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Members of the Board of Adjustment
City of Austin, Texas

Re: Reconsideration of the Board of Adjustment (B.O.A.) Action on Dec. 1, 2014
Case #C15-2014-0158 – Texas Title Loans 7501 N. Lamar Blvd.

Dear Board Members:

On behalf of Texas Loan Brokers I, LLP d/b/a Texas Title Loans, I am hereby requesting reconsideration of the Board of Adjustment (the “**B.O.A.**”) action to deny the appeal of the Use Determination to allow the existing financial services use to be considered a legal non-conforming alternative financial services use. As previously stated, Texas Title Loans has been operating out of the above referenced location for over seven years in compliance with all applicable zoning and site development regulations at the time the tenant occupied the premises and we believe that there is a valid Certificate of Occupancy for the use.

I am requesting the reconsideration of the B.O.A. action in order that denial of the appeal be rescinded and that staff be directed to forward the appeal of the Use Determination to the Building and Fire Code Board for their consideration because the issue of the legal non-conforming use is not strictly a zoning use determination as defined by Section 25-1-197 of the Land Development Code. The use determination that was issued by staff is based solely on the staff position that the use does not have a valid Certificate of Occupancy and therefore cannot be a legal non-conforming use. In this case, the appeal of the use determination acted upon by the B.O.A. is not based upon a zoning issue, but is based upon a building permit issue of what constitutes a valid Certificate of Occupancy. Because of the specific facts of this case, we believe that the more appropriate body to consider this appeal should be the Building and Fire Code Board rather than the B.O.A. and request that they be allowed to consider the case.

The Use Determination as described in the Land Development Code, Section 25-1-197 applies to a formal determination under Section 25-2-2 Determination of Use Classification which describes and defines all land uses. The objective of the use determination is to assign an appropriate classification of land use to a use that is not specifically classified under Subchapter A, Section 25-2-1.

Point: This specific case is not based solely upon the issue of zoning use classification, but is a building permit/Certificate of Occupancy matter as well. We were advised by the Law Department to submit a Use Determination for this specific case and we did so. However, after going through this process, it has become clear, based upon the discussion amongst the B.O.A. members on December 1, 2014, that this is not a zoning use issue as much as a building

permitting issue and the practice of how the Planning and Development Review Department handles use changes and reissuance of Certificates of Occupancy.

A review of the applicable Code language for Use Determinations, Section 25-1-197 (I) describes how a use determination is to be determined. (**Exhibit A** includes the entire Code sections referenced.) Specifically, Sections 25-1-197 (I) (3) and (I) (4) state that the Director must:

...“ explain factors considered by the director in making the determination under Section 25-2-2 (*Determination of Use Classification*), including the similarity of a use to other classified land uses and (I) (4) describe any special characteristics of the use determination, including limitations on size, scale, location or intensity, of the use”.

Section 25-2-2 (D) Determination of Use Classification requires that once a use determination is made by the Director, the Director must notify the Planning Commission and Platting and Zoning Commission of an appeal of the use determination and the final outcome of the appeal and (Sec. 25-2-2-(E) and shall maintain a list of determinations made under this section.

Point: Review of the Code language provides further evidence that this specific case is not just a zoning use determination matter. The question of whether or not Texas Title Loans has a valid Certificate of Occupancy in order to be considered a legal non-conforming use has less to do with zoning land use matters, but more with building permitting issues, as it is clear that at the time the tenant occupied the structure at 7501 N. Lamar Blvd., the existing zoning allowed financial services uses and there was no doubt as to the use classification.

Title 2-1 Boards, specifically outlines the responsibilities of each board. Section 2-1-111 (F) states that the B.O.A. shall:

- (1) hear and decide a request for a variance from the requirements of chapter 25-2 (*Zoning*), except as otherwise provided by the Code;
- (2) hear and decide an appeal of an administrative action under Chapter 25-2 (*Zoning*);
- (3) hear and decide a request for a variance from the requirements of airport zoning regulations under Section 241.034, Local Government Code;
- (4) hear and decide a request for a special exception under Chapter 25-2 (*Zoning*); and
- (5) perform other duties prescribed by ordinance or state law.

Section 2-1-121 Building and Fired Code board of Appeals states the following:

(C) The board shall:

- (1) review any appeal filed in accordance with Title 25 (*Land Development*); and
- (2) hear and decide appeals of orders, decisions, or determinations made by the building official relating to the application and interpretations of the Building Code and Fire Code.

Summary

Due to the specific facts of the use determination request for a legal non-conforming use status for Texas Title Loans, it is evident that the staff denial is based upon the Planning and Development Review Department practice of issuing building permits and Certificates of Occupancy versus a zoning use determination and therefore, I believe that it is more appropriate that the Building and Fire Code Board consider this case. Therefore, I respectfully request that the B.O.A. rescind its prior action and direct staff staff to place this case on the next available Building and Fire Code Board hearing.

