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K. F. Carbone
2710 West 49th 1/2 Street
Austin, TX 78731
September 8, 2010

Board of Adjustment
City of Austin
P.O. Box 1088
Austin, TX 78767

Re: CASE #C15-2010-0039

Mr. Benjamin T. White's second amended request for fence height variance at 4921 Bull Creek

Dear Chair and Members of the Board of Adjustment,

My property is adjacent to 4921 Bull Creek. I ask that you reject Mr. White's variance request to maintain his fence height in excess of 6-ft. because it fails to meet any of the findings of fact required by the Board of Adjustment:

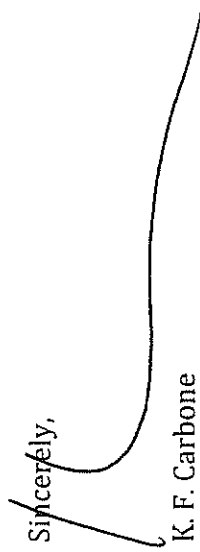
- There are no special circumstances of the property that deprive the owner of privileges enjoyed by others in the area: the applicant's property is virtually identical to five contiguous properties and numerous other properties in the neighborhood.
 - A 6-ft. fence satisfies all of the reasonable uses sought and listed by the applicant.
 - There is nothing unique to the property to prevent compliance with the fence ordinance. Personal and financial claims listed by the applicant are not valid hardships. There is no hardship relating to the property that differs from other properties in the area.
 - The applicant's fence negatively alters the character of the area adjacent to his property as it creates an unsightly stockade or compound effect that blocks light, air, drainage, and views.
- Granting this variance will subvert the clear intent of the ordinance and will confer a special privilege not enjoyed by others similarly situated in the neighborhood. In addition, many of the statements made by the applicant are false. For example, the applicant states that the fence was constructed in accordance with building permits but, according to City of Austin records, the 8-ft. fence was built without a permit. It was only after a Code Complaint was filed that a permit was subsequently and fraudulently obtained. Mr. White later obtained a second permit through misrepresentations for a 7-ft. segment of fence adjoining a single property.

In addition, the Allandale Neighborhood Association's Executive Committee opposes Mr. White's variance request. Minutes of the April 22, 2010 ANA meeting read: "Motion was made to support the residents at 2710 W. 49th 1/2 St. and their opposition to allow a variance for a 7- and 8-ft. fence at 4921 Bull Creek. Motion was made by George, seconded by Diane, motion carried unanimously."

Only the changes in Mr. White's second amended variance application are addressed herein. Please see my July 6 Refutation document (page D1/51 in your packet) for complete details.

Thank you for your consideration and for your service to Austin.

