

**BOARD OF ADJUSTMENT, PANEL A  
PUBLIC HEARING MINUTES  
DALLAS CITY HALL, COUNCIL CHAMBERS  
TUESDAY, OCTOBER 19, 2010**

MEMBERS PRESENT AT BRIEFING: Rob Richmond, Chair, Jordan Schweitzer, Panel Vice-Chair, Steve Harris, Scott Hounsel, regular member and Johnnie Goins, regular member

MEMBERS ABSENT FROM BRIEFING: No one

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

MEMBERS PRESENT AT HEARING: Rob Richmond, Chair, Jordan Schweitzer, Panel Vice-Chair, Steve Harris, Scott Hounsel, regular member and Johnnie Goins, regular member

MEMBERS ABSENT FROM HEARING: No one

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

**11:02 A.M.** The Board of Adjustment staff conducted a briefing on the Board of Adjustment's **October 19, 2010** docket.

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**1:00 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.

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**MISCELLANEOUS ITEM NO. 1**

To approve the Board of Adjustment Panel A **September 14, 2010** public hearing minutes.

**BOARD OF ADJUSTMENT ACTION: OCTOBER 19, 2010**

**MOTION: Harris**

I move **approval** of the Tuesday, **September 14, 2010** public hearing minutes.

**SECONDED: Schweitzer**

**AYES: 5 – Richmond, Schweitzer, Harris, Honsel, Goins**

**NAYS: 0 -**

**MOTION PASSED: 5– 0 (unanimously)**

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**MISCELLANEOUS ITEM NO. 2**

Consideration of Panel C's 2011 Public Hearing Schedule

**\*This was not an action item.**

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**BOARD OF ADJUSTMENT ACTION: OCTOBER 19, 2010**

**MOTION: Schweitzer**

I move that we hear Miscellaneous Item No. 3 and Miscellaneous Item No. 4 after hearing BDA 090-069.

**SECONDED: Harris**

**AYES: 5 – Richmond, Schweitzer, Harris, Honsel, Goins**

**NAYS: 0 -**

**MOTION PASSED: 5– 0 (unanimously)**

**FILE NUMBER:** BDA 090-069

**BUILDING OFFICIAL'S REPORT:**

Application of Barbara Young, represented by Rob Baldwin, for a special exception to the fence height regulations at 6933 Lyre Lane. This property is more fully described as Lot 11A in City Block 10/2987 and is zoned R-7.5(A) which limits the height of a fence in the side yard to 9 feet. The applicant proposes to construct and/or maintain a 12-foot 6-inch high fence which will require a special exception of 3 feet 6 inches.

**LOCATION:** 6933 Lyre Lane

**APPLICANT:** Barbara Young  
Represented by Rob Baldwin

**October 19, 2010 Public Hearing Notes:**

- An opposing property owner submitted written documentation related to this request to the Board at the public hearing.

**REQUEST:**

- A special exception to the fence height regulations of 3' 6" is requested in conjunction with modifying and maintaining a solid corrugated metal fence in the site's 5' required side yard setback on the northwest side of the subject site – a fence that (according to the submitted revised elevation) is 9' in height (atop an approximately 6" high "existing patio tile") yet reaches 12' 6" in height above grade given the change in topography on the site downward from the street on the east to the creekbed on the west.

**STAFF RECOMMENDATION:**

No staff recommendation is made on this or any request for a special exception to the fence height regulations 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.

**STANDARD FOR A SPECIAL EXCEPTION TO FENCE HEIGHT REGULATIONS:**

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

**GENERAL FACTS:**

- The Dallas Development Code states that a person shall not erect or maintain a fence in a required yard more than 9' above grade, and additionally states that in all

residential districts except multifamily districts, a fence may not exceed 4' above grade when located in the required front yard. The Dallas Development Code states that "fence heights shall be measured from in single family districts, the top of the fence to the level of the ground on the inside of the fence in the required side or rear yard."

The applicant has submitted a revised site plan and a revised elevation indicating that the proposal located in the required 5' side yard setback on the northwest side of the site reaches a maximum height of 12' 6".

- The submitted revised site plan indicates that the corrugated metal fence/wall located in the required 5' side yard setback is approximately 38' long fence. This plan shows that the fence is located approximately 1' from the side property line.
- The submitted revised elevation indicates that 26' of the fence/wall exceeds 9' in height. Approximately half of the length of the 9' high corrugated metal fence appears to be approximately 9' 6" in height given that this portion of the fence/wall sits atop an "existing patio tile." The other approximate half of the length of the 9' high corrugated metal fence that exceeds 9' in height is located atop a concrete slab and/or is cantilevered as much as 42" from grade – most likely to comply with flood plain regulations and/or a floodway easement on the site. (The submitted revised elevation and revised site plan make the following notation: "No structure to be located within the boundary of the floodway easement.")
- On September 22<sup>nd</sup> and 23<sup>rd</sup>, the City of Dallas Trinity Department Senior Program Manager (whose department reviews all flood plain issues) emailed the Board Administrator the following comments on the applicant's submittal: "The applicant should make sure the fence is cantilevered above the floodplain as well as above the floodway easement which may not be on the same line. The deck enclosure next door is cantilevered above the floodplain correctly based on survey information. If the applicant's cantilever starts at the same point as the deck cantilever, it is correct. If the retaining wall continues past the deck cantilever toward the creek, it must be either altered or a hydraulic analysis and floodplain alteration permit will be required." The manager also emailed that "the bottom of the fence must be at least as high as the bottom of the adjacent property's deck in order to pass the flood," and in response to pictures forwarded to him of the site and neighboring property that "he has to remove part of the retaining wall. It was originally extended into the floodplain without a permit. The retaining wall must be removed and the bottom of the fence elevated to match the clear space beneath the deck next door. This way there can be no adverse impact." (Note that these emails were forwarded to the applicant's representative on September 23, 2010).
- One single family home abuts the proposal in the required side yard setback.

