

# City of Fairhope, Alabama

## APPLICATION FOR BUILDING PERMIT

B-1

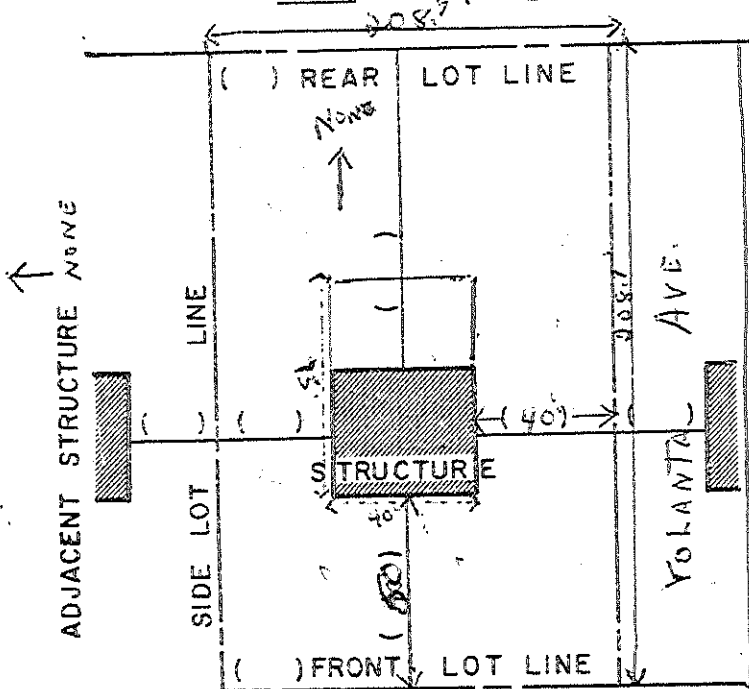
8974

Application is hereby made for a permit to erect/alter a structure as described herein or shown in accompanying plans and specifications, which structure is to be located as shown on the accompanying plot plan. The information which follows and the accompanying plans and specifications with the representations therein contained are made a part of this application, in reliance upon which the Building Inspector is requested to issue a building permit.

It is understood and agreed by this applicant that any error, misstatement or misrepresentation of material fact or expression of material fact, either with or without intention on the part of this applicant, such as might, or would, operate to cause a refusal of this application, or any material alteration or change in the accompanying plans, specifications or structure made subsequent to the issuance of a permit in accordance with this application, without the approval of the Building Inspector, shall constitute sufficient ground for the revocation of such permit.

Date 6-10-69 Application No. 181 Bldg. Permit No. \_\_\_\_\_  
 Est. Val. \$ \_\_\_\_\_ Fee \$ \_\_\_\_\_ Address GREENO AND VOLANTA  
SOUTH WEST CORNER

Address \_\_\_\_\_ Tel. No. \_\_\_\_\_ Lic. No. \_\_\_\_\_  
 General Contractor \_\_\_\_\_  
 Elec. Contractor \_\_\_\_\_  
 Plumbing Contractor \_\_\_\_\_  
 Other Contractor \_\_\_\_\_  
 Alteration New Bldg. Acc. Bldg. \_\_\_\_\_ Repair \_\_\_\_\_ Work Started \_\_\_\_\_  
 Demolition \_\_\_\_\_ Addition \_\_\_\_\_ Sign \_\_\_\_\_ Move \_\_\_\_\_ Work not included \_\_\_\_\_



Type. \_\_\_\_\_  
 Const. STEEL  
 Occupancy SERV STA  
 Group \_\_\_\_\_  
 Fire \_\_\_\_\_  
 Zone NO  
 Use R-1  
 Zone NONE  
 Overall \_\_\_\_\_  
 Height 12'  
 No. of \_\_\_\_\_  
 Rooms 4  
 No. of \_\_\_\_\_  
 Families NONE  
 No. of \_\_\_\_\_  
 Floors 1  
 Type of \_\_\_\_\_  
 Roof STEEL  
 Number of \_\_\_\_\_  
 Baths 3 Baths

No. of \_\_\_\_\_  
 Kitchens NONE  
 Type of \_\_\_\_\_  
 Heat GAS  
 Fire \_\_\_\_\_  
 Place NONE  
 Foundation \_\_\_\_\_  
 Material CONCRETE  
 Ext. Wall \_\_\_\_\_  
 Material STEEL  
 Int. Wall PRE FINISHED  
 Material PLYWOOD  
 Sprinklers \_\_\_\_\_  
 Standpipe \_\_\_\_\_  
 Res. Bldg. \_\_\_\_\_  
 Non. Res. NON RES  
 Non. Res. \_\_\_\_\_  
 Specify Use SERV STA.  
 Are Plans \_\_\_\_\_  
 on File? yes