Sincerely,



K. F. Carbone

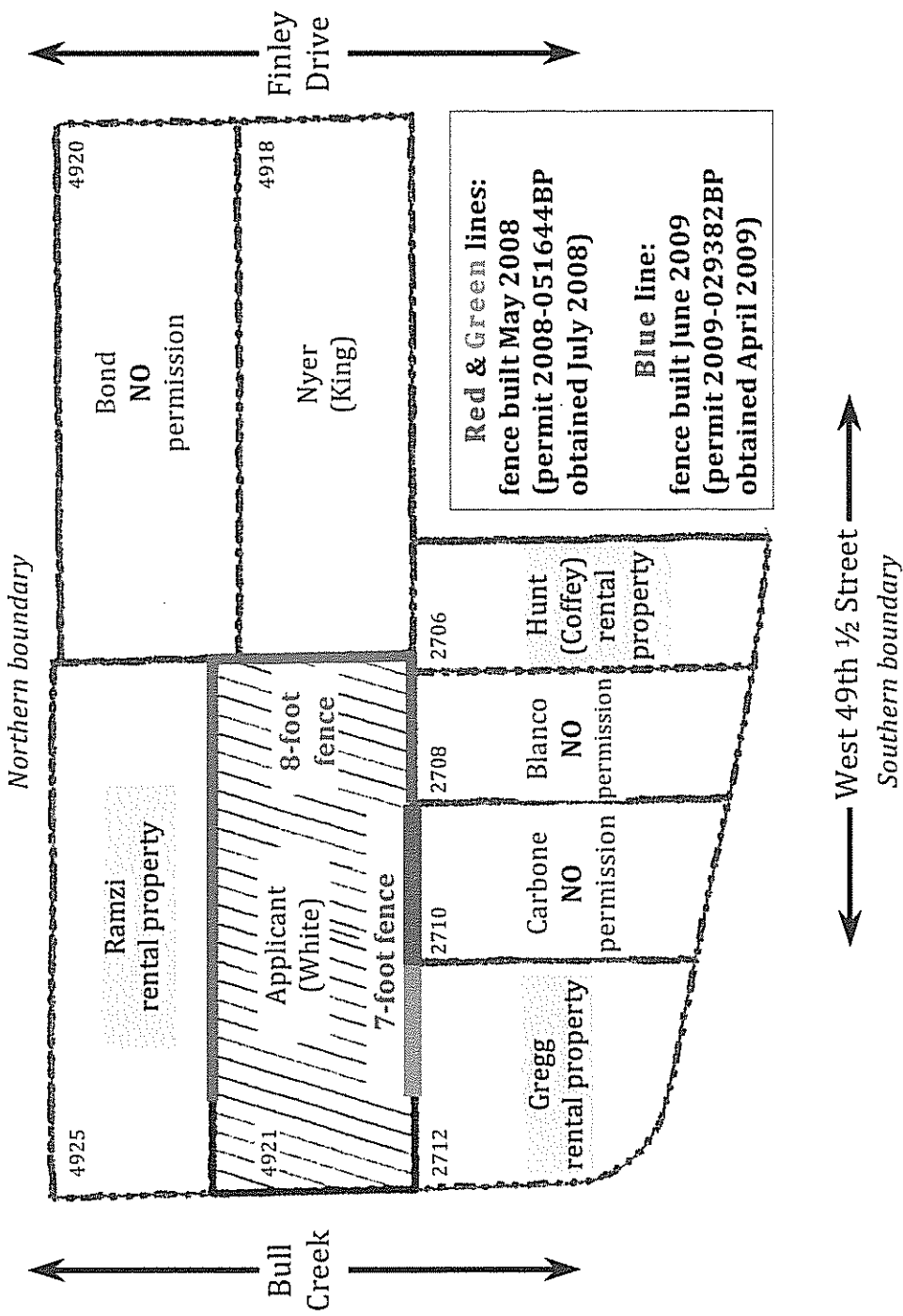
Mr. White has made numerous misleading and false claims in his application for variance. He fails to meet any of the required findings of fact for Reasonable Use, Hardship, or Area Character as addressed in my July 6 *Refutation to Variance for Application for 4921 Bull Creek*. That document (starting on page D1/51 in your packet) was submitted to the BOA in response to Mr. White's *First Amended Application for Variance*.

The additional claims made by Mr. White in his *Second Amended Application for Variance*, dated July 12, 2010, are addressed herein. Mr. White's new claims appear in bold type, followed by refutations.

Re: Cover page of second amended variance application

The following diagram may help clarify the properties and permits in question:

Applicant's property and all adjacent properties



Re: Reasonable Use

Please see my July 6 Refutation document for commentary regarding Reasonable Use.

Pg. 4, ¶6 of #1: “for those same reasons set forth above, I am also requesting a variance to allow the portion of fence adjacent to 4918 Finley, 4920 Finley and 4925 Bull Creek Rd. to remain at its present height of 8’.”

Mr. White has given no indication how he has been denied Reasonable Use of his property. A 6-ft. fence allows for Reasonable Use, and privacy and security are both adequately achieved. Mr. White disregarded the allowable fence height specified by Code, he continues to park his recreational vehicles in public view instead of behind his fence, and he continues to receive code violation notices. When he does park his boat behind his fence, it is behind the lowest fence section rather than the 8-ft. section, negating his claim that he needs an 8-ft. fence for reasonable use of his property.

Pg. 4, ¶6 of #1: “Each of the elements of Section 25-2-899(E)(2) has been satisfied.”

Not so; according to § 25-2-899, each of the elements of this section of Code have not been satisfied:

§ 25-2-899 FENCES AS ACCESSORY USES.

(A) Except as otherwise provided in this chapter, a fence:

(1) is permitted as an accessory use in any zoning district; and

(2) must comply with the requirements of this section.

(B) In this section:

(1) an ornamental fence is a fence with an open design that has a ratio of solid material to open space of not more than one to four; and

(2) a solid fence is a fence other than an ornamental fence.