## **BACKGROUND INFORMATION:**

### **Zoning:**

Site: R-7.5 (A)(FP) (Single family district 7,500 square feet, flood plain)  
North: R-7.5 (A)(FP) (Single family district 7,500 square feet, flood plain)  
South: R-7.5 (A)(FP) (Single family district 7,500 square feet, flood plain)

East: R-7.5 (A) (Single family district 7,500 square feet)  
West: R-7.5 (A)(FP) (Single family district 7,500 square feet, flood plain)

**Land Use:**

The subject site is developed with a single family home. The areas to the north, east, south, and west are developed with single family 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 30, 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 A. (Note that this application was delayed from being scheduled for hearing from May until September in order for the applicant to complete the application by submitting a site plan and an elevation that were represented as being in compliance with flood plain regulations).

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 4<sup>th</sup> deadline to submit additional evidence for staff to factor into their analysis; and the October 8<sup>th</sup> 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 22 & 23, 2010: The City of Dallas Trinity Department Senior Program Manager (whose department reviews all flood plain issues) emailed the Board Administrator the following comments on the applicant’s submittal: “The applicant should make sure the fence is cantilevered above the floodplain as well as above the floodway easement which may not be on the same line. The deck enclosure next door is cantilevered above the floodplain correctly based on survey information. If the applicant’s cantilever starts at the same

point as the deck cantilever, it is correct. If the retaining wall continues past the deck cantilever toward the creek, it must be either altered or a hydraulic analysis and floodplain alteration permit will be required.” The manager also emailed that “the bottom of the fence must be at least as high as the bottom of the adjacent property’s deck in order to pass the flood,” and in response to pictures forwarded to him of the site and neighboring property that “he has to remove part of the retaining wall. It was originally extended into the floodplain without a permit. The retaining wall must be removed and the bottom of the fence elevated to match the clear space beneath the deck next door. This way there can be no adverse impact.” (Note that these emails were forwarded to the applicant’s representative on September 23, 2010).

September 27, 2010: The Building Inspection Senior Plans Examiner/Development Code Specialist submitted a review comment sheet marked “Has no objections if certain conditions are met” commenting “All applicable permits must be obtained. Previous fence permits issued to this property are voided.”

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 7, 2010: The Sustainable Development Department Project Engineer submitted a review comment sheet marked “Has no objections if certain conditions are met” with the following comments: “Needs to comply with floodplain requirements.”

### **STAFF ANALYSIS:**

- This request focuses on modifying and maintaining a corrugated metal fence in the site’s 5’ required side yard setback on the northwest side of the subject site – a fence that (according to the submitted revised elevation) is 9’ in height (atop an approximately 6” high “existing patio tile”) yet reaches 12’ 6” in height above grade given the change in topography on the site. (According to the applicant’s representative, the existing fence/wall that is currently stair-stepped towards the creek will be modified/raised to be a level height).
- Note that the applicant has stated in a letter that is part of this application that the fence/wall that is the issue in this request is a result of a City-approved fence permit – a fence built in accordance with the plans provided to the City but where the fence contractor did not take the slope of the property into account, and where after

completion of the fence that a “small portion” of it was discovered to be out of compliance with the City’s fence regulations.

- A revised site plan indicates that the corrugated metal fence/wall located in the required 5’ side yard setback is approximately 38’ long fence. This plan shows that the fence is located approximately 1’ from the side property line.
- The submitted revised elevation indicates that 26’ of the fence/wall exceeds 9’ in height. Approximately half of the length of the 9’ high corrugated metal fence appears to be approximately 9’ 6” in height given that this portion of the fence/wall sits atop an “existing patio tile.” The other approximate half of the length of the 9’ high corrugated metal fence that exceeds 9’ in height is located atop a concrete slab and/or is cantilevered as much as 42” from grade – most likely to comply with flood plain regulations and/or a floodway easement on the site. (The submitted revised elevation and revised site plan make the following notation: “No structure to be located within the boundary of the floodway easement.”)
- The City of Dallas Trinity Department Senior Program Manager (whose department reviews all flood plain issues) has emailed the Board Administrator with concerns on this fence commenting among other things how the applicant should make sure the fence is cantilevered above the floodplain as well as above the floodway easement which may not be on the same line; how bottom of the fence on the subject site must be at least as high as the bottom of the adjacent property’s deck in order to “pass the flood;” that part of the existing retaining wall has to be removed since it was originally extended into the floodplain without a permit; and that the retaining wall must be removed and the bottom of the fence elevated to match the clear space beneath the deck next door assure that there is no adverse impact.” (The city program manager’s emails were forwarded to the applicant’s representative on September 23, 2010 with no written response).
- The applicant’s submitted plans makes reference to “no structure to be located within the boundary of the floodway easement” but does not denote compliance with City required flood plain regulations.
- One single family home abuts the proposal in the required side yard setback.
- As of October 11, 2010, a petition signed by 81 people had been submitted to staff in support of the request, and no letters had been submitted in opposition to the proposal.
- The applicant has the burden of proof in establishing that the special exception to the fence height regulations of 3’ 6” to modify and maintain the fence/wall in the required side yard setback does not adversely affect neighboring property.
- Granting this special exception with a condition imposed that the applicant complies with the submitted revised site plan and submitted revised elevation would assure that the existing fence exceeding 9’ in height (as measured from the top of the fence to the level of the ground on the inside of the fence in the required side) is modified and maintained in the location and of the heights and material as shown on these documents.
- Granting this special exception and imposing the submitted revised site plan and revised elevation as a condition does not waive the applicant from fully complying with all required City building codes (given the height of the fence/wall that is the issue of this request) and City flood plain regulations.