I hereby certify that the information given is correct and true Thomas E. Dyer Applicant.  
 Permit applied for above (will not) (will not) comply with Fairhope Zoning Ordinance. By George Dyer Building Inspector. Approved  
 Disapproved 6-10-69.  
 If not approved give reasons: R-1 DISTRICT BUSINESS NOT ALLOWED  
 Completed building complies with this application \_\_\_\_\_  
 Building Inspector \_\_\_\_\_ Date. \_\_\_\_\_  
 Board of Appeal (affirmed) \_\_\_\_\_ (denied) \_\_\_\_\_ above application  
 for Building Permit. Date \_\_\_\_\_

MEETING NOTICE

BOARD OF ZONING ADJUSTMENTS AND APPEALS

1. The application of HARRY C. BUSH, whose address is Fairhope, Ala., for a USE VARIANCE relative to property located north of Big Head Gully, east of Church Street and south of Fig Avenue, Fairhope, has been given Case Number 172 and has been scheduled for hearing on Monday, June 30, 1969 at 7:30 P.M. in the City Hall.

2. The application of THOMAS E. DYER, whose address is Fairhope, Ala., for a USE VARIANCE relative to property located on the Southwest corner of Greeno Blvd. and Volanta Avenue, Fairhope, has been given Case Number 173 and has been scheduled for hearing on Monday, June 30, 1969 at 7:30 P.M. in the City Hall.

The applicants and all interested parties wishing to be heard are requested to be present at that time.

*Appeals*  
Board of Zoning Adjustments and ~~Appeals~~

Eloise T. Wilson, Secretary

CASE NO 173

B-6

Application No. 171

Bldg. Permit No.

## NOTICE OF APPEAL

CITY OF FAIRHOPE, ALABAMA

OFFICE OF THE BUILDING INSPECTOR

The undersigned hereby appeals to the Board of Adjustment for authorization of a (Building Permit) (Certificate of Occupancy) for the property located at Greenwood, Volant, Ala  
 Ordinance No. 295, adopted JAN 14 1963 and cited as  
 Note: Fill in Section 1, 2, or 3, whichever is appropriate. Additional information may be supplied on separate sheets if necessary.

Sec. A Appeal for INTERPRETATION of Ordinance by Building Inspector, Provisions of the Ordinance in question, giving Section numbers.

THIS IS AN R-1 DISTRICT ARTICLE 7 SECTION  
71 RESIDENTIAL, DOES NOT PERMIT  
THE BUILDING OF A SERVICE STATION  
IN THIS DISTRICT  
 (Attach written decision of Building Official)

Sec. B Request for SPECIAL EXCEPTION (Zoning only)  
 Describe provisions of Zoning Ordinance requiring written approval of Board of Adjustment in this case \_\_\_\_\_

Describe proposed use. (Draw plot plan on back of this sheet if required). \_\_\_\_\_

Sec. C Appeal for VARIANCE

Describe the provisions of the Ordinance from which you seek a variance. From R-1

To B-2  
 Describe unusual conditions of property causing unnecessary hardship which may justify variance from terms of the ordinance Property on North City Park  
Property on East Vol business Farm  
Property on South Nursery

Transmitted by

Received by

Building Official

Date

Secretary

Public Hearing (if required) \_\_\_\_\_ Date Advertised \_\_\_\_\_

Hearing Date July 21, 1969

Notice Mailed to (if required) \_\_\_\_\_

VOL

63 PAGE 61

MR DUCK

BOARD OF ZONING ADJUSTMENTS AND APPEALS

The Board of Zoning Adjustments and Appeals met in Special session Monday, June 30, 1969 at 7:30 P.M., City Hall, Fairhope, Ala.

Present: Chairman McCoy, Members Smith, Fortenberry, Stejskal, Mancini.

Visitors: Mr. and Mrs. Thomas E. Dyer, Mr. Harry Bush, Mr. John Duck.

Reading of minutes of previous meeting omitted.

Case # 173, Appeal of Thos. E. Dyer for use variance allowing him to build and operate service station on the following described property:

Beginning at the Northeast corner of East half of the Northeast quarter of the Southeast quarter of fractional Section 39, Township 6 South, Range 2 East, run West 208.7 feet; thence run South 208.7 feet; thence run East 208.7 feet; thence run North 208.7 feet to the POINT OF BEGINNING, containing one (1) acre in the Northeast corner of said 20 acre tract. JW

Building permit application # 181 rejected because of R-2 use in R-1 District.

Mr. Duck, attorney for Mr. Dyer explained that the property was owned by Mr. Dyer prior to annexation and zoning by the City; that the property in question is nearly surrounded by business and agricultural uses with the municipal park nearby; subsequently his client does not consider this desirable residential property and does consider it a hardship to deny him a business use.

Following questioning of appellant by the Board Mr. and Mrs. Dyer and Mr. Duck were dismissed.

Case # 172: Appeal of Harry C. Bush to locate mobile home on property located north of Big Head Gully, east of Church Street and South of Fig Avenue, Zoned R-2.

Certificate of occupancy refused under Section 66.5 of Ordinance 295.

Mr. Bush explained that owners of property, Mr. and Mrs. L. H. Shepherd were old and in poor health and wanted their granddaughter to live nearby. He also stated he planned to install septic tank.