(C) The height restrictions of this section do not apply to an ornamental fence.

(D) Except as otherwise provided in this section, a solid fence constructed along a property line may not exceed an average height of six feet or a maximum height of seven feet.

(E) A solid fence along a property line may be constructed to a maximum height of eight feet if each owner of property that adjoins a section of the fence that exceeds a height of six feet files a written consent to the construction of the fence with the building official, and:

(1) there is a change in grade of at least two feet within 50 feet of the boundary between adjoining properties; or

(2) a structure, including a telephone junction box, exists that is reasonably likely to enable a child to climb over a six foot fence and gain access to a hazardous situation, including a swimming pool.

(F) A solid fence may be constructed to a maximum of eight feet in height if the fence is located on or within the building setback lines.

Director Greg Guernsey personally inspected the properties in question, determined that access points and hazards do not exist, and issued a Notice of Intent to Suspend:

RE: No Response from Director Greg Guernsey and Ongoing Incompetence of City Staff & Fw: Improper Notice of Public Hearing, BOA Case # C15-2010-0039

Monday, June 14, 2010 5:00 PM

From: "Guernsey, Greg" <greg.guernsey@ci.austin.tx.us>
 To: "David Orshalick" <dorshalick@yahoo.com>
 Cc: "Ott, Marc" <Marc.Ott@ci.austin.tx.us>, "Kata F. Carbone" <kata@mail.utexas.edu>, crsolns@texas.net, trumanfenton@gmail.com, "Walker, Susan" <susan.walker@ci.austin.tx.us>, "Corpus, Grace" <Grace.Corpus@ci.austin.tx.us>, "Morrison, Laura" <Laura.Morrison@ci.austin.tx.us>, "Edwards, Sue" <Sue.Edwards@ci.austin.tx.us>, "Sandoval, Marie" <Marie.Sandoval@ci.austin.tx.us>, "Birkner, Donald" <Donald.Birkner@ci.austin.tx.us>, "Haught, Kathy" <Kathy.Haught@ci.austin.tx.us>, "McDonald, John" <John.McDonald@ci.austin.tx.us>, "Barba, Leon" <Leon.Barba@ci.austin.tx.us>

Hello David:

I visited Ben White's property last week and had the opportunity to look at improvements and vehicles in his back yard. I also was able to look at the location of the adjoining structures/sheds on the adjacent properties. Based on this information I have decided that the permit for the eight (8) foot fence should not have been issued, because the structures to the north and east are not located close enough to the property line to enable a child to climb over a six foot fence to gain access to the property, and the improvements (fire pit, horseshoe pit, shed) and vehicles (jeep and boats) on Mr. White's property do not create a hazardous situation. This interpretation would also apply to the south property line, although a shed is located in close proximity to Mr. White's property line.

The actions taken by Ms. Susan Walker modifying the Board of Adjustment (BOA) notice for the April meeting and the interpretation of the variance request filed by Mr. White was incorrect and in error. Ms. Walker was mistaken on how this Code section should be applied to this BOA variance application. I will be working with my Staff in the near future to make sure this mistake does not happen again. As I stated previously, Staff does not make a recommendation regarding BOA variance requests. I understand that a new sign was not posted and a revised notice was not sent out for tonight's BOA meeting, because Ms. Walker got this case confused with another case that is on the agenda tonight that should have been posted for the July meeting.

I have contacted legal counsel for Mr. Ben White and informed him via voicemail message of my decision and expect that he will modify his pending BOA application prior to the July meeting. If you have any questions, please contact me via e-mail or at 974-2387.

Greg

City of Austin

Founded by Congress, Republic of Texas, 1839
 Planning & Development Review Department
 One Texas Center, 505 Barton Springs Road
 P.O. Box 1088, Austin, Texas 78767

June 24, 2010

Certified: 7006 0810 0002 4210 5480

Mr. Michael Cihock
 McLean & Howard, LLP
 1004 MoPac Circle, Suite 100
 Austin, Texas 78746

RE: **Notice of Intent to Suspend Building Permit No. 2008-051644-BP**

In accordance with City Code Section 25-1-417 (*Notice of Intent to Suspend or Revoke*), this letter constitutes a Notice of Intent to Suspend Building Permit No. 2008-051644 issued July 2, 2008.