- Although the applicant's submitted plans make reference to "no structure to be located within the boundary of the floodway easement," note that staff has made the applicant fully aware that in order to obtain a fence permit for the fence in this case given its height (above 9') and given its location (in a required side yard and partially in floodplain), that the fence would be required to comply with: 1) the board's order/conditions; 2) City building code requirements; and 3) City flood plain regulations; and the applicant would be required to return to the board with a new fence height special exception application if the fence were to exceed 9' in height and be located in the required side yard setback and be altered from characteristics shown on any condition/plan imposed in conjunction with the approval of BDA090-069 in order to comply with City building code and/or flood plain regulations.

**BOARD OF ADJUSTMENT ACTION: OCTOBER 19, 2010**

**APPEARING IN FAVOR:** Robert Baldwin, 401 Exposition Ave., Dallas, TX  
Bill Buchanan, 6939 Lyre Lane, Dallas, TX

**APPEARING IN OPPOSITION:** James Manning, 6927 Lyre lane, Dallas, TX

**MOTION:** Harris

I move that the Board of Adjustment, in Appeal No. **BDA 090-069**, on application of Barbara Young, represented by Robert Baldwin, **deny** the special exception requested by this applicant **without prejudice**, because our evaluation of the property and the testimony shows that granting the application would adversely affect neighboring property.

**SECONDED:** Goins

**AYES:** 3 – Schweitzer, Harris, Goins

**NAYS:** 2 – Richmond, Hounsel

**MOTION PASSED:** 3– 2

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**MISCELLANEOUS ITEM NO. 3**

**REQUEST:** To reimburse the filing fee submitted in conjunction with a request for a special exception to restore a nonconforming use – BDA090-087

**LOCATION:** 939 N. Winnetka Avenue

**APPLICANT:** Josh Terry

**STANDARD FOR A FEE WAIVER OR A FEE REIMBURSEMENT:**

The Dallas Development Code states that the board may waive the filing fee for a board of adjustment application if the board finds that payment of the fee would result in substantial financial hardship to the applicant.



## **GENERAL FACTS:**

- The Dallas Development Code states the following with regard to requests for Board of Adjustment fee waivers and reimbursements:
  - The board may waive the filing fee if the board finds that payment of the fee would result in substantial financial hardship to the applicant.
  - The applicant may either pay the fee and request reimbursement at the hearing on the matter or request that the issue of financial hardship be placed on the board's miscellaneous docket for predetermination.
  - If the issue is placed on the miscellaneous docket, the applicant may not file the application until the merits of the request for a waiver have been determined by the board.
  - In making this determination, the board may require the production of financial documents.

## **Timeline:**

- July 15, 2010: The Board of Adjustment Secretary randomly assigned the case (BDA090-087) to Board of Adjustment Panel A.
- Sept. 27, 2010: The applicant submitted a letter to the Board Administrator stating among other things how he wanted him to place a fee reimbursement request on the board's docket for this application (BDA090-087) and his other application on the subject site: BDA090-101 (see Attachment A).
- Sept. 27, 2010: The Board Administrator emailed the applicant the following information:
- an attachment that provided the public hearing date and panel that will consider his applications and fee reimbursements; the October 8<sup>th</sup> 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 fee reimbursement request including a note how this standard states that the board may require the production of financial documents (i.e. financial documents as in but not limited to copies of 1040's, W-4's, bank statements - all with account numbers redacted)); and
  - the Board of Adjustment Working Rules of Procedure pertaining to documentary evidence.
- Oct. 6, 2010: The applicant submitted additional materials regarding his fee reimbursement requests for both of his applications: BDA090-087 and BDA090-101 (see Attachment B).

## **BOARD OF ADJUSTMENT ACTION: OCTOBER 19, 2010**

**APPEARING IN FAVOR:** Josh Terry, 13901 Midway, Ste., Dallas, TX

APPEARING IN OPPOSITION:

APPEARING FOR THE CITY: Charles Estee, 1500 Marilla St., 5DN, Dallas, TX

**MOTION #1: Goins**

I move that the Board of Adjustment **deny** the request to reimburse the filing fee submitted in conjunction with a request for a special exception to restore a nonconforming use.