Following questioning by Board, Mr. Bush was dismissed.

DECISIONS:

Case No. 172: Motion by Mr. Mancini, seconded by Mr. Stejskal, that due to the location of the property the Board grant the variance requested by Harry C. Bush for a period not to exceed five years at which time a request for extension if desired be re-submitted to Board of Adjustment; also that sanitary facilities be installed to the satisfaction of the building inspector and County Health Department.

Case # 173: Motion by Mr. Smith, seconded by Mr. Mancini that the use variance requested by Thos. E. Dyer be granted. Voting Nay: Mr. Fortenberry, Mr. Stejskal, Mr. McCoy. Motion defeated.

Motion by Mr. Fortenberry seconded by Mr. Stejskal, that the Board deny the appeal of Thomas E. Dyer for a use variance as requested in Case # 173 for the reason given in the booklet, A GUIDE FOR BOARD OF ZONING ADJUSTMENT, Page 13, "General Rules for Board Action" which read in part "----the board may not make any decision which is contrary to the purpose and intent of the Zoning Ordinance. --it has no power to permit business establishments to invade residential districts in which such businesses are prohibited"  
Voting Aye: Mr. McCoy, Mr. Fortenberry, Mr. Stejskal.  
Voting Nay: Mr. Smith.  
Abstaining: Mr. Mancini. *W* Motion carried.

The Chairman stated that he would be out of town during July and that a permanent vice-chairman should be elected. Mr. George Stejskal was nominated by Mr. Smith, 2nd by Mr. Fortenberry.

There being no other nominations, Mr. Stejskal was unanimously elected vice-chairman.

Upon motion, seconded and carried, meeting adjourned.

*Elaine T. Wilson*

---

Elaine T. Wilson, secretary

# DECISION OF BOARD OF APPEAL

CITY OF FAIRHOPE, ALABAMA  
OFFICE OF THE BUILDING INSPECTOR

With regard to authorization of a (Building Permit) (~~Certificate of Occupancy~~)  
for property located at Greeno Road and Volanta Ave.

Applicant Thomas E. Dyer Address Fairhope, Ala.

Sec. A INTERPRETATION - In accordance with Section \_\_\_\_\_ the Board adopted  
the following statement of interpretation of the  
Ordinance: Section \_\_\_\_\_.

Sec. B SPECIAL EXCEPTION - In accordance with Section \_\_\_\_\_ the Board reviewed  
the request for special exception under the terms of Section \_\_\_\_\_  
of the Zoning Ordinance. The request is \_\_\_\_\_ granted  
\_\_\_\_\_ denied  
\_\_\_\_\_ granted subject  
\_\_\_\_\_ to conditions

Explanation of (denial) (conditions): \_\_\_\_\_

Sec. C VARIANCE - In accordance with Section Art 7 71 the Board reviewed the  
appeal for a variance to the requirements of Section 71 of the  
Zoning Ordinance. The Board applied the following  
criteria:

1. Strict application of the ordinance would produce an undue hardship, other than financial.
2. The above hardship is unique and would not be shared by many other properties.
3. The variance would preserve the purpose and intent of the ordinance.

It was determined that all three of the above conditions (~~were~~)  
(were not) present, therefore the appeal is \_\_\_\_\_

\_\_\_\_\_ Granted  
☒ denied  
\_\_\_\_\_ granted subject  
\_\_\_\_\_ to conditions

Explanation of (denial) (conditions): See attached sheet

Date: July 2, 1969 Signed Elouise J. Johnson  
Secretary, Board of Appeal  
Building Official \_\_\_\_\_

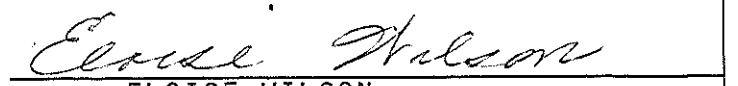
Case # 173 Thomas E. Dyer  
Denied for the reason given in the booklet A GUIDE FOR BOARD  
OF ZONING ADJUSTMENT , page 13, "General Rules for  
Board Action" which read in part "---- the Board  
may not make any decision which is contrary to the  
purpose and intent of the Zoning Ordinance.--- it has  
no power to permit business establishments to invade  
residential districts in which such businesses are  
prohibited."

THOMAS E. DYER,	)	
Appellant,	)	
vs.	)	BOARD OF ADJUSTMENT
BOARD OF ZONING ADJUSTMENT	)	CASE NO. 173
AND APPEALS OF THE CITY OF	)	
FAIRHOPE, FAIRHOPE, ALABAMA,	)	
Appellee	)	

Comes now the Appellant, THOMAS E. DYER, and gives notice of appeal in the above styled cause in accordance with Title 37, Section 783 of the 1940 Code of Alabama as recompiled in 1958 from the judgment of the Board of Adjustment and Appeals of the City of Fairhope rendered on June 30, 1969 denying a use variance under Zoning Ordinance No. 295 from an R-1 Zone to a B-2 Zone.