In order to avoid suspension of the Building Permit, as authorized by Section 25-1-411 (*Suspension of a Permit or License*), you are required to correct the following code violations on or before August 24, 2010.

Code Violation	Corrective Action Required
<p>Section 25-2-899</p>	<p>Permit No. 2008-051644 BP was issued in error. The existing 8 foot fence is not in compliance with Section 25-2-899 (E).</p> <p><i>E) A solid fence along a property line may be constructed to a maximum height of eight feet if each owner of property that adjoins a section of the fence that exceeds a height of six feet files a written consent to the construction of the fence with the building official, and:</i></p> <ul style="list-style-type: none"> <i>(1) there is a change in grade of at least two feet within 50 feet of the boundary between adjoining properties; or</i> <i>(2) a structure, including a telephone junction box, exists that is reasonably likely to enable a child to climb over a six foot fence and gain access to a hazardous situation, including a swimming pool.</i> <p>Redesign your project or request a variance from the Board of Adjustment.</p>

Please contact Mr. Leon Barba 512-974-7254 or by email at leon.barba@ci.austin.tx.us if you have any questions regarding the action required under this Notice.

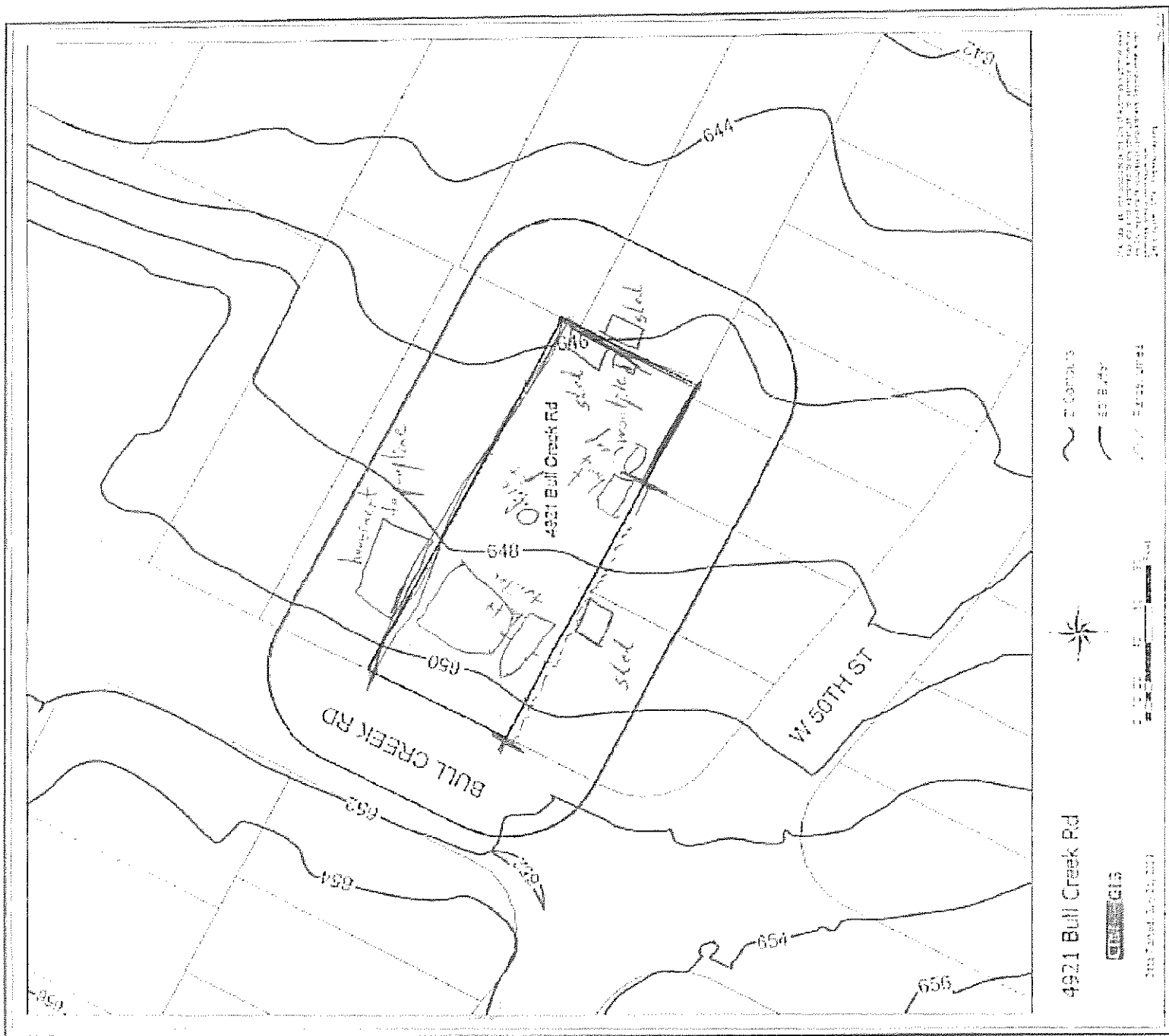
Sincerely,



Gregory I. Guernsey, AICP, Director
 Planning and Development Review Department

cc: Benjamin T. White, 4921 Bull Creek Rd.
 Leon Barba, PE,

Prior determinations by Assistant Director Leon Barba were based on misleading evidence presented by Mr. White and his attorney, Mr. Cihock. Mr. Barba stated that he based his administrative decision on this drawing supplied to him by Mr. Cihock:



In transcript excerpts from a March 12, 2010 meeting, Mr. Barba explains his reliance on Mr. Cihock's drawing in making his December 3, 2009 administrative decision:

David Orshalick: ...what are the structures that exist on the other side of the fence that would reasonably enable a child to climb over a 6-ft. fence?

Leon Barba: There were 2 sheds and a house that they could use to [get over] the fence on the outside.

Leon Barba: That's the information we were presented by the attorney that they had and he indicated that he was not an architect and that's why he went to law school, so I understand that, but this is what he provided us.

David Orshalick: But you're basing that on what Ben White's attorney said?

David Orshalick: Well, Leon, are there photos that show those sheds from an investigator?

Leon Barba: No. They don't show the distance. They do show some sheds. This is the document provided by the attorney.