**SECONDED: No Second**

**MOTION#2: Harris**

I move that the Board of Adjustment **grant** the request to reimburse the filing fee submitted in conjunction with a request for a special exception to restore a nonconforming use.

**SECONDED: Hounsel**

**AYES: 4 – Richmond, Schweitzer, Harris, Hounsel**

**NAYS: 1 - Goins**

**MOTION PASSED: 4– 1**

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**MISCELLANEOUS ITEM NO. 4**

**REQUEST:** To reimburse the filing fee submitted in conjunction with a request to appeal the decision of the administrative official– BDA090-101

**LOCATION:** 939 N. Winnetka Avenue

**APPLICANT:** Josh Terry

**STANDARD FOR A FEE WAIVER OR A FEE REIMBURSEMENT:**

The Dallas Development Code states that the board may waive the filing fee for a board of adjustment application if the board finds that payment of the fee would result in substantial financial hardship to the applicant.

**GENERAL FACTS:**

- The Dallas Development Code states the following with regard to requests for Board of Adjustment fee waivers and reimbursements:
  - The board may waive the filing fee if the board finds that payment of the fee would result in substantial financial hardship to the applicant.
  - The applicant may either pay the fee and request reimbursement at the hearing on the matter or request that the issue of financial hardship be placed on the board’s miscellaneous docket for predetermination.

- If the issue is placed on the miscellaneous docket, the applicant may not file the application until the merits of the request for a waiver have been determined by the board.
- In making this determination, the board may require the production of financial documents.

**Timeline:**

- Sept. 16, 2010: The Board of Adjustment Secretary assigned the case (BDA090-101) to Board of Adjustment Panel A.
- Sept. 27, 2010: The applicant submitted a letter to the Board Administrator stating among other things how he wanted him to place a fee reimbursement request on the board's docket for this application (BDA090-101) and his other application on the subject site: BDA090-087 (see Attachment A).
- Sept. 27, 2010: The Board Administrator emailed the applicant the following information:
- an attachment that provided the public hearing date and panel that will consider his applications and fee reimbursements; the October 8<sup>th</sup> 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 fee reimbursement request including a note how this standard states that the board may require the production of financial documents (i.e. financial documents as in but not limited to copies of 1040's, W-4's, bank statements - all with account numbers redacted)); and
  - the Board of Adjustment Working Rules of Procedure pertaining to documentary evidence.
- Oct. 6, 2010: The applicant submitted additional materials regarding his fee reimbursement requests for both of his applications: BDA090-087 and BDA090-101 (see Attachment B).

**BOARD OF ADJUSTMENT ACTION: OCTOBER 19, 2010**

APPEARING IN FAVOR: Josh Terry, 13901 Midway, Ste., Dallas, TX

APPEARING IN OPPOSITION: No one

APPEARING FOR THE CITY: Charles Estee, 1500 Marilla St., 5DN, Dallas, TX

**MOTION#2: Harris**

I move that the Board of Adjustment **grant** the request to reimburse the filing fee submitted in conjunction with a request to appeal the decision of the administrative official.

**SECONDED: Schweitzer**

**AYES: 4 – Richmond, Schweitzer, Harris, Hounsel**

**NAYS: 1 - Goins**

**MOTION PASSED: 4– 1**

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**FILE NUMBER: BDA 090-101**

**BUILDING OFFICIAL’S REPORT:**

Application of Josh Terry to appeal the decision of the administrative official at 939 N. Winnetka Avenue. This property is more fully described as Lot 10 and part of Lot 9 in City Block 4/3455 and is zoned CD No. 1 which requires a certificate of occupancy for its use. The building official shall deny an application for a certificate of occupancy if the building official determines that the application contains 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 denial of an application for a certificate of occupancy.

**LOCATION: 939 N. Winnetka Avenue**

**APPLICANT: Josh Terry**

**October 19, 2010 Public Hearing Notes:**

- The applicant submitted additional written documentation related to this request to the Board at the public hearing.

**REQUEST:**

- An appeal has been made requesting that the Board of Adjustment reverse/overturn the Building Official’s August 30, 2010 decision to deny an application for a Certificate of Occupancy (CO) on the subject site – specifically Certificate of Occupancy application #1002101036 dated 2/9/2010 for a “4 unit apt”/multifamily dwelling use on the property. The applicant alleges that the Building Official’s decision to deny this CO application was in error and should be overturned.

**BASIS FOR APPEAL FROM DECISION OF AN ADMINISTRATIVE OFFICIAL:**

Section 51A-3.102(d)(1) of the Dallas Development Code states that the Board of Adjustment has the power and duty to hear and decide appeals from decisions of Administrative Officials made in the enforcement of the Dallas Development Code.