  
 ATTORNEY FOR APPELLANT

Filed on this the 9th day of July, 1969.

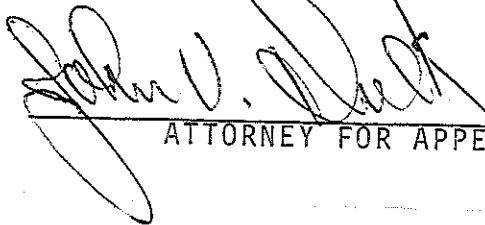
  
 ELOISE WILSON  
 Secretary - Board of Adjustment  
 City of Fairhope, Alabama



THOMAS E. DYER,	)	IN THE CIRCUIT COURT OF
Appellant,	)	BALDWIN COUNTY, ALABAMA
vs.	)	AT LAW, CASE NO. 8974
BOARD OF ZONING ADJUSTMENT	)	
AND APPEALS OF THE CITY OF	)	
FAIRHOPE, FAIRHOPE, ALABAMA,	)	
Appellee.	)	

Comes now the Appellant in the above styled cause, and respectfully moves the Court to set a date for the hearing of this Appeal from the Board of Adjustment from the City of Fairhope, Fairhope, Alabama, and for grounds thereof, assigns the following separately and severally:

1. That the said case is at issue and is on the Civil Non-Jury Docket and is to be tried without a Jury.

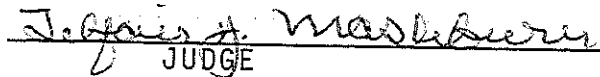
  
ATTORNEY FOR APPELLANT

ORDER

This cause, coming on to be heard, is submitted upon the motion by the Appellant in the above styled cause, and it is therefore,

ORDERED, ADJUDGED AND DECREED by the Court that the 15<sup>th</sup> day of December, 1969 at 9:00 A.M. be, and the same is hereby set for the date for the hearing.

DONE this the 12<sup>th</sup> day of December, 1969.

  
JUDGE

**FILED**

DEC 1 1969

**ALICE J. DUCK** CLERK  
REGISTER



THOMAS E. DYER,	)	
Appellant,	)	
vs.	)	BOARD OF ADJUSTMENT
BOARD OF ZONING ADJUSTMENT	)	CASE NO. 173
AND APPEALS OF THE CITY OF	)	
FAIRHOPE, FAIRHOPE, ALABAMA,	)	
Appelle	)	

I, ELOISE WILSON, Secretary of the BOARD OF ZONING ADJUSTMENT AND APPEALS OF THE CITY OF FAIRHOPE, FAIRHOPE, ALABAMA, hereby certify that the attached documents, including minutes of meetings, decisions of Board of Appeals, applications, drawings and exhibits contain the entire record of the case of THOMAS E. DYER, Board of Adjustment Case No. 173, of the BOARD OF ZONING ADJUSTMENT AND APPEALS OF THE CITY OF FAIRHOPE, FAIRHOPE, ALABAMA.

Eloise Wilson  
ELOISE WILSON

Sworn to and subscribed before  
me on this the 1st day of  
November, 1969.

Eula Mae Smith  
NOTARY PUBLIC

**FILED**

NOV 8 1969

**ALICE J. DUCK** CLERK  
REGISTER

THOMAS E. DYER,  
Appellant,

vs.

BOARD OF ZONING ADJUSTMENT  
AND APPEALS OF THE CITY OF  
FAIRHOPE, FAIRHOPE, ALABAMA,

Appellee.

) IN THE CIRCUIT COURT OF  
) BALDWIN COUNTY, ALABAMA  
) AT LAW, CASE NO. 8974

NOTICE OF APPEAL

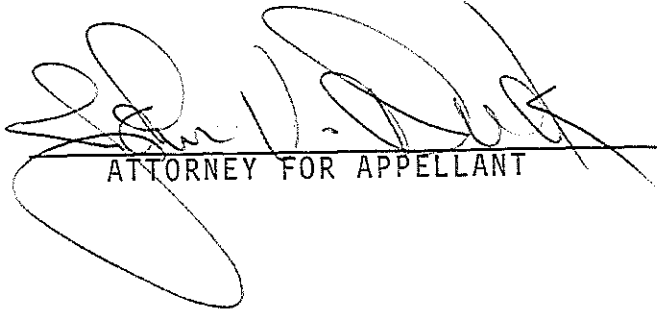
Comes now the Appellant in the above styled cause, and gives notice of appeal from the judgment of the Circuit Court of Baldwin County, Alabama at Law, rendered on the 15th day of December, 1969, to the Supreme Court of Alabama.