Notwithstanding any of the foregoing, the appellant does not waive any position previously taken at B.O.A. hearing December 1, 2014 or in any written materials submitted in connection with that hearing.

Sincerely,



Katherine Loayza

EXHIBIT A

Excerpts from the Land Development Code

Division 2. - Administrative Decisions.

§ 25-1-197 - USE DETERMINATIONS.

(A)

This section applies to a formal determination by the director under Section 25-2-2 (*Determination of Use Classification*) regarding the appropriate classification of a land use that is not specifically classified under Chapter 25-2, Subchapter A (*Zoning Uses*).

(B)

Except as otherwise provided by this section, a use determination may be requested at any time by filing an application on a form provided by the director and by paying a fee established by separate ordinance.

(C)

In addition to any additional information required by the director, an application for a use determination must:

(1)

state whether the determination is requested in connection with a specific project, and if so, reference the application number;

(2)

if the determination is not related to a specific development application, state whether it is requested for a particular address;

(3)

describe the land use(s) for which a determination is sought; and

(4)

include any information that the applicant requests the director to consider in making the use determination, including but not limited to an explanation of the similarities, if any, of the use to other classified uses.

(D)

A use determination for a project that is subject to a pending development application is a "project use determination" and is subject to the requirements of this subsection.

(1)

The director shall determine whether a site plan application requires a use determination under Section 25-2-2 (*Determination of Use Classification*) within the applicable review period required by Section 25-5-114 (*Time Periods for Determination; Notice*) or Section 25-5-143 (*Director's Report*).

(2)

If the director determines that a use determination is required, the applicant must submit a request for a project use determination under Subsection (B) before the application expires.

• (3)

Within 14 days after receiving a request for a project use determination, the director shall issue a determination under Subsection (F) of this section and provide notice of the determination under Section 25-1-133(B) (Notice of Applications and Administrative Decisions).

(4)

Any person entitled to notice of a use determination under Section 25-1-133(B) (Notice of Applications and Administrative Decisions) may appeal the decision to the Board of Adjustment no later than 14 days after notice is provided.

(E)

A request for a use determination that is not associated with a pending development application is a "non-project use determination" and is subject to the requirements of this subsection.

(1)

A non-project use determination may be requested by anyone, at any time, for a use that requires a determination under Section 25-2-2 (Use Determination).

(2)

In addition to the requirements in Subsection (C) of this section, an application for a non-project use determination must include:

(a)

any information requested by the director regarding the nature of the use for which a determination is requested, including the size, scale, or intensity of the use; and

(b)

a specific address, if the applicant intends to rely on the determination in connection with a development application.

(3)

Within 14 days after receiving a request for a non-project use determination, the director shall provide notice of the determination:

(a)

to the applicant and to registered environmental and neighborhood organizations, if the determination is not associated with a specific address; or

(b)

to all parties entitled to notice under Section 25-1-133(A) (Notice of Applications and Administrative Decisions), if the determination is associated with a particular address.

(4)

Any person entitled to notice of a non-project use determination under this subsection may appeal the determination to the Board of Adjustment within 14 days.

(F)

The director may not make a decision on an application that is dependent upon a use determination:

(1)

until after the period for appealing the use determination to the Board of Adjustment has run;

(2)

if the use determination is appealed to the Board of Adjustment, until after the board has decided the appeal; or

- (3)
 - if a decision of the Board of Adjustment is appealed to district court, until after the district court has decided the appeal.
- (G)
 - Unless a use determination is reversed or modified by the Board of Adjustment, the director shall follow the determination in reviewing subsequent requests for a determination on the same or substantially similar land uses.
- (H)
 - A use determination is not subject to further notification or appeal under this section if it has been considered by the Board of Adjustment in response to an appeal or notice of the determination was previously provided under this section and no appeal was filed.
- (I)
 - A use determination issued by the director under this section must:
 - (1)
 - include all information required under Section 25-1-133(C) (*Notice of Applications and Administrative Decisions*);
 - (2)
 - state the director's determination regarding how the use is classified under existing use regulations;
 - (3)
 - explain the factors considered by the director in making the determination under Section 25-2-2 (*Determination of Use Classification*), including the similarity of a use to other classified land uses; and
 - (4)
 - describe any special characteristics of the use determination, including limitations on the size, scale, location or intensity, of the use.
- (J)
 - A use determination issued under this section may not be used to render decisions interpreting site development regulations.

Source: Ord. 20120426-122.

ARTICLE 1. - ZONING USES.

§ 25-2-1 - USE CLASSIFICATIONS.

This article describes and classifies uses in the zoning jurisdiction. The major use categories are residential, commercial, industrial, civic, and agricultural.

Source: Sections 13-2-2 through 13-2-6; Ord. 990225-70; Ord. 031211-11.