## **GENERAL FACTS:**

- The Building Official's August 30, 2010 letter to the applicant/owner of the site, Josh Terry, states the following:
  - You have applied for a certificate of occupancy for a multifamily use on the Property. The Property is zoned Subarea 1 of Conservation District No. 1, which does not allow multifamily as a permitted use. Our research of permit records and zoning history maps indicates that a multifamily use was never a legal use on the Property. Therefore, your application for a certificate of occupancy is denied. Any use operating without a certificate of occupancy is an illegal land use that must immediately cease operating.
  - Any determination made by the Building Official shall be final unless appealed within 15 days of the date of this letter. Questions about the appeal process should be directed to the Building Official at 214-948-4320.
- On October 8, 2010, the applicant forwarded additional information to the Board Administrator regarding this appeal beyond what was submitted with the original application (see Attachment A). (The applicant's documents include an "executive summary" that states among other things that "the Property was built in 1922 and was operated as a multifamily property prior to the first zoning ordinance established September 11, 1929;" and that "since the 1920's, the Property has continued to be used a multifamily property, as evidenced by numerous documents.")
- The Dallas Development Code defines "nonconforming use" as "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."
- On October 8, 2010, the Assistant City Attorney assisting the Building Official on this application forwarded additional information to the Board Administrator regarding this appeal and BDA090-087 (see Attachment B).

## **BACKGROUND INFORMATION:**

### **Zoning:**

<u>Site:</u>	CD No. 1 (Conservation District)
<u>North:</u>	CD No. 13 (Conservation District)
<u>South:</u>	CD No. 1 (Conservation District)
<u>East:</u>	CD No. 1 (Conservation District)
<u>West:</u>	CD No. 1 (Conservation District)

### **Land Use:**

The subject site is developed with two structures that appear to be vacant and appear to have been residential in use. The areas to the north, south, east, and west are developed with single family residential uses.

**Zoning/BDA History:**

1. BDA090-087, Property at 939 N. Winnetka Avenue (the subject site)

Depending on whether Board of Adjustment Panel A grants the applicant's request in this application made on the subject site (BDA090-101) on October 19, 2010, overturning/reversing the Building Official's August 30, 2010 decision to deny an application for a Certificate of Occupancy (CO) on the subject site – specifically Certificate of Occupancy #1002101036 dated 2/9/2010 for a "4 unit apt"/multifamily dwelling use on the property, will be whether the Board of Adjustment Panel A will consider the applicant's other request on the subject site for a special exception to restore/reinstate nonconforming use rights requested in conjunction with obtaining a Certificate of Occupancy (CO) for a nonconforming "multifamily" use on the subject site even though this nonconforming use was discontinued for a period of six months or more (BDA090-087).

If the board grants the applicant's request in this application and reverses/overturns the Building Official's decision, the applicant is aware that the board will then consider the applicant's other request on the subject site for a special exception to restore/reinstate nonconforming use rights requested in conjunction with obtaining a Certificate of Occupancy (CO) for a nonconforming "multifamily" use on the subject site even though this nonconforming use was discontinued for a period of six months or more (BDA090-087) since the board will have determined in this application that the multifamily use is a nonconforming use rather than an illegal use.

If the board denies the applicant's request in this application and affirms the Building Official's decision, the applicant is aware that the board will not be able to consider his other application made on the subject site (BDA090-087) since the board will have determined in this application that the multifamily use is an illegal use rather than a

nonconforming use.

2. Miscellaneous Items 3 and 4,  
Property at 939 N. Winnetka  
Avenue (the subject site)

On October 19, 2010, the Board of Adjustment Panel A will reconsider reimbursing the filing fees submitted in conjunction with BDA090-087 and BDA090-101 - the board of adjustment applications submitted by the applicant to appeal the decision of the Building Official's decision and for a special exception to restore/reinstate nonconforming use rights on the subject site.

**Timeline:**

- September 3, 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 assigned this case to Board of Adjustment Panel A.
- September 16, 2010: The Board Administrator emailed the applicant/owner of the site the following information:
- an attachment that provided the public hearing date and panel that will consider the application; the October 4<sup>th</sup> deadline to submit additional evidence for staff to factor into their analysis; and the October 8<sup>th</sup> deadline to submit additional evidence to be incorporated into the Board's docket materials;
  - the outline of procedure for appeals from decisions of the building official to the board of adjustment; 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 "The stated multifamily use of this property was, and is, illegal for all previous and current zoning of the property."
- 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 8, 2010: The applicant forwarded additional information on this application to staff beyond what was submitted with the original application (see Attachment A).

October 8, 2010: The Assistant City Attorney assisting the Building Official on this application forwarded additional information to the Board Administrator regarding this appeal and BDA090-087 (see Attachment B).

