

To	Board of Adjustment
Hearing Date	June 11, 2020   Continued from May 14, 2020
Case Number	JBOA 20-430   Dewhurst
Request	Special Exception   To allow for a continuation of a pre-existing nonconformity after a requested zone change
Location	122 North 6th Street
Applicant	Teresa Dewhurst

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## Staff Report

Preparer | Marcaé Hilton

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### Attachments

- CASE MAP
- Legal Opinion Memo

Preparer  
INCOG  
City Attorney

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## Background Information

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**STAFF COMMENTARY** | This item has been continued on two occasions, first it was continued from the April 16, 2020 regularly scheduled BOA meeting. The Board of Adjustment requested a legal opinion to further clarify the zoning code and the timing/adoption of certain zoning text ordinances. See “Legal Opinion Memo” for details. Secondly, it was continued from the regularly scheduled meeting of May 14, 2020. A motion to approve failed due to a lack of three votes which is required by state statute and City ordinance. Of the five Board members serving only (3) three were present. A second motion was made and carried to continue to a meeting with more Board members present.

The applicant Teresa Dewhurst went through the rezoning process in January of 2020. The case *JZ 19-648* was heard by Planning Commission on January 09, 2020 and approved by City Council on January 21, 2020 along with Ordinance No. 1504. The action as requested and approved permitted the property (122 North 6th Street) to be rezoned from (RS-3) Residential Single-Family High Density to (CS) Commercial Shopping Center. At the time of rezoning hearing, the applicant planned to sell/lease the property for Uses allowed within a CS district such as office, medical, retail, food service, etc. development. Since approval, the applicant has decided to keep the residential use indefinitely and is seeking a Special Exception.

The property is located south of Main Street in an area of older residences which continue to transition to commercial and office uses, the requested zone change is consistent with the Comprehensive Plan. The property was originally built and functioned as a single-family home with a garage and accessory structure. The accessory structure has operated as a Barber shop for many years. The operation of a commercial use (Barber Shop) on a residential property without a special exception deemed the lot “pre-existing nonconforming”. The change in zoning brought the Use and anticipated Uses into conformance with the new (CS) zoning.

Currently, staff recommends the BOA approve the requested special exception to allow the residential use along with the commercial use on a lot that is zoned CS.

EXCERPT FROM APPROVAL LETTER | *Blue highlights per Marcae'*

Your requested Zone Change from RS-3 (Residential Single-Family High-Density District) to CS (Commercial Shopping Center District) was approved by Jenks City Council on 21 January 2020. Before this zone change, the property was operating under a pre-existing nonconformity to allow for two primary structures on one lot and to allow a commercial business on a residential lot. Normally, as long as the status quo is continued the pre-existing nonconformity is allowed to continue. This changed with the approval of the zoning change.

According to §1200. e of the Jenks Zoning Code, “Upon approval of a rezoning request, the previous use of a property if not permitted within the new zoning district shall be deemed an unlawful use and shall not be considered for rights extended to pre-existing nonconforming uses.” By that reading, once the requested zone change was approved, the commercial property (*barber shop*) on the lot became the principal *structure “use”* and the only one conforming to the Zoning Code. It also means that a residential dwelling is no longer a lawful use of the property.

§1220.f, though, states:

When at the effective date of this zoning code or amendment thereto, there exists a lawful use of a building, or use of a principal building and land, or use of land and accessory structures, such structures covering more than ten percent of the lot area, and such use would not be permitted by the terms of this zoning code or amendment thereto, such use shall be deemed pre-existing nonconforming and may continue subject to the following provisions

f. A pre-existing nonconforming use of a building or of a building and land in combination when located within a residential district shall not be changed unless changed to a use permitted in the district in which located. (*i.e. Residential to Commercial Shopping for office and barber*) A pre-existing nonconforming use of a building or of a building and land in combination, when located within a district other than a Residential District, may, as a Special Exception, be changed upon approval of the Board of Adjustment after finding that the proposed use will not result in any increase of incompatibility with the present and future use of proximate properties. The change of a use to another use contained within the same use unit shall not constitute a “change of use” within the meaning of this section.