FILED

JAN 15 1970

ALICE J. DICK

CLERK  
REGISTER

  
ATTORNEY FOR APPELLANT

THOMAS E. DYER,	)	IN THE CIRCUIT COURT OF
Appellant,	)	BALDWIN COUNTY, ALABAMA
vs.	)	AT LAW, CASE NO. 8974
BOARD OF ZONING ADJUSTMENT	)	
AND APPEALS OF THE CITY OF	)	
FAIRHOPE, FAIRHOPE, ALABAMA,	)	
Appellee.	)	

ORDER GRANTING EXTENSION FOR  
FILING OF TRANSCRIPT OF EVIDENCE

This cause, coming on to be heard, is submitted upon sworn motion by the attorney for Plaintiff-Appellant in the above styled cause, and the Court, upon consideration of the same is of the opinion that the said motion is well taken.

It is therefore, ORDERED, ADJUDGED and DECREED by the Court that the Appellant-Plaintiff be, and he is hereby granted an extension of thirty (30) days for the filing of the transcript of the evidence in this cause.

DONE this the 19th day of March, 1970.

*John G. Maskeberry*  
JUDGE, CIRCUIT COURT OF BALDWIN  
COUNTY, ALABAMA.

**FILED**

MAR 19 1970

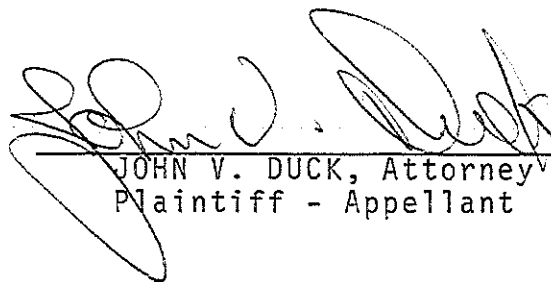
**ALICE J. DUCK** CLERK  
REGISTER

THOMAS E. DYER,	)	IN THE CIRCUIT COURT OF
Appellant,	)	BALDWIN COUNTY, ALABAMA
vs.	)	AT LAW, CASE NO. 8974
BOARD OF ZONING ADJUSTMENT	)	
AND APPEALS OF THE CITY OF	)	
FAIRHOPE, FAIRHOPE, ALABAMA,	)	
Appellee.	)	

Comes now the Appellant, Plaintiff, in the above styled cause, and respectfully moves the Court to grant a thirty (30) day extension for the filing of the transcript of the evidence in this cause, and for grounds thereof says:

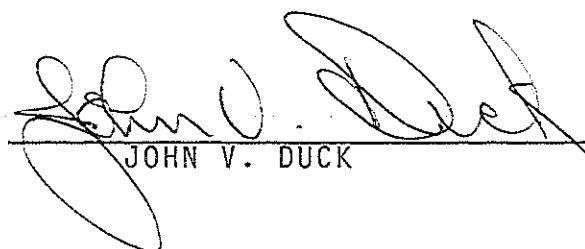
That the said notice from the office of John V. Duck to the Court Reporter was lost in the mail, and the transcript of the evidence was not timely filed.

WHEREFORE, Plaintiff respectfully moves the Court for a thirty (30) day extension for the filing of the transcript of the evidence.

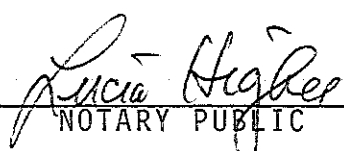
  
JOHN V. DUCK, Attorney for  
Plaintiff - Appellant

STATE OF ALABAMA  
BALDWIN COUNTY

Personally appeared before me, the undersigned authority, JOHN V. DUCK, who being by me first duly and legally sworn, doth depose and say that the matters and facts alleged in the foregoing motion are true and correct.

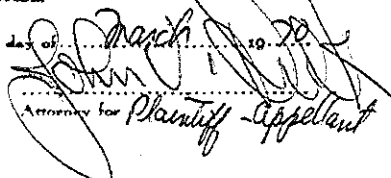
  
JOHN V. DUCK

Sworn to and subscribed before  
me this 18th day of March, 1970.

  
NOTARY PUBLIC

#### CERTIFICATE OF SERVICE

This is to certify that I have this day served counsel for the opposing party in the foregoing matter with a copy of this pleading by depositing in the United States Mail a copy of same in a properly addressed envelope with adequate postage thereon.

This 18 day of March 1970.  
  
Attorney for Plaintiff - Appellant

FILED

MAR 19 1970

ALICE J. DUCK  
CLERK  
REGISTER

THE STATE OF ALABAMA }  
 Baldwin County - Circuit Court }

TO ANY SHERIFF OF THE STATE OF ALABAMA—GREETING:

Whereas, at a Term of the Circuit Court of Baldwin County, held on the ..... 15th day of .....  
 December, 1969, ..... ~~Monday~~ ....., 19....., in a cer-  
 tain cause in said Court wherein THOMAS E. DYER,  
 ..... Plaintiff, and BOARD OF ZONING ADJUSTMENT AND APPEALS OF  
 THE CITY OF FAIRHOPE, FAIRHOPE, ALABAMA Defendant, a judgement was rendered against said  
 Thomas E. Dyer  
 to reverse which Judgment ..... the said Thomas E. Dyer  
 .....  
 .....  
 applied for and obtained from this office an APPEAL, returnable to the ..... next  
 Term of our Supreme ..... Court of the State of Alabama, to be held at Montgomery, on the .....  
 ..... day of ....., 19..... next, and the necessary bond  
 having been given by the said Thomas E. Dyer  
 ..... with James W. Dyer & Herbert L. Fuqua, sureties,  
 .....  
 .....