### **STAFF ANALYSIS:**

- The applicant is requesting the Board of Adjustment to overturn or reverse the Building Official's August 30, 2010 decision to deny an application for a Certificate of Occupancy (CO) on the subject site – specifically Certificate of Occupancy application #1002101036 dated 2/9/2010 for a “4 unit apt”/multifamily dwelling use on the property.
- The applicant has submitted documents including an “executive summary” that states among other things that “the Property was built in 1922 and was operated as a multifamily property prior to the first zoning ordinance established September 11, 1929;” and that “since the 1920’s, the Property has continued to be used a multifamily property, as evidenced by numerous documents.”
- If the Board of Adjustment upholds the Building Official's August 30th decision, Certificate of Occupancy application #1002101036 dated 2/9/2010 for a “4 unit apt”/multifamily dwelling use on the property will remain denied. If this action occurs, the Board of Adjustment Panel A will not consider the applicant's other request on the subject site for a special exception to restore/reinstate nonconforming use rights requested in conjunction with obtaining a Certificate of Occupancy (CO) for a nonconforming “multifamily” use on the subject site since the board will have determined in this application that the multifamily use is an illegal use rather than a nonconforming use.
- If the Board of Adjustment overturns/reverses the Building Official's August 30th decision, Certificate of Occupancy application #1002101036 dated 2/9/2010 for a “4 unit apt”/multifamily dwelling use on the property will be approved. If this action occurs, the Board of Adjustment Panel A will consider the applicant's other request on the subject site for a special exception to restore/reinstate nonconforming use rights requested in conjunction with obtaining a Certificate of Occupancy (CO) for a nonconforming “multifamily” use on the subject site since the board will have determined in this application that the multifamily use was a lawfully established use

under the regulations in force at the beginning of operation and has been in regular use since that time.

**BOARD OF ADJUSTMENT ACTION: OCTOBER 19, 2010**

APPEARING IN FAVOR: Josh Terry, 13901 Midway, Ste., Dallas, TX  
Laura Sims, 939 N. Clinton Ave., Dallas, TX  
Kevin Gibbs, 1022 N. Winnetka Ave., Dallas, TX

APPEARING IN OPPOSITION: Robert Puckett, 1000 N. Winnetka Ave., Dallas, TX  
David Patterson, 922 Clinton, Dallas, TX

APPEARING FOR THE CITY: Charles Estee, 1500 Marilla St., 5DN, Dallas, TX  
Jennifer Hiromoto, 320 E. Jefferson, Dallas, TX

**MOTION #1: Schweitzer**

Having fully reviewed the decision of the building official of the City of Dallas in Appeal No. **BDA 090-101**, on application of Josh Terry, and having evaluated the evidence pertaining to the property and heard all testimony and facts supporting the application, I move that the Board of Adjustment **reverse** the decision of the building official and **grant** the relief requested by this applicant. Further, we find that the nonconforming multifamily use became nonconforming on September 11, 1929.

**SECONDED: Hounsel**

**AYES:** 3 – Richmond, Schweitzer, Hounsel

**NAYS:** 1 - Harris

**MOTION FAILED:** 3– 1

**MOTION #2: Harris**

Having fully reviewed the decision of the building official of the City of Dallas in Appeal No. **BDA 090-101**, on application of Josh Terry, and having evaluated the evidence pertaining to the property and heard all testimony and facts supporting the application, I move that the Board of Adjustment **affirm** the decision of the building official and **deny** the relief requested by the applicant **without** prejudice.

**SECONDED: No Second  
Motion failed for lack of a second.**

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**FILE NUMBER:** BDA 090-087

**BUILDING OFFICIAL’S REPORT:**

Application of Josh Terry to restore a nonconforming use at 939 N. Winnetka Avenue. This property is more fully described as Lot 10 and part of Lot 9 in City Block 4/3455 and is zoned CD No. 1 which limits the legal uses in a zoning district. The applicant proposes to restore a nonconforming multifamily use which will require a special exception to the nonconforming use regulations.

**LOCATION:** 939 N. Winnetka Avenue

**APPLICANT:** Josh Terry

**REQUEST:**

- A special exception to reinstate nonconforming multifamily use rights is requested in conjunction with obtaining a Certificate of Occupancy (CO) for what the applicant

alleges is a nonconforming “multifamily” use on the subject site even though the alleged nonconforming use was discontinued for a period of six months or more.

Note that the applicant/owner of the site is aware of the fact that this application (BDA090-087) will only be heard by Board of Adjustment Panel A on October 19, 2010 if the panel grants the applicant/owner’s other application made to the board on the subject site (BDA090-101), overturning/reversing the Building Official’s August 30, 2010 decision to deny an application for a Certificate of Occupancy (CO) on the subject site – specifically Certificate of Occupancy #1002101036 dated 2/9/2010 for a “4 unit apt”/multifamily dwelling use on the property, whereby with this action the Board will have determined that the multifamily use on the subject site is a nonconforming use rather than an illegal use.

**STAFF RECOMMENDATION:**

No staff recommendation is made on this or any request for a special exception to operate a nonconforming use if that use is discontinued for six months or more since the basis for this type of appeal is based on whether the board determines that there was a clear intent not to abandon the nonconforming use even though the use was discontinued for six months or more.

**STANDARD FOR A SPECIAL EXCEPTION TO OPERATE A NONCONFORMING USE IF THAT USE IS DISCONTINUED FOR SIX MONTHS OR MORE:** The Dallas Development Code specifies that the Board may grant a special exception to operate a nonconforming use that has been discontinued for six months or more if the owner can show that there was a clear intent not to abandon the nonconforming use even though the use was discontinued for six months or more.

