the spirit and intent of Section 51P-193.126 of the Dallas Development Code. I further move that the following conditions be imposed to further the purpose and intent of the Dallas Development Code:

- Compliance with the submitted revised site/landscape plan is required.
- The existing sidewalk must be fully clear of obstructions at all times. Vegetation along the facade of the rear structure must be pruned back to eliminate any obstacles to pedestrian movement.
- If either of the large mature canopy trees should die, or be removed, it must be replaced with a large canopy tree, approved by the Building Official, at a minimum of 4 caliper inches and in the approximate location of the original tree.
- The landscape conditions of PD No. 193 will be required on this property for any change from the current use or redevelopment of the property.

SECONDED: Chernock

AYES: 5– Reynolds, Gillespie, Chernock, Wilson, Agnich

NAYS: 0 –

MOTION PASSED 5 – 0(unanimously)

MOTION #2: Agnich

I move that the Board of Adjustment, in Appeal No. **BDA 090-095**, on application of Robert Clayton represented by Roger Albright, **deny** the front yard setback variance 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: No one

Motion failed for lack of a Second

MOTION #3: Wilson

I move that the Board of Adjustment, in Appeal No. **BDA 090-095**, on application of Robert Clayton represented by Roger Albright, **grant** the 6-foot 1-inch variance to the minimum 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 revised site plan is required.

SECONDED: Chernock

AYES: 4– Reynolds, Gillespie, Chernock, Wilson,

NAYS: 1 – Agnich

MOTION PASSED 4 – 1

MOTION: Wilson

I move to adjourn this meeting.

SECONDED: Chernock

AYES: 5– Reynolds, Gillespie, Chernock, Wilson, Agnich

NAYS: 0 -

MOTION PASSED 5– 0 (unanimously)

2:16 P.M. - Board Meeting adjourned for **November 17, 2010.**

CHAIRPERSON

BOARD ADMINISTRATOR

BOARD SECRETARY

Note: For detailed information on testimony, refer to the tape retained on file in the Department of Planning and Development.