Now, You Are Hereby Commanded, without delay, to cite the said BOARD OF ZONING ADJUSTMENT  
 AND APPEALS OF THE CITY OF  
 FAIRHOPE, ALABAMA, ..... or E. G. Rickarby  
 ....., attorney, to appear at the ..... next ..... Term of our  
 said Supreme Court, to defend against the said Appeal, if ..... they ..... think proper.

Witness, ALICE J. DUCK, Clerk of the Circuit Court of said County, this ..... 15th  
 day of January ....., A. D., 1970.....

Attest:

..... Alice J. Duck, Clerk.

Received 16 day of January 1970  
End on 19 day of Jan. 1970  
I served a copy of the within Citation  
on Board of Zoning Adjust.  
Appeals of Fairhope  
By services of Mr. E. G. Rickarby  
(Attorney of Law)  
TAYLOR WILKINS, Sheriff  
By [Signature] D. S.

Sheriff claims 70 miles at  
Ten Cents per mile Total \$ 7.00  
BY [Signature] TAYLOR WILKINS, Sheriff  
DEPUTY SHERIFF

in Fairhope, Ala.

CASE NO. 8974

**CIRCUIT COURT**  
**Baldwin County, Alabama**

THOMAS E. DYER,  
Appellant,

Vs. } Citation in Appeal

BOARD OF ZONING ADJUSTMENT AND APPEALS  
OF THE CITY OF FAIRHOPE, FAIRHOPE, ALABAMA

Issued 15th day of Jan., 1970

serve: Hon. E. G. Rickarby  
Fairhope, Ala.



THOMAS E. DYER,	)	IN THE CIRCUIT COURT OF
Appellant,	)	BALDWIN COUNTY, ALABAMA
vs.	)	AT LAW, CASE NO. 8974
BOARD OF ZONING ADJUSTMENT	)	
AND APPEALS OF THE CITY OF	)	
FAIRHOPE, FAIRHOPE, ALABAMA,	)	
Appellee.	)	

We hereby acknowledge ourselves security for cost of appeal to the Supreme Court in the above case, returnable to the present term thereof. And for the payment of the above security, we hereby waive our right of exemption to personal property under the Constitution and Laws of the State of Alabama.

Thomas E. Dyer (L.S.)

Approved 1-15-78  
*Alvin J. Duck*  
 Clerk

James H. Dyer (L.S.)

Herbert L. Fugua (L.S.)

THE STATE OF ALABAMA—JUDICIAL DEPARTMENT

THE COURT OF CIVIL APPEALS OF ALABAMA

October Term, 19 69-70

1 Div. No. 26

To the Clerk ~~Register~~ of the Circuit Court,

Baldwin County—Greeting:

Whereas, the Record and Proceedings of the Circuit Court \_\_\_\_\_  
of said county, in a certain cause lately pending in said Court between  
Thomas E. Dyer \_\_\_\_\_, Appellant\_\_\_\_,  
\_\_\_\_\_ and Board of Zoning Adjustment  
and Appeals of the City of Fairhope, Fairhope, Alabama \_\_\_\_\_, Appellee\_\_\_\_,  
wherein by said Court it was considered adversely to said appellant\_\_\_\_, were brought before the  
Court of Civil Appeals, by appeal taken, pursuant to law, on behalf of said appellant\_\_\_\_\_:

NOW, IT IS HEREBY CERTIFIED, That upon consideration thereof the Court of Civil Appeals,  
on the 10th day of June \_\_\_\_\_, 1970 \_\_\_\_\_, affirmed said cause, in all respects, and  
ordered that appellant \_\_\_\_\_, Thomas E. Dyer \_\_\_\_\_,

and James W. Dyer and Herbert L. Fuqua \_\_\_\_\_,

sureties for the costs of appeal, pay the costs of appeal in this Court and in the Court below .

It is further certified that, it appearing that said parties have waived their rights of exemption  
under the laws of Alabama, it was ordered that execution issue accordingly.

Witness, J. O. Sentell, Clerk of the Court of Civil

Appeals of Alabama, at the Judicial Building,

this the 10th day of June \_\_\_\_\_, 1970 .

J. O. Sentell  
Clerk of the Court of Civil Appeals of Alabama.

THE COURT OF CIVIL APPEALS  
OF ALABAMA

October Term, 1969-70

1 Div., No. 26

Thomas E. Dyer

Appellant,

vs.

Board of Zoning Adjustment and

Appeals of the City of  
Fairhope, Alabama

Appellee.

From Baldwin Circuit  
Court.

# 8974

CERTIFICATE OF  
AFFIRMANCE

The State of Alabama,

Barbours County.

} Filed

this day of

JUN 1 1970

BROWN PRINTING CO., MONTCOMERY

N

LAMS TOURIST CT.