**GENERAL FACTS:**

- The subject site is zoned CD No. 1, Subarea 1 (Conservation District) – a zoning district created in 1988 that does not permit a “multifamily” use. The applicant alleges that the “multifamily” use on the site is a nonconforming use and has made a separate application to the Board of Adjustment (BDA090-101) appealing the Building Official’s August 30, 2010 decision to deny an application for a Certificate of Occupancy (CO) on the subject site – specifically Certificate of Occupancy #1002101036 dated 2/9/2010 for a “4 unit apt”/multifamily dwelling use on the property. The applicant alleges that the Building Official’s decision to deny this CO was in error and should be overturned. The Dallas Development Code defines “nonconforming use” as “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 nonconforming use regulations of the Dallas Development Code state it is the declared purpose of the nonconforming use section of the code 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 nonconforming use regulations continue to state that the right to operate a nonconforming use ceases if the nonconforming use is discontinued for six months or more, and that the board of adjustment may grant a special exception to operate a nonconforming use that has been discontinued for six months or more if the owner can show that there was a clear intent not to abandon the nonconforming use even though the use was discontinued for six months or more.

- According to information from Dallas Central Appraisal District (DCAD), the property at 939 N. Winnetka Avenue is developed with a structure with 1,112 square feet in “average” condition constructed in 1923.
- The applicant has stated that the “City of Dallas alleges that the Property has been vacant from November 5, 2008 to January 14, 2010.”
- Given provisions set forth in the Dallas Development Code, if Board of Adjustment Panel A were to grant the owner/applicant’s other application to them (BDA090-101) overturning/reversing the Building Official’s August 30, 2010 decision to deny an application for a Certificate of Occupancy (CO) on the subject site – specifically Certificate of Occupancy #1002101036 dated 2/9/2010 for a “4 unit apt”/multifamily dwelling use on the property, whereby with this action they have determined that the multifamily use on the subject site is a nonconforming use rather than an illegal use, the “multifamily” use could only obtain “conforming use” status upon attaining a change from the current zoning district from the City Council.
- Given provisions set forth in the Dallas Development Code, even if Board of Adjustment Panel A were to grant the owner/applicant’s separate application to them (BDA090-101) appealing the Building Official’s August 30, 2010 decision to deny an application for a Certificate of Occupancy (CO) on the subject site – specifically Certificate of Occupancy #1002101036 dated 2/9/2010 for a “4 unit apt”/multifamily dwelling use on the property, whereby with this action the Board would have determined that the multifamily use on the subject site is a nonconforming use rather than an illegal use, the nonconforming “multifamily” use on the site would be subject to the possibility of an application that may be brought to the Board of Adjustment requesting that the board establish a compliance date as is the case with any other nonconforming use in the city.
- The Board Administrator has informed the applicant of the provisions set forth in the Dallas Development Code pertaining to nonconforming uses.
- On October 8, 2010, the applicant forwarded additional information to the Board Administrator regarding this appeal beyond what was submitted with the original application (see Attachment A).
- On October 8, 2010, the Assistant City Attorney assisting the Building Official on this application forwarded additional information to the Board Administrator regarding this appeal and BDA090-101 (see Attachment B).

## **BACKGROUND INFORMATION:**

### **Zoning:**

Site: CD No. 1 (Conservation District)  
North: CD No. 13 (Conservation District)  
South: CD No. 1 (Conservation District)  
East: CD No. 1 (Conservation District)  
West: CD No. 1 (Conservation District)

**Land Use:**

The subject site is developed with two structures that appear to be vacant and appear to have been residential in use. The areas to the north, south, east, and west are developed with single family residential uses.

**Zoning/BDA History:**

1. BDA090-101, Property at 939 N. Winnetka Avenue (the subject site)

Depending on whether Board of Adjustment Panel A grants the applicant's request in his application made on the subject site (BDA090-101) on October 19, 2010, and overturns/reversed the Building Official's August 30, 2010 decision to deny an application for a Certificate of Occupancy (CO) on the subject site – specifically Certificate of Occupancy #1002101036 dated 2/9/2010 for a "4 unit apt"/multifamily dwelling use on the property, will be whether the Board of Adjustment Panel A will consider the applicant's request on the subject site for a special exception to restore/reinstate nonconforming use rights for is requested in conjunction with obtaining a Certificate of Occupancy (CO) for a nonconforming "multifamily" use on the subject site even though this nonconforming use was discontinued for a period of six months or more.

If the board grants the applicant's request in the other application (BDA090-101) and reverses/overturns the Building Official's decision, the applicant is aware that the board will consider the applicant's request on the subject site for a special exception to restore/reinstate nonconforming use rights requested in conjunction with obtaining a Certificate of Occupancy (CO) for a nonconforming "multifamily" use on the subject site even though this nonconforming use was discontinued for a period of six

months or more (BDA090-087) since the board will have determined in the other application that the multifamily use is nonconforming use rather than an illegal use.

If the board denies the applicant's request in the other application (BDA090-101) and affirms the Building Official's decision, the applicant is aware that the board will not be able to consider the applicant's request made on the subject site in this application (BDA090-087) since the board will have determined in the other application that the multifamily use is an illegal use rather than a nonconforming use.

2. Miscellaneous Items 3 and 4, Property at 939 N. Winnetka Avenue (the subject site)

On October 19, 2010, the Board of Adjustment Panel A will reconsider reimbursing the filing fees submitted in conjunction with BDA090-087 and BDA090-101 - the board of adjustment applications submitted by the applicant to appeal the decision of the Building Official's decision and for a special exception to restore/reinstate nonconforming use rights on the subject site.