**PLANNING DATA**

Intended Use	Non-conforming combination of Residential and Commercial Uses
Zoning	CS   Commercial Shopping
Uses Allowed	See Chart   Sec 610
Comprehensive Plan	High Intensity Area, no specific land uses reserved
General Location	122 North 6th Street   South of A St. and north of Main St. and west of N. 6 <sup>th</sup> St.
Plat	Jenks Original Town, Lots 1,2,3, Block 13
STR	Section: 19, Township: 18, Range: 13

Zoning Commercial and office

Nonconformance A nonconforming use is a use of property that was allowed under the zoning regulations at the time the use was established but which, because of subsequent changes in those regulations ([rezoning](#)), is no longer a permitted use.

**SUPPLEMENTAL INFORMATION | Lawful Use Zoning Information**

Sec. 610. - Principal uses permitted in commercial districts.

The principal uses permitted in the Commercial Districts are designated by use units. The use units are groupings of individual uses and are fully described, including their respective off-street parking, loading, and screening requirements and other use conditions in Chapter 10. The use units permitted in Commercial Districts are set forth below in Table 1 and Table 1A.

Table 1. Use Units Permitted in Commercial Districts 1 (Chapter 10)

No.	Chapter 10 Use Units Name	Districts				
		ROC	RTC	LC	CS	RS
1.	Area wide Uses			X	X	X
2.	Area wide Specific Use	S	S	S	S	S
3.	Public Protection and Utility and Open Air Facilities					E
4.	Public Protection	X	X	X	X	
5.	Community Services and Cultural Facilities	P	P	X	X	E
6.	Single-Family Dwelling and Similar Uses X					X
7.	Duplex Dwelling					E2
8.	Multifamily Dwellings and Similar uses	P			P	
10.	Off-Street Parking Areas	X	X		X	
11.	Offices and Studios	P	P	X	X	
12.	Eating Places Other Than Drive-Ins	X	X		X	
13.	Convenience Goods and Services	X	X	X	X	
14.	Shopping Goods and Services	X	X		X	
15.	Other Trades and Services					
16.	Gasoline Service Stations				X	
17.	Automotive and Allied Activities				E	
18.	Drive-In Restaurants					
19.	Hotel, Motel, and Recreation Facilities	X	X		X	
20.	Commercial Recreation, Intensive	P	P			
21.	Business Signs and Outdoor Advertising	X	X		X	

1 X = Use by Right.

E = Special Exception-unless use is specifically identified on Specific Use List.

S = Specific Use - see Use Unit 2 and Chapter 17.

P = Requires Planned Unit Development Application due to Mixed Use Requirements.

Sec. 630. - Bulk and area requirements in the commercial districts.

Table 2. Bulk and Area Requirements in the Commercial Districts

	CS
Frontage (min. ft.)— Arterial	150
Frontage (min. ft.)— Not an Arterial	50
Floor Area Ratio (maximum)	0.50
Setback from centerline of abutting street (min. ft.) — Arterial	50
Setback from centerline of abutting street (min. ft.)— Not an Arterial	25
Setback from an abutting R District boundary line (min. ft.)	10 1
Building Height (max. ft.)	35