CITY PARK

DR. STINE

NO SCALE

HJELLUM.

LINDBERG

NE CORNER of  
SE 1/4 SEC. 8-6-2.

VOLANTA AVE.

1 Acre

DYER PROPERTY

20 ACRES

1320'

GREENO ROAD

660'

No. 8974

THE STATE OF ALABAMA

BALDWIN County.

I, Alice J. Duck, Clerk of the Circuit

Court of Baldwin County, in and for said State and

County, hereby certify that the foregoing pages numbered from one to

\_\_\_\_\_, both inclusive, contain a full, true and complete

transcript of the record and proceedings of said Court in a certain

cause lately therein pending wherein THOMAS E. DYER, Appellant

was Plaintiff, and Board of Zoning Adjustment and Appeals of the City of Fairhope,

was

Fairhope, Alabama, Appellee

\_\_\_\_\_, as fully and completely as the same appears of record

in said Court.

And I further certify that the said Thomas E. Dyer

did on the 15th day of January, 1970, pray for and obtain

an appeal from the judgment of said Court to the Supreme Court

of Alabama to reverse said judgment of said

Court upon entering into bond with THOMAS E. DYER, JAMES W. DYER & HERBERT L. FUGUA

as surety thereon, which said bond has

been approved by me.

Witness my hand and the seal of said Circuit Court of BALDWIN

County is hereto affixed, this the 15th

day of January, 1970

*Alice J. Duck*

Clerk of the Circuit Court of

Baldwin County, Alabama.

(Code 1940, Title 7, Sec. 767)

14

appears  
likely to  
be a copy of the  
original

JUN 10 1970

STATE OF ALABAMA --- JUDICIAL DEPARTMENT

THE COURT OF CIVIL APPEALS

OCTOBER TERM 1969-70

1 Div. 26

Thomas E. Dyer

v.

Board of Zoning Adjustment and Appeals  
of the City of Fairhope, Fairhope, Alabama

Appeal from Baldwin Circuit Court

BRADLEY, JUDGE

The appellant here, Thomas E. Dyer, applied to the City of Fairhope for a building permit so that he might erect a service station on a portion of land that he owned in the northeast section of Fairhope, Alabama.

2.

The property on which the building permit was sought was located in an area zoned for residential purposes.

The permit applied for was denied on the basis that the property was zoned for residential purposes, and Mr. Dyer applied to the Board of Zoning Adjustment and Appeals for a "use variance" as is permitted under certain circumstances by the master zoning ordinance of the City of Fairhope.

A hearing on such application was duly held, at which time and place all interested parties had been notified to be present.

The Board, after said hearing, denied the request for the "use variance" and Mr. Dyer appealed to the Circuit Court of Baldwin County for a de novo hearing thereon in accordance with the provisions of Title 37, Section 783, Code of Alabama 1940, as Recompiled 1958.

Section 783, supra, provides as follows:

"Any party aggrieved by any final judgment or decision of such board of zoning adjustment, may within fifteen days thereafter appeal therefrom to the circuit court or court of like jurisdiction, by filing with such board a written notice of appeal specifying the judgment or decision from which appeal is taken. In case of such appeal such board shall cause a transcript of the



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proceedings in the cause to be certified to the court to which the appeal is taken and the cause in such court be tried de novo."

Trial was duly held before the Circuit Court, sitting without a jury, and it rendered judgment in favor of the Board and refused to grant the "use variance" as requested by Mr. Dyer.

The case was then appealed to the Supreme Court, which later transferred it to this court.

There are three assignments of error in the record; assignments one and three question the trial court's judgment and the sufficiency of the evidence to support said judgment, and assignment number two concerns the failure of the trial court to rule on objections made to questions asked of the appellant.

We will consider assignments one and three together.

The evidence introduced at the trial tended to show that Mr. Dyer owned fifty acres in the northeast section of the City of Fairhope and within its city limits.

Mr. Dyer sought a "use variance" for one-half acre of his property for the purpose of building a service station thereon.

4.

The testimony revealed that the property in question was zoned for residential purposes, although there was a nursery, an animal clinic, a trailer court, a farm operated by the Gulf Coast Experimental Station, and a city park or playground. Otherwise, the area was residential.

There was testimony that the nursery, the trailer court and the animal clinic were in existence at the time this area was taken into the city, and came under the zoning ordinance as a non-conforming use.

There was testimony that, should the "use variance" be granted, the result would be a lowering of values of the residential property.

Mr. Dyer testified that to refuse the "use variance" to him would cause him undue hardship and prevent him from putting the property to its highest and best use.

The record established before the Zoning Board of Adjustment and Appeals of the City of Fairhope and which was before the Circuit Court, revealed that the Board had denied similar requests in the past on the basis that "spot zoning" would get out of hand and that the non-conforming uses were not allowed to expand or change, and that it was trying to keep the area residential in keeping with its zoning designation. This was also the sentiment of the surrounding residential property owners.

5.