§ 25-2-2 - DETERMINATION OF USE CLASSIFICATION.

- (A)
 - The director of the Planning and Development Review Department shall determine the appropriate use classification for an existing or proposed use or activity.
- (B)

If a particular use is not classified within a zoning category or land use definition, the director shall determine the appropriate use classification based on the characteristics of the proposed use and the similarities, if any, of the use to other classified uses.

(C)

If a use requires a determination under Subsection (B) of this section, a person may request that the director issue a formal use determination stating how the use is classified under existing use regulations. A use determination may be appealed to the Board of Adjustment under Section 25-1-197 (Use Determinations).

(D)

The director shall notify the Planning Commission and the Zoning and Platting Commission of the filing of an appeal within 30 days of the filing, and of the disposition of the appeal within 30 days of disposition.

(E)

The director shall maintain a list of determinations made under this section.

Source: Section 13-2-7; Ord. 990225-70; Ord. 010329-18; Ord. 010607-8; Ord. 031211-11; Ord. 20120426-122.

• **§ 2-1-111 - BOARD OF ADJUSTMENT.**

(A)

The Board of Adjustment is established as provided in Local Government Code Chapter 211 (*Municipal Zoning Authority*).

(B)

The board shall be composed of seven members.

(C)

Each board member shall be appointed to serve a two-year term.

(D)

The council may appoint alternate board members to serve in the absence of regular members. An alternate member shall be appointed to serve a two-year term.

(E)

A regular or alternate board member may be removed by council for cause on a written charge after a public hearing.

(F)

The board shall:

(1)

hear and decide a request for a variance from the requirements of Chapter 25-2 (Zoning), except as otherwise provided by the Code;

(2)

hear and decide an appeal of an administrative action under Chapter 25-2 (Zoning);

(3)

hear and decide a request for a variance from the requirements of airport zoning regulations under Section 241.034, Local Government Code;

(4)

hear and decide a request for a special exception under Chapter 25-2 (Zoning); and

(5)

perform other duties prescribed by ordinance or state law.

(G)

The board shall hold meetings at the call of the chairperson and at other times as requested by the board.

(H)

The chairperson, or the acting chairperson in the absence of the chairperson, may administer oaths and compel the attendance of witnesses.

(I)

Each case before the board must be heard by at least 75 percent of the board members.

(J)

The concurring vote of 75 percent of the board members is necessary to:

(1)

reverse an order, requirement, decision, or determination of an administrative official;

(2)

decide in favor of an applicant on a matter on which the board is required to pass under Chapter 25-2 (Zoning); or

(3)

authorize a variation from the terms of Chapter 25-2 (Zoning).

(K)

The board shall prepare minutes of its proceedings. The minutes shall include the vote of each member on each item before the board and shall state if a member is absent or fails to vote on an item.

Source: Ord. 20071129-011; Ord. 20080110-048; Ord. 20080618-030; Ord. 20110526-098.

§ 2-1-121 - BUILDING AND FIRE CODE BOARD OF APPEALS.

(A)

The Building and Fire Code Board of Appeals members should be qualified by experience and training to consider matters relating to building construction and fire prevention. Members may not be City employees.

(B)

The building official and the fire marshal shall serve as ex officio members of the board. The building official shall also serve as the board secretary.

(C)

The board shall:

(1)

review any appeal filed in accordance with Title 25 (Land Development); and

(2)

hear and decide appeals of orders, decisions, or determinations made by the building official relating to the application and interpretations of the Building Code and Fire Code.

(D)

The board may not waive a Code requirement.

(E)

The board shall render all decisions and findings in writing, file them with the building official, and send copies to the appellant.

(F)

A person who is aggrieved by a decision of the board may appeal the decision to the city council under this subsection.

(1)

The appeal shall be made by filing a written notice of appeal with the city clerk. The notice of appeal shall contain:

(a)

the name of the person filing the appeal;

(b)

a background of the case, and a summary of the decision from which the appeal is taken;

(c)

a statement containing facts which show, beyond a reasonable doubt, that the decision appealed from was incorrect because of its inconsistency or conflict with city ordinance or state law, or that a finding of fact by the board was clearly contrary to the evidence before the board; and

(d)

the relief requested from the city council.

(2)

Notice of appeal from a decision of the board shall be filed within 14 days after the date on which the decision appealed from was made.

(3)

If the last day for filing the notice of appeal is a Saturday, Sunday, or City holiday, then the notice of appeal may be filed on the next day which is not a Saturday, Sunday, or City holiday.

(4)

A person filing a notice of appeal under this section shall, on the same day of the filing, mail or deliver a copy of the notice of appeal to the board.

(5)

The city council may, in the disposition of any appeal, waive any requirement of any ordinance in any case in which the council considers the application of the requirement to be unjust and unnecessary to achieve the purposes of the ordinance. The city council may take any other action it deems advisable in deciding any appeal under this section.