**Timeline:**

- June 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.
- July 15, 2010: The Board of Adjustment Secretary randomly assigned this case to Board of Adjustment Panel C.
- August 23, 2010: The Board Administrator emailed the applicant/owner of the site the following information:
- an attachment that provided the tentative public hearing date and panel that will consider the application; the August 30<sup>th</sup> deadline to submit additional evidence for staff to factor into

their analysis; and the September 3<sup>rd</sup> 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.

August 30, 2010: The Building Official sent a letter to the applicant/owner (Josh Terry) informing him that his application for a certificate of occupancy for a multifamily use on the site is denied.

August 31, 2010: The Board of Adjustment Chief Planner instructed the Board Administrator to remove the applicant/owner's special exception to reinstate nonconforming multifamily use rights from Board of Adjustment Panel A's September 14<sup>th</sup> agenda.

September 3, 2010: The applicant/owner of the subject site filed a separate application on the subject site that being an appeal requesting that the Board of Adjustment reverse/overturn the Building Official's August 30, 2010 decision to deny an application for a Certificate of Occupancy (CO) on the subject site – specifically Certificate of Occupancy #1002101036 dated 2/9/2010 for a “4 unit apt”/multifamily dwelling use on the property – BDA090-101. The applicant alleges in this application that the Building Official's decision to deny this CO was in error and should be overturned/reversed.

September 10, 2010: The applicant/owner sent a letter to staff requesting that staff place his application BDA090-101 on the same Panel A hearing day in October as his originally submitted application BDA090-087 on the subject site with the understanding that the board would only be able to hear and consider his application to restore/reinstate nonconforming multifamily use rights requested in conjunction with according obtaining a Certificate of Occupancy (CO) for what the applicant alleges is a nonconforming “multifamily” use on the subject site even though this nonconforming use was discontinued for a period of six months or more (BDA090-087), if they were to conclude that the Building Official's August 30<sup>th</sup> decision to deny an application for a Certificate of Occupancy (CO) on the subject site for a “4 unit apt”/multifamily dwelling use on the property was in error (BDA090-101).

September 16, 2010: The Board Administrator emailed the applicant/owner of the site the following information:

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



and the October 8<sup>th</sup> 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 "The nonconforming use appealed for restoration was never a legal use. And the illegal use was abandoned for over a year."

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 8, 2010: The applicant forwarded additional information on this application to staff beyond what was submitted with the original application (see Attachment A).

October 8, 2010: The Assistant City Attorney assisting the Building Official on this application forwarded additional information to the Board Administrator regarding this appeal and BDA090-087 (see Attachment B).

### **STAFF ANALYSIS:**

- A special exception to reinstate nonconforming multifamily use rights is requested in conjunction with obtaining a Certificate of Occupancy (CO) for what the applicant alleges is a nonconforming "multifamily" use on the subject site even though the alleged nonconforming use was discontinued for a period of six months or more. Note that the applicant/owner of the site is aware of the fact that this application (BDA090-087) will only be heard by Board of Adjustment Panel A on October 19, 2010 if the panel grants the applicant/owner's other application made to the board on the subject site (BDA090-101), overturning/reversing the Building Official's August 30, 2010 decision to deny an application for a Certificate of Occupancy (CO) on the subject site – specifically Certificate of Occupancy #1002101036 dated 2/9/2010 for a "4 unit apt"/multifamily dwelling use on the property, whereby with this action the Board will have determined that the multifamily use on the subject site is a nonconforming use rather than an illegal use.
- The applicant has stated that the "City of Dallas alleges that the Property has been vacant from November 5, 2008 to January 14, 2010."

- The applicant has the burden of proof in establishing the following related to the special exception request:
    - There was a clear intent not to abandon the alleged nonconforming “multifamily” use on the subject site even though the use was discontinued for six months or more.
  - Granting this request would reinstate/restore the nonconforming use rights that were lost when the alleged nonconforming “multifamily” use was vacant for a period of six (6) months or more. Granting this request would restore the “multifamily” use as legal nonconforming use but not as a legal *conforming* use. The applicant would have to make application for a change in zoning and obtain approval from City Council in order to make the use on the site a legal conforming use.
  - If restored/reinstated, the alleged nonconforming use would be subject to compliance regulations of the Dallas Development Code by the Board of Adjustment as any other nonconforming use in the city. (The applicant has been advised by staff of Section 51A-4.704 which is the provision in the Dallas Development Code pertaining to “Nonconforming Uses and Structures”).
- \* **This case was not able to be called or heard due to the previous case (BDA 090-101) being denied.**

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MOTION: **Harris**

I move to adjourn this meeting.

SECOND: **Hounsel**

AYES: 4– Richmond, Schweitzer, Harris, Hounsel

NAYS: 0 -

MOTION PASSED: 4– 0 (unanimously)

**3:18 P.M.** - Board Meeting adjourned for **October 19, 2010.**

\_\_\_\_\_  
CHAIRPERSON

\_\_\_\_\_  
BOARD ADMINISTRATOR

\_\_\_\_\_  
BOARD SECRETARY

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