Our Supreme Court said in Moore v. Pettus, 260 Ala. 616, 71 So. 2d 814, that courts generally follow a strict policy against extension or enlargement of variations of zoning ordinances.

It was also said in Arant v. Board of Adjustment of City of Montgomery, 271 Ala. 600, 126 So. 2d 100, 89 A.L.R. 2d 652, that, "whether variance should be granted depends on facts of each case."

And in White v. Board of Adjustment of City of Birmingham, 245 Ala. 48, 15 So. 2d 585, the Supreme Court said when an appeal from action of the board of adjustment in denying a building permit was tried de novo in the circuit court, as provided by statute, and testimony was orally before the trial judge without a jury, his judgment would not be disturbed when not palpably wrong.

In the case at bar, there is ample evidence to support the decision of the trial court that the "use variance" to the residential zoning ordinance should not be allowed, and such decision is in keeping with the principle laid down in Moore, supra; consequently, we are unable to say that the trial court was palpably wrong in its decision upholding the Zoning Board of Adjustment and Appeals of the City of Fairhope. We are therefore of the opinion that assignments of error one and three are not well taken.

6.

Appellant, in his second assignment of error, complains that the trial court erred to reversal by not ruling on objections to questions asked of the witnesses for appellee.

The trial judge, during the trial, in response to several objections to the admission of testimony, stated that this proceeding was in the nature of an equity proceeding and he would not rule on said objections.

All of the objections to the admission of testimony, except one, came after responsive answers were made to the questions asked, and therefore came too late to prompt a ruling thereon by the trial court. Salter v. Cobb, 264 Ala. 609, 88 So. 2d 845.

The question to which an objection was made and on which the trial court refused to rule, is as follows:

"Q. Did the Board of Zoning and Adjustment indicate to you-- Did they grant the variance that you requested that night?

"A. No sir.

"Q. Did they indicate to you why the variance was not granted?

"MR. RICKARBY: Object.

"THE COURT: Note his objection and go ahead."

The objection to the question was general with no grounds stated, and our Supreme Court has stated that in such circumstances, the action of the lower court in overruling the objection will not be error unless the evidence is patently inadmissible. Tankersley v. Webb, 263 Ala. 234, 82 So. 2d 259.

The question attempted to elicit from the witness whether or not the Board of Adjustment said why the requested variance was denied.

The most that could be said against an answer to such question was that it was immaterial, but certainly it was not patently inadmissible.

But in the case at bar, the court did not overrule the objection; it simply did not rule because, we think, of a mistaken belief that this was an equity proceeding.

The appeal from the decision of the Fairhope Board of Zoning Adjustment and Appeals to the Circuit Court of Baldwin County was taken pursuant to Title 37, Section 783, supra, which provides, in part, as follows:

" \* \* \* the cause in such court be tried de novo."

The record of the proceedings before the Circuit Court of Baldwin County clearly reflects that the matter

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was tried de novo on the law side without the intervention of a jury; although the Supreme Court has held that an aggrieved party in this type case can demand a jury trial of the issues of fact. Arant v. Board of Adjustment of City of Montgomery, supra; and Zoning Board of Adjustment of City of Mountain Brook v. Wright, 283 Ala. 654, 220 So. 2d 261.

We are convinced that this case was not tried on the equity side of the Circuit Court and was not an equity matter, but was a legal proceeding.

The Supreme Court said in Liberty National Life Ins. Co. v. Reid, 276 Ala. 25, 158 So. 2d 667:

"This being a suit at law, the rules developed in equity cases pursuant to the provisions of Section 372(1), Title 7, Code of Alabama 1940, to the effect that in the absence of objections the court could consider only such evidence as is relevant, material, competent, and legal, do not apply."

Then, in Reese v. Par Value Loan Co., 283 Ala. 162, 214 So. 2d 905, the Supreme Court said:

"When, in the course of a trial at law, the court ought to rule on an objection to a question, but refuses to rule, we do not know of anything the party objecting can do except to state his objection. The party cannot compel the court to rule."

In the circumstances of the instant case, the party objecting is completely without remedy against inadmissible evidence unless the appellate court will treat the action of the trial court as overruling the objection."

In the present case the trial court refused to rule on the objection made and we think this was erroneous. However, in order for a review to be had of the evidence admitted by failure of the trial court to rule, we will consider the action of the trial court as being one overruling the objection and permitting the testimony to go into evidence as suggested by Reese, supra.

By following this procedure, we can then decide whether the admitted testimony was "patently inadmissible," and the resulting judgment bad.

As stated above, we do not consider the testimony to have been "patently inadmissible," and we, therefore, do not believe the trial court committed reversible error by not ruling on the admissibility of the testimony in question.

The court having committed no reversible error in the trial of this case, it is affirmed.

AFFIRMED.

I, J. O. Sentell, Clerk of the Court of Civil Appeals of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appears of record in said Court, *th*

Witness my hand this 10 day of June 1970

*J. O. Sentell*

Clerk, Court of Civil Appeals of Alabama