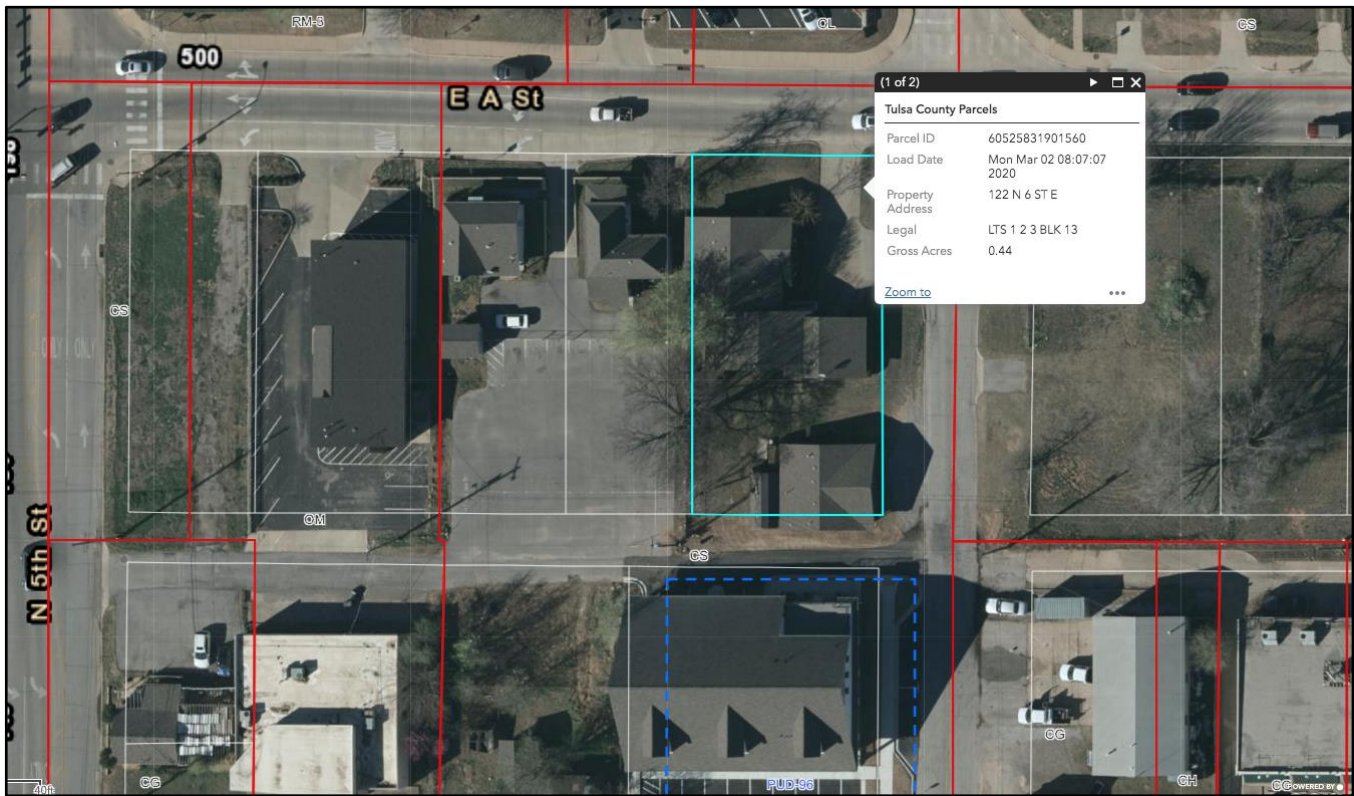


Figure 1: Aerial View of 122 N. 6th



Figure 2: View of House and Barber Shop

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## Staff Evaluation & Recommendation

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### **Evaluation | Please see BOA action below**

#### 1380.3. Board of Adjustment Action.

1. May grant the Special Exception after finding that the Special Exception will be:
  - a. In harmony with the spirit and intent of the code.
  - b. Will not be injurious to the neighborhood.
  - c. Is not otherwise detrimental to the public welfare.
2. The Board in granting a Special Exception shall prescribe:
  - a. Appropriate conditions and safeguards.
  - b. May require such evidence and guarantee or bonds as it may deem necessary to enforce compliance with the conditions attached.

#### 1380.4. Time Limitation on Special Exceptions.

A Special Exception which has not been utilized within two years from the date of the order granting same shall thereafter be void. For the purpose of this provision, utilization shall mean actual use or the issuance of a building permit, when applicable, provided construction is diligently carried to completion.

### **Staff Comments**

1. The request is complicated, staff has no specific conditions for approval, but believes the request meets the spirit and intent of a "Special Exception."
2. The proposed use will not result in any increase of incompatibility with the present and future use of proximate properties

**Recommendation** | *Grant the Special Exception to allow for the continuation of a pre-existing nonconformity after a requested zone change*