David Orshalick: So just that little hand drawing on that map.

Leon Barba: Mhm.

David Orshalick: And that's it.

Leon Barba: Yes.

David Orshalick: So as far as we know, there may not be any structures close enough to the fence to constitute access points to the fence for a child to climb over.

Leon Barba: I'm basing my facts on the sketch that was given to me.

Re: Hardship

Please see my July 6 Refutation document for commentary regarding Hardship.

Pg. 5, ¶4 of #2: "With respect to the portions of fence along my Eastern and Northern property lines... was built in compliance with Chapter 25-2-899."

As previously shown, the fence is not in compliance with Code as determined by a personal inspection of the property by Director Greg Guernsey. Leon Barba had relied on misleading evidence presented by Ben White and his attorney. Nevertheless, this paragraph from Mr. White has nothing to do with proving Hardship.

Pg. 5, ¶5 of #2: "it appears as though he [Greg Guernsey] has simply substituted his subjective interpretation of several elements of 25-2-899(E)(2) for Mr. Barba's"

On the contrary, Mr. Guernsey was the first PDRD official to personally inspect the conditions existing on Mr. White's property rather than just take his word for it as Mr. Barba did. In any event, this has nothing to do with proving Hardship.

Pg. 5, ¶15 of #2: “Mr. Guernsey has now spontaneously decided to provide me with notice of his intent to suspend this permit”

When Mr. Guernsey’s inspection of Mr. White’s property showed that there are no structures permitting access by a child and no hazardous conditions on the property, he confirmed that the ordinance precluded a fence higher than an “average height of six feet or a maximum height of seven feet.” Mr. Barba’s interpretation was based on erroneous information.

In any event, these delays do not represent any kind of Hardship other than one of Mr. White’s own making. He built his fence without a permit, defrauded the City into issuing a permit based on Section 25-2-899(E)(1) until the City discovered the deception, then changed his basis for an over-height fence to Section 25-2-899(E)(2) when presenting misleading evidence to Leon Barba. Now he complains of a “spontaneous decision” when his latest claim is dubious.

Mr. White has failed to demonstrate any valid Hardship reason to grant a variance for his 7- and 8-ft. fence.

Re: Area Character

No changes from *First Amended Variance Application*. (Please see my July 6 Refutation document for commentary regarding Area Character.)

Re: Parking

No changes from *First Amended Variance Application*. (Please see my July 6 Refutation document for commentary regarding